International Law and Economics

Jan Engelmann

International Commercial Arbitration and the Commercial Agency Directive

A Perspective from Law and Economics

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Jan Engelmann
Berlin, Germany

ISSN 2364-1851 ISSN 2364-186X (electronic)
International Law and Economics
ISBN 978-3-319-47448-9 ISBN 978-3-319-47449-6 (eBook)
DOI 10.1007/978-3-319-47449-6

Library of Congress Control Number: 2016961359

Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer International Publishing AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

To Geraldine

Acknowledgements

This book would not have been possible without the support and encouragement of many people. Many thanks are owed to my two doctoral supervisors: first, to Jürgen Basedow for encouraging me to pursue this project and for giving me all the freedom needed to create this book as it appears today and, second, to Jan Kleinheisterkamp for allowing me to benefit from his expertise and constant support, in particular during my time at the London School of Economics.

Furthermore, I am indebted to the German Research Foundation (DFG) for awarding me a generous research grant and for providing me with a unique academic environment at the University of Hamburg's Graduate School of Law and Economics. I would also like to thank the staff at the library of the Max Planck Institute of Comparative and International Private Law and the Arthur A. Diamond Library at the Columbia Law School for their steadfast support.

My research into the crossroads of EU law and international commercial arbitration was advanced again and again by conversations with different scholars, practitioners and some of my dearest friends, among them Eduardo Baistrocchi, George Bermann, Thomas Eger, Karim El Chazli, Peter Kulasza, Daragh McGreal, Francesco Parisi, Maud Piers, Nils Schmidt-Ahrendts, Johannes Schwarze, Christian Steger, Malte Stübinger, Moritz Schmitt, Jan Schmitz, Thomas Ulen, Stefan Voigt, Simon Vorburger and Nils Wighardt. My sincere thanks belong to all of them.

My heartfelt gratitude goes to my parents Günther and Liane Engelmann as well as to my brother Jens Engelmann for motivating me and helping me in every conceivable way. Finally, putting in words my gratitude towards Geraldine Blomberg and her support while writing this book is next to impossible. The dedication of this book to her is but a modest attempt.

Contents

Abbreviations

AcP	Archiv für die civilistische Praxis
Admin. Science Q.	Administrative Science Quarterly
AG	Advocate general
All ER	All England Law Reports
Am. J. Agricultural Econ.	American Journal of Agricultural Economics
Am. L. Econ. Rev.	American Law and Economics Review
Am. Rev. Int'l Arb.	The American Review of International Arbitration
Am. U. Int'l L. Rev.	American University International Law Review
Am. Econ. Rev.	American Economic Review
APP LR	Arbitration, Practice and Procedure Law Reports
Arb. Int.	Arbitration International
Art./Arts	Article/articles
ASA Bull.	ASA Bulletin
ASIL Proceedings	ASIL Annual Meeting Proceedings
BB	Betriebs-Berater
BYIL	British Yearbook of International Law
Cal App Ct 2nd Dist	Court of Appeal of California Second District
Cal App Ct 5th Dist	Court of Appeal of California Fifth District
Cal.App 4th	California Appellate Reports Fourth Series
Can. J. Econ.	The Canadian Journal of Economics
CETA	Comprehensive Economic and Trade Agreement
cf.	Confer
Ch	Chancery Division
Chap.	Chapter
Cir	United States Court of Appeals
1st Cir	United States Court of Appeals for the First Circuit
2nd Cir	United States Court of Appeals for the Second Circuit
7th Cir	United States Court of Appeals for the Seventh Circuit
9th Cir	United States Court of Appeals for the Ninth Circuit
Civ	Civil Division
CMLR	Common Market Law Review

Colum. J. Eur. L.	Columbia Journal of European Law
Colum. J. Trans. L.	Columbia Journal of Transnational Law
Comm	Commercial Court
Co	Company
Corp	Corporation
DCFR	Draft Common Frame of Reference
DDC	United States District Court for the District of Columbia
Dispute Resol. J.	Dispute Resolution Journal
Doc	Document
DPR	United States District Court for the District of Puerto Rico
Duke L. J.	Duke Law Journal
e.g.	For example
E.v.p.	Eenvormig en vergelijkend privaatrecht
EBLR	European Business Law Review
EBOR	European Business Organization Law Review
EC	European Communities
ECJ	European Court of Justice
ECR	European Court Reports
Ed./Eds.	Editor/editors
ed.	Edition
EDNY	United States District Court for the Eastern District of New York
enl	Enlarged
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
ETS	European Treaty Series
EU	European Union
Eur. J. L. Reform	The European Journal of Law Reform
Europ. Econ. Rev.	European Economic Review
Europ. J. L. Econ.	European Journal of Law and Economics
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
EWCA	England and Wales Court of Appeals
EWHC	England and Wales High Court
F.2d	Federal Reporter Second Series
FCA	Federal Court of Australia
f/ff	Following (page/pages or paragraph/paragraphs)
F Supp	Federal Supplement
Harvard J. Int'l L.	Harvard Journal of International Law
HM	Her Majesty's
ICC	International Chamber of Commerce
ICC Bull.	The ICC International Court of Arbitration Bulletin
ICLRQ	International and Comparative Law Quarterly

i.e.	That is
InDret	Revista para el Análisi del Derecho
Int'l Bus. Rev.	International Business Review
Int'l Rev. of L. & Econ.	International Review of Law and Economics
Int'l L. Forum	International Law Forum du droit international
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IsrSC	Decisions of the Supreme Court of Israel
J. Econ. Beh.	Journal of Economic Behavior and Organization
J. Econ. Lit.	Journal of Economic Literature
J. Fin. Econ.	Journal of Financial Economics
J. Int'l Arb.	Journal of International Arbitration
J. Int'l Bus. Studies	Journal of International Business Studies
J. Int'l Econ.	Journal of International Economics
J. Int'l Disp. Settlement	Journal of International Dispute Settlement
J. L. & Econ.	The Journal of Law and Economics
J. L. Econ. Org.	Journal of Law, Economics, and Organization
J. Leg. Stud.	Journal of Legal Studies
J. Management Studies	Journal of Management Studies
J. Pol. Econ.	Journal of Political Economy
J. Private Int'l L.	Journal of Private International Law
JITE	Journal of Institutional and Theoretical Economics
JZ	Juristenzeitung
Kap.	Kapitel
lit.	Litera
LCIA	London Court of International Arbitration
Lloyd's Rep	Lloyd's List Law Reports
Ltd	Limited
Mealey's Int'l Arb'n Rep.	Mealey's International Arbitration Report
Melbourne U. L. R.	Melbourne University Law Review
Mich. L. Rev.	Michigan Law Review
n	Footnote
NC	Supreme Court of North Carolina
ND Iowa	United States District Court for the Northern District of Iowa
New York Int'l L. J.	New York International Law Journal
N.I.L.Q.	Northern Ireland Legal Quarterly
NIPR	Nederlands International Privaatrecht
NJOZ	Neue Juristische Online-Zeitung
NJW	Neue Juristische Wochenschrift
No.	Number
Northwestern J. Int'l L. & Bus.	Northwestern Journal of International Law and Business
Northwestern U. L. Rev.	Northwestern University Law Review
Notre Dame L. Rev.	Notre Dame Law Review

NW	Northwestern Reporter
Ohio St. J. Disp. Resol.	Ohio State Journal on Dispute Resolution
OJ	Official Journal of the European Union
ONSC	Ontario Superior Court of Justice
para/paras	Paragraph/paragraphs
Pas.	Pasicrisie belge
PEL CAFDC	Principles of European Law on Commercial Agency, Franchise and Distribution Contracts
QB	Queen's Bench Division
Qu. J. Econ.	Quarterly Journal of Economics
R	The Queen
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
R.W.	Rechtskundig Weekblad
Rev. arb.	Revue de l'arbitrage
Rev. c. DIP	Revue critique de droit international privé
Rev. dr. com. belge	Revue de droit commercial belge
RIW	Recht der Internationalen Wirtschaft
SchiedsVZ	Zeitschrift für Schiedsverfahren
SD Fla	United States District Court for the Southern District of Florida
SE	South Eastern Reporter
SIMPLY	Scandinavian Institute of Maritime Law Yearbook
Southern California L. Rev.	Southern California Law Review
Southern Econ. J.	Southern Economic Journal
Spain Arb. Rev.	Revista del Club Español del Arbitraje
Stan. L. Rev.	Stanford Law Review
Supreme Court Econ. Rev.	Supreme Court Economic Review
Sydney L. Rev.	Sydney Law Review
TCC	Technology and Construction Court
TEC	Treaty Establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
Tul. L. Rev.	Tulane Law Review
U. Chi. L. Rev.	University of Chicago Law Review
U. Kan. L. Rev.	University of Kansas Law Review
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT-Principles	UNIDROIT Principles of International Commercial Contracts
UNTS	United Nations Treaty Series
US	United States Reports
USA	United States of America
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Vand. L. Rev.	Vanderbilt Law Review
Vol.	Volume
WAMR	World Arbitration and Mediation Review
WuW/E	Wirtschaft und Wettbewerb, Entscheidungssammlung zum Kartellrecht
Yale J. Int'l Law	Yale Journal of International Law
Yale L. J.	Yale Law Journal
YB Comm. Arb.	International Council for Commercial Arbitration Yearbook of Commercial Arbitration
ZDAR	Zeitschrift für Deutsches und Amerikanisches Recht
ZEuP	Zeitschrift für Europäisches Privatrecht
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft

Chapter 1
Introduction

The year 1958 marks a milestone both for international commercial arbitration and European integration. On 10 June 1958 the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was adopted by a United Nations diplomatic conference.[1] The New York Convention became the cornerstone of international commercial arbitration and its pro-enforcement bias has facilitated its success in the modern business world.[2] Earlier in 1958, the Treaty of Rome had already entered into force, marking the beginning of what has now become the European Union.[3] The European Union has allowed its Member States to form an economic superpower of unparalleled kind.[4]

EU law and international commercial arbitration share more than this historical coincidence. To a certain extent, they can be understood as two distinct attempts to solve the same problem from opposite ends.[5] The problem is a coordination problem, which emerged with the increase in international trade and commerce: nation states have different regulatory policies that they want to apply when economic activities touch upon their territory. In a world where mutually dependent economic activities are dispersed across the globe, economic actors need to cumulatively respect a large number of policies, which at times even contradict each other. The resulting frictions can hinder economic actors from engaging in mutually profitable and potentially welfare-increasing activities. One possible solution is for

[1]Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1959] 330 UNTS (No 4739), pp. 38ff; see also UN Doc E/CONF. 26/9/Rev. 1 [1958].

[2]Lew et al. (2003), para. 2-18. Currently, 153 of the 193 UN Member States as well as three non-UN Member States have adopted the New York Convention.

[3]Treaty Establishing the European Economic Community, Rome, 25 March 1957, [1958] 298 UNTS (No 4300) 11ff; Treaty Establishing the European Atomic Energy Community, Rome, 25 March 1957, [1958] 298 UNTS (No 4301), pp. 167 ff.

[4]Cf. e.g. Grundmann (2001), p. 509; Rifkin (2004).

[5]Cf. Basedow (1988), pp. 34 f.

J. Engelmann, *International Commercial Arbitration and the Commercial Agency Directive*, International Law and Economics, DOI 10.1007/978-3-319-47449-6_1

nation states to unify their regulatory policies in order to allow a single market to develop—the route taken with the development of the EU. Another solution is the route of unification starting from the private end. This route may be taken by private individuals resolving their disputes through the decision of other private individuals based on transnational legal standards—the route taken with the development of international commercial arbitration.

Despite these shared properties, EU law and international commercial arbitration hardly came into contact in the following decades. They were described as 'distant planets whose orbits hardly ever intersected'.[6] In recent years, however, the application of EU law in international commercial arbitration has gained attention. This development is due to two concurrent developments. One is the increasing legal integration in European economic regulation of matters related to cross-border trade; the other is the continuous and increasing importance of international commercial arbitration as the preferred means of dispute resolution for cross-border trade.

Over the last decades, European economic regulation has extended from the classic matter of competition law to areas such as consumer protection, insolvency law, the law of commercial agents, white collar crime and even tax law. As a consequence, more and more mandatory substantive EU law addresses private actors. These private actors typically prefer arbitral tribunals over state courts to decide their cross-border disputes.[7] From a traditional dogmatic standpoint, arbitrators are first and foremost bound by the parties' will and not by national or European legislation. The consequential question arises whether and to what extent it is possible to opt out of EU regulation by incorporating an arbitration clause into a contract—especially in light of the pro-enforcement approach of the New York Convention.[8] The principal research question of this inquiry is whether the current regime for the application of substantive mandatory EU law leads to over- or under-enforcement of the respective provisions.

1.1 Arbitration and Mandatory Substantive EU Law

International commercial arbitration has emancipated itself from nation states' boundaries to a certain degree. One of the issues where the consequences of this emancipation manifest themselves is the application of mandatory rules in

[6] Shelkoplyas (2003), p. ix.

[7] 80 to 90 % of international commercial contracts are assumed to include an arbitration clause, cf. Voigt (1992), p. 179; Berger (1993), p. 8; Casella (1996), pp. 155f.

[8] Cf. Weigand (1993); more generally O'Hara (2000); Drahozal (2005); Greenawalt (2007), p. 111. It should be noted in this instance that all 28 Member States of the EU have ratified the New York Convention.

international commercial arbitration.[9] In this context, in particular, arbitration's relation to the European Union remains unclear. The interrelation of arbitration and mandatory substantive EU law involves tensions as homogeneous standards are treated heterogeneously in two different settings. One setting is arbitration proceedings where private individuals enjoy wide discretion to make final awards on matters possibly regulated by mandatory EU law. They make use of this discretion in different ways. The other setting is the judicial review of the respective awards by national courts, which again enjoy a relatively wide discretion in the way they carry out the review. Nonetheless, arbitration has been dealt with to a certain extent in the ECJ's case law. Most prominently, the Court has granted public policy status to certain EU law provisions.[10] In doing so, the ECJ has created a category of provisions which, if violated, call for setting aside or non-enforcement of arbitral awards.

By way of example, the object of research can further be illustrated in relation to EU competition law (Sect. 1.1.1). It will be illustrated further with a general outline of the interests involved whenever arbitral tribunals are confronted with EU law in (Sect. 1.1.2).

1.1.1 Example: EU Competition Law

On 1 June 1999 the ECJ held in its *Eco Swiss* decision that an arbitral award is to be annulled if it is in conflict with EU competition law.[11] Specifically, the Court held that Art. 85 EC Treaty (now Art. 101 TFEU) may be regarded as a matter of public policy within the terms of the New York Convention. In response to *Eco Swiss*, both arbitral practice and the judicial review system increasingly had to deal with EU competition law.

1.1.1.1 Arbitral Practice

Arbitral practice has developed a variety of approaches for the application of EU competition law. As published awards are scarce, the assessment of arbitrators' conduct is a difficult task.[12] Even judging from the observable part of practice, predicting whether and how arbitrators will apply mandatory EU law provisions is

[9]By one account, arbitrators are confronted with questions pertaining to the application of these provisions in more than 50 % of cases, Blessing (1999), p. 228.

[10]Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055; Case C-381/98 *Ingmar* [2000] ECR I-9305; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421; Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579.

[11]Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055, para. 41.

[12]Accordingly, the process of arbitral decision making has been seen as a 'black box' for the better part of commercial arbitration's existence, cf. McConnaughay (1999), p. 453. *Rogers* gives an account of recent improvements in this regard: Rogers (2006), p. 1312.

impossible to some extent.[13] In particular where the parties made a choice in favour of the law of a non-Member State, the possible approaches fall somewhere in between two extremes—on one side disregarding mandatory EU law as not being explicitly chosen by the parties and on the other side disregarding the parties' will and unconditionally respecting the regulatory interest of the EU. An analysis of arbitration rules, national arbitration laws and international conventions reveals that the matter is not effectively regulated.[14] Accordingly, it has been suggested that the driving factors behind the individual choices made by arbitrators in this instance are not to be found in any laws or rules which demand to be applied in arbitration, but rather in arbitrators' legal backgrounds and personal preferences.[15] Along those lines, arbitral practice is influenced by traditional conflict of laws concepts which arbitrators may consider to constitute the middle ground between the two extremes. In this sense, concepts such as *loi de police, Eingriffsnormen* and the idea of overriding mandatory provisions have been referred to in arbitral awards.[16] A different but comparable reasoning anticipates that EU competition law will be applied in the judicial review of an award. Accordingly, the standard of judicial review which revolves around standards such as arbitrability and public policy indirectly turns into the standard of application in arbitration.

1.1.1.2 Judicial Review

However, the standard of judicial review does not always give clear guidelines. In the noteworthy *SNF/Cytec* case, an award was reviewed a total of four times regarding an alleged breach of EU competition law. Two Belgian courts reviewed it in setting aside proceedings and applied a level of scrutiny which took account of all possible breaches of EU competition law and explicitly not only those that are 'flagrante, effective et concrète'. However, while in 2007 the Tribunal de première instance de Bruxelles[17] (court of first instance) came to the conclusion that EU competition law had been breached, in 2009 the Cour d'appel de Bruxelles[18] came to the contrary result. When the award was reviewed in enforcement proceedings in France both the Cour d'appel de Paris[19] and the Cour de cassation[20] pointed out that

[13] Shelkoplyas (2003), pp. 266 and 272.

[14] See infra 78ff.

[15] Shelkoplyas (2003), p. 272.

[16] Cf. e.g. Beulker (2005).

[17] Tribunal de première instance de Bruxelles (Belgium), 8 March 2007, 2005/7721/A, *Cytec Industries BV v SNF SAS*, YB Comm. Arb. XXXII (2007), 282–283.

[18] Cour d'appel de Bruxelles (Belgium), 22 June 2009, 2007/AR/1742, *Cytec Industries BV v SNF SAS*, Rev. Arb. 2009, 574–575.

[19] Cour d'appel de Paris (France), 23 March 2006, *SNF SAS/Cytec Industries BV*, YB Comm. Arb. XXXII (2007), 282–283.

[20] Cour de cassation (France), 4 June 2008, *SNF SAS/Cytec Industries BV*, YB Comm. Arb. XXXIII (2008), 489–499.

only breaches that are 'flagrante, effective et concrète'[21] would be considered. Both found the award not to suffer from any such faults.

Other examples are provided by German courts. In 2004, the Oberlandesgericht Düsseldorf applied a maximalist approach regarding the review of EU competition law in arbitral awards.[22] Reviewing a Swiss award, it undertook a fully fledged analysis of the legal and factual findings of the arbitral tribunal. Most notably, it heard witnesses on its own motion.[23] The analysis ended in the conclusion that there was no violation of EU competition law. In contrast to this, the Oberlandesgericht Thüringen chose a minimalist approach in 2007 when reviewing another Swiss award in light of EU competition law.[24] The Court pointed out that it is not its task to engage in a *révision au fond* and limited itself to a *prima facie* analysis of the plausibility of the wording of the award. These heterogeneities can be illustrated with numerous other decisions from different Member States.[25] In light of these developments, calls for a uniform standard of review regarding competition law have gained attention.[26]

1.1.2 Arbitral Tribunals Confronted with EU Law

The application of EU law in arbitration is influenced by two main interests. One is the interest of allowing parties to use arbitration as a tool for efficient and flexible dispute resolution. The other is the regulatory interest calling for compliance with the respective provisions of EU law.

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[21]This standard can be traced back to Cour de cassation (France), 19 November 1991, *Société des Grands Moulins de Strasbourg/Société Compagnie Continentale France*, Rev. Arb. 1992, p. 76 (demanding recognition unless the breach of EU competition law renders the award in 'flagrante et effective' contradiction to international public policy).

[22]Oberlandesgericht Düsseldorf, 21 July 2004, VI Sch (Kart) 1/02, published in excerpts in WuW/E DE-R, pp. 1647ff, full text available on juris-Database (subject to charge) www.juris.de accessed 26 November 2016.

[23]ibid para. 24.

[24]Oberlandesgericht Thüringen, 8 August 2007, 4 Sch 03/06, SchiedsVZ 2008, p. 44.

[25]Among others: OGH (Austria), 23 February 1998, Wirtschaftsrechtliche Blätter 1998, p. 221 (demanding that the breach of EU competition law is 'evident' and that no review of the factual findings was permissible); Corte d'Apello di Milano (Italy), 5 July 2006, 1897/06, *Terra Armata S.r.l./Tensacciai S.p.A*, reported in Landolt (2008), p. 143 (instead of enforcing unless breaches are found, the Milan Court requires awards to provide sufficient and detailed reasoning as to compliance with EU competition law, threatening refusal of enforcement where the reasoning is lacking); Gerechtshof Den Haag (Netherlands), 24 March 2005, *Marketing Displays International Inc./VR Van Raalte Reclame B.V*, YB Comm. Arb. XXXI (2006) 808–809 (the Court undertook a detailed substantive review); with regard to national competition law: BGH, 23 April 1959, NJW 1438 (finding that the court should also review the factual findings as far as relevant for the result in the award).

[26]Cf. e.g. Kasolowsky and Steup (2011).

From the perspective of an arbitral tribunal the regulatory interest can indirectly constrain its leeway when making a decision. Arbitrators take their decision in one stage of a multi-stage process, which includes decisions taken by the parties and potentially by national courts before, during or after the arbitration proceedings. In all stages different constraints come into play. Three main categories of constraints on arbitrators can be singled out. The first constraint is the will of the parties as reflected in the fundamental significance of the arbitration agreement to an arbitral tribunal's mandate. The parties additionally influence the arbitrator's leeway through their choice of law, the evidence they present, the procedural steps they take etc. Second, the substantive laws and conflict of laws rules which can become applicable can be considered as constraining arbitrators. Third, arbitrators are constrained by state courts' systems of review regarding arbitration. The interplay of those three constraints shapes the arbitrators' leeway for their decisions. Understanding this interplay allows understanding of international commercial arbitration and its place in a legal system.

Over the years, different perspectives on international arbitration have been developed that attempt to describe arbitration's role in the legal system at large. These perspectives are based upon different starting points in legal theory and philosophy.[27] Three different perspectives can be singled out: the monolocal approach, the multilocal approach and the transnational approach.[28]

According to the traditional monolocal line of thought, arbitrators are assimilated to national judges executing their task in the framework of a single national legal order, i.e. the legal order of the seat of arbitration. Consequently, arbitration is understood to be governed primarily by the *lex fori* and only secondarily by the parties' will, i.e. to the extent admitted by the *lex fori*.[29] This hierarchy is also reflected in the direct applicability of the seat of arbitration's conflict rules.[30] The monolocal approach also deems the overriding mandatory rules of the *lex fori* to apply directly, making substantive mandatory EU law applicable in arbitration proceedings seated in a Member State.

[27]Gaillard (2010b), p. 1ff.

[28]These three categories have been developed and outlined by Gaillard; cf. ibid p. 9 for the nomenclature monolocal, multilocal and transnational.

[29]The Institute of International Law's Amsterdam Resolution of 1957 on the International Recognition and Enforcement of Arbitral Awards unequivocally follows the monolocal approach, cf. e.g. Art. 9: 'The law of the place of the seat of the arbitral tribunal shall determine whether the procedure to be followed by the arbitrators may be freely established by the parties (. . .)'; cf. also Art. 2 Geneva Protocol on Arbitration Clauses (1923): 'The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.'

[30]Art. 11 (1) Amsterdam Resolution of 1957: 'The rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference.'; Mann (1967), pp. 164, 167; Wagner (2002), p. 552.

In contrast, according to the multilocal approach, international arbitration derives its legitimacy not from one but from a plurality of legal orders.[31] The multilocal approach reflects the parties' will in that it focuses on their will to have a final and enforceable decision. Accordingly, the legal orders of the states where the review of the award may be sought become relevant in addition to that at the seat of arbitration.[32] All of these legal orders are assumed to cumulatively constrain the decision-making of an arbitral tribunal.[33] This can lead to the application of the most restrictive among the mandatory rules at the seat of arbitration and potential places of judicial review.[34]

Lastly, the most modern approach is the transnational approach. It views arbitration as a judicial mechanism which is completely delocalised and detached from national legal orders. International arbitration is deemed to have evolved into a legal order of its own based on the collective consensus of states around the world in favour of international arbitration as the normal means of dispute resolution.[35] Accordingly, mandatory rules emanating from a given national legal order cannot become applicable by virtue of the enacting state's authority *per se*. They only become relevant if they also form part of transnational public policy, i.e. if they are accepted by 'civilised nations' as fundamental rules of natural law, principles of universal justice, *ius cogens* in public international law and the general principles of morality.[36]

Each of these three approaches is a comprehensive way to look at arbitration. In doing so however, all three adopt an external perspective. Any decision taken by an arbitrator requires him to identify the specific and concrete circumstances of that decision within the framework of the multi-stage process of arbitration. In spite of the importance of the arbitrators' legal background, rational arbitrators cannot be assumed to simply adhere to one approach in a stubborn fashion. This inquiry will examine what the preferable course of action is if arbitrators do not strictly follow

[31]Gaillard (2010a), p. 25.

[32]The proponents of the multilocal approach criticise the monolocal fixation on the *lex fori* for violating the parties' true intention when choosing the seat of arbitration. They stress that the seat of arbitration is often chosen merely out of reasons of geographical accessibility for the parties, available infrastructure for private hearings or other considerations of convenience. The role granted to the *lex fori* under the monolocal approach has been held to go against the degree of relevance attached to it by the parties when making their choice by Judge Lagergren, cf. Godwin Sarre (1964), p. 271.

[33]de Court Fontmichel (2004), p. 205: 'Arbitrators must comply with the mandatory rules (*lois de police)* of the State of the seat as well as the mandatory rules (*lois de police*) of the State of enforcement that claim to apply to the situation. Otherwise their award could be set aside and/or become unenforceable.', translation by Gaillard (2010a), p. 119.

[34]Cf. also Gaillard (2010a), p. 119ff where the negative implications in case of conflicting mandatory rules are underlined. Proponents of the multilocal approach typically meet the potential over-inclusiveness by qualifying the link between the dispute and the respective mandatory rule and by weighing the different interests at stake, cf. Beulker (2005), pp. 288ff, 322.

[35]Gaillard (2010a), p. 35.

[36]Lalive (1987), p. 273; Gaillard and Savage (1999), para. 1648; Poudret and Besson (2007), para. 933; International Law Association (2003a), p. 220.

one school of thought but instead adopt the approach which provides the greatest benefits to them in individual cases.

The benefits of a decision which an arbitrator takes regarding the application of substantive mandatory law depend on a number of factors that can be differentiated from the three rather philosophical points of view outlined above. Arbitrators are concerned about their reputation in the arbitral community and want to create the type of reputation which enables them to be reappointed. Fostering the required reputation is more important to arbitrators than strict adherence to a certain philosophical approach. Especially since neither of the aforementioned approaches has prevailed on a global scale, an arbitral tribunal relying on only one approach runs the risk of rendering an unenforceable award. That scenario can be considered to constitute the worst case for fostering a reputation as an arbitrator worth reappointing. The constraints which an arbitral tribunal meets in actuality depend on a variety of factors, e.g. the substance matter of the dispute, the seat of arbitration, nationality or seat of the parties, the choice of law and the dispute's geographical centre of gravity. If, for example, the seat of arbitration and the relevant place of enforcement recognises EU law, there is little benefit for an arbitrator in adhering only to transnational principles where those do not coincide with EU law. There may exist activist arbitrators who pursue certain long-term policy goals even if they act against their own short-term interests. It is, however, argued that this type of arbitrator is in a small minority, which can be ignored for predicting the behaviour of arbitrators at large.

Arbitrators act within a framework in which the benefits of their actions are dependent on how other actors in this framework react to these actions. On the one hand, parties evaluate the services of arbitrators, and in this respect an arbitrator's actions are connected with building up a certain reputation. On the other hand, the different perspectives outlined above on the autonomy of arbitrators are reflected in the different systems of review. The actions of arbitrators are dependent on these systems of review in order to create a final and enforceable award. Therefore theses approaches and their differences have to be taken into account by a rationally acting arbitrator when making certain decisions, e.g. on the application of substantive mandatory EU law. An arbitrator can then be assumed to look at the different probabilities of having an award enforced or reviewed and evaluate the actions available to him in view of their expected effect on his reputation. Therefore, it is necessary to analyse the system of review and to investigate whether and how review by different Member States implicates different probabilities in this sense.

1.2 Scope of the Inquiry

1.2.1 International Commercial Arbitration

The inquiry focuses on international commercial arbitration as distinct from domestic arbitration. Different rules can apply to these two types of arbitration especially in terms of the admissibility of arbitration, the applicable law or the requirements for review of the award.[37] The French[38] and the Belgian[39] arbitration laws are two examples which differentiate between domestic and international arbitration—providing for a more liberal regime for the latter. Different theories aim at answering the question whether a given arbitration is international.[40] The objective theory analyses the content of the dispute and qualifies arbitration proceedings as international if the relationship of the parties giving rise to the dispute entails an economic transaction across national borders.[41] The contrasting subjective theory emphasises the importance of the parties' domicile, residence or nationality.[42] The European Convention on International Commercial Arbitration (European Convention) combines both theories in its Art. 1 (1) (a).[43] It limits the Convention's scope to 'disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States'. The definition of the European Convention is adopted for the purpose of this inquiry.

[37]For an overview of European countries that have enacted special arbitration laws for international commercial arbitration cf. Poudret and Besson (2007), para. 22.

[38]Art. 1506 NCPC (France).

[39]Art. 1717 (4) Code Judiciaire (Belgium); cf. also Arts 176 to 194 Bundesgesetz über das International Privatrecht (Switzerland).

[40]Poudret and Besson (2007), paras. 31–39.

[41]This approach is reflected in Art. 1504 NCPC (France), which provides that an arbitration is international if it involves the interests of international trade.

[42]Art. 176 (1) Bundesgesetz über das International Privatrecht (Switzerland) takes up the subjective approach. It makes the application of the Swiss regime designed for international arbitration dependent on the fact that at least one of the parties had neither its domicile nor its habitual residence in Switzerland at the time the arbitration agreement was concluded. Art. 1717 (4) Code Judiciaire (Belgium) provides for a special regime for arbitration proceedings between parties that do not have Belgian nationality or a residence in Belgium. Legal persons are considered Belgian in this sense if their registered office or one of their branch offices is located in Belgium.

[43]European Convention on International Commercial Arbitration, Geneva, 21 April 1961, 484 UNTS (No 7041) 349ff. The current ratifying states are Albania, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Croatia, Cuba, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Kazakhstan, Latvia, Luxembourg, Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Turkey and Ukraine; for the current status see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en accessed 26 November 2016.

The commercial dimension of the term international commercial arbitration distinguishes it from public international arbitration or investment arbitration, i.e. arbitration which actively involves at least one state as a party. The commercial dimension also comes into play to exclude disputes between suppliers and consumers from arbitration. In this context, Art. I (3) New York Convention allows any state to make the declaration that it will apply the Convention only to legal relationships which are considered as commercial under the national law of the respective state. The respective states can define consumer disputes as not commercial making the New York Convention inapplicable, yet to date, only six of the EU's 28 Member States have made this declaration.[44] In this inquiry, the commercial dimension is understood in a broad sense. It covers all typical contractual disputes.[45]

1.2.2 Substantive Mandatory Law and Overriding Mandatory Provisions

The inquiry on the interaction between international commercial arbitration and EU law is focused on the substantive mandatory part of EU law. The procedural aspects of international commercial arbitration are governed by the parties' agreement as supplemented by arbitration rules and arbitration laws if need be. So far there has not been any harmonisation of arbitration laws by the EU. The relevant interaction between EU law and international commercial arbitration which presents itself to arbitral tribunals therefore concerns substantive law.

Furthermore, the focus of this inquiry is on mandatory provisions. The general definition of mandatory provisions is straightforward: parties cannot opt out of mandatory provisions, while dispositive or default provisions give them this option. Rendering provisions mandatory allows legislators to put their views on certain matters in place of an otherwise autonomous decision of contractual parties. In addition to this general observation, there are further nuances of the mandatory nature of provisions.[46] Based on the differentiation made in cross-border contexts,

[44]These six Member States are Cyprus, Denmark, Greece, Hungary, Poland and Romania; cf. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html accessed 26 November 2016; see generally Hill (2008), para. 7.32.

[45]Cf. the definition in n. 2 of the UNCITRAL Model Law on International Commercial Arbitration: 'The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.'

[46]Basedow (2014), p. 337.

mandatory provisions can be split into two further categories: internally mandatory provisions and overriding mandatory provisions.

Internally mandatory provisions are mandatory in the sense that parties cannot escape their applicability through ordinary contractual stipulations. If, however, they choose the law of another country to apply to their international contract, internally mandatory provisions become inapplicable and are replaced with the provisions of the chosen law on the respective matter. In contrast, the avenue of separating a contract from the otherwise applicable law is not open to parties in relation to overriding mandatory provisions. Overriding mandatory provisions are provisions which require to be applied whenever a certain situation falls within their substantive and territorial scope. The rationale behind granting provisions the aforementioned degree of binding force in the cross-border context is provided by their high degree of regulatory significance. It exceeds that of internally mandatory provisions. Typically, overriding mandatory provisions relate to the interests of a certain group of individuals or policy goals such as protecting the economic system at large.[47] Reconciling this type of provisions with modern conflict of laws systems which focus on the parties' freedom to choose the law applicable to their contract has been compared to providing shelter for the homeless.[48] It is in this area that the rationales of EU law and those of arbitration collide head on.[49]

1.2.3 Substantive Mandatory EU Law and Focus on Arts 17 to 19 Commercial Agents Directive

Tensions between EU law and arbitration can arise in a number of different areas. It is conceivable that an arbitrator has the task of deciding whether to apply a provision in the Treaties themselves—e.g. Art. 102 TFEU where one party claims that a contract is in violation of the prohibition on restrictive agreements. Equally, secondary EU law comes into question in the form of both Regulations and Directives. Only a few Regulations can be conceived as impacting international commercial arbitration, e.g. regulations establishing trade restrictions based on Art. 215 TFEU.[50] For example, an award relating directly to a Regulation regarding procedures in matters of food safety was rendered in 2009.[51]

[47]Cf. regarding this differentiation in the Rome I Regulation, infra 83ff.

[48]Basedow (1988), p. 10. The structural reason behind this challenge is that modern conflict of laws rules are all-sided, i.e. they define which law is applicable to certain circumstances. In contrast to this, mandatory provisions embody one-sided conflict rules as they define circumstances in which they deem themselves to be applicable, cf. Mann (1973), pp. 117f.

[49]Cf. Michaels (2012), pp. 191ff.

[50]E.g. Regulation 833/2014/EU of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1.

[51]Chambre Arbitrale de Paris, 1 September 2009, YB Comm. Arb. XXXV (2010), 30, 36 regarding Regulation (EC) 178/2002 of 28 January 2002 laying down the general principles and

Practically the EU's most important instruments for the harmonisation of substantive law have been and still are Directives.[52] Their potential impact through mandatory requirements can become relevant in a number of areas. For example Art. 7 (1) Directive 1999/44/EC (Sales Directive) rules out the waiver of certain rights which the Directive bestows upon consumers.[53] Additionally, the question whether a contract from which these rights might arise can be subject to arbitration in the first place can also be subject to substantive mandatory EU law, namely Art. 3 and Annex 1 (q) of Directive 93/13/EEC (Unfair Terms Directive), which relate to the validity of arbitration clauses in standard terms of B2C contracts.[54] Other examples include Directive 2015/849/EU (Fourth Money Laundering Directive), which raises the question whether arbitrators that rule on transactions that appear to have been feigned in order to launder money are under an obligation to report them to the appropriate authorities.[55] As far as Directives are concerned, arbitrators are typically confronted with the question whether a certain transposition is applicable.[56] It is, however, also possible that arbitrators have to deal with parties who chose a Directive itself as the applicable law for their contract.[57]

In spite of the wide array of Directives which can become relevant in this context, the focus in this inquiry will turn towards one particular set of provisions in one particular Directive. This Directive is Directive 86/653/EEC (Commercial Agents Directive), which was the first attempt at European harmonisation of an entire type of contract.[58] This area is considered the most frequent source of friction

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requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. Arbitrators found this regulation to reflect considerations of public policy [2002] OJ L31/1.

[52]Cf. Art. 115 TFEU and the principle of subsidiarity enshrined in Art. 5 TEU.

[53]Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12; see. Riesenhuber (2001), p. 357.

[54]Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29; cf. Case C-168/05 *Mostaza Claro* [2006] ECR I-10421; Case C-40/08 *Asturcom Telecomunicaciones* [2009] I-9579.

[55]Directive 2015/849/EU of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/73; cf. generally Lew (2011); de Lotbinière McDougall (2005).

[56]Beulker (2005), p. 336.

[57]In ICC Award 9032/1998 and ICC Award 12045/2003 arbitrators had to decide a dispute in which the parties had agreed to apply the Commercial Agents Directive instead of the otherwise applicable transpositions, cf. ICC Award 9032/1998, (2001) 12 ICC Bull. 123; ICC Award 12045/2003, Clunet 2006, 1434, 1435; cf. also the unpublished ICC Awards 7583/1994, 7589/1994 and 8593/1996 referred to by Shelkoplyas (2003), p. 152, n. 19.

[58]Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17. For an overview on the developments leading up to the Directive cf. Basedow (1981), pp. 200ff; Saintier (2002), pp. 86–98; Fock (2002), pp. 15–20; Randolph and Davey (2010), pp. 13–17.

between a Directive and international commercial arbitration.[59] The most influential provisions of the Commercial Agents Directive have proven to be Arts 17 to 19.[60] These provisions set up a mandatory regime which requires principals to indemnify or compensate commercial agents upon termination. The Directive itself does not, however, determine under what circumstances its transpositions require to be applied where a commercial agency reaches across borders. In light of this, the ECJ rendered a decision in 2009 which related to commercial agency in which the parties had chosen the applicability of Californian law while the agency itself was carried on in England.[61] That decision marked the first time that the ECJ took a position on the scope of application of provisions in a Directive in a cross-border contract. It has far-reaching consequences extending to the field of international commercial arbitration which will be analysed in Chaps. 3–5.

1.2.4 Questions Addressed in This Inquiry

In a first step, this inquiry aims at determining whether a specific subset of substantive mandatory EU law is over- or under-enforced in international commercial arbitration. This requires determining the preferable standard of enforcement. To this end, the analysis will focus on the insurmountable conditions set by EU law and the interdependencies of arbitral decision-making. Within that framework, the ideal standard of enforcement of Arts 17 to 19 Commercial Agents Directive and its transpositions will be determined in light of the concrete conditions under which commercial agency contracts are concluded. This first step will be taken in Chaps. 2–4. In a second step, attention will turn towards to the question how a system of review should preferrably be designed in order to be capable of guiding arbitral practice towards the preferable standard of enforcement. This will be undertaken in Chap. 5.

1.3 Methodology

1.3.1 Comparative Legal Analysis

Within the realms of this inquiry, the juxtaposition of numerous legal orders within the EU is further extended by international commercial arbitration—which some consider to be a legal order in its own right. Accordingly, a comparative legal

[59] Shelkoplyas (2003), p. 152.

[60] Leiss (1965), p. 38: 'Kernstück'; Leloup (2001), para. 1101: 'caractéristique fondamentale'; Saintier (2002), p. 110: 'undoubtedly some of the most important rules'.

[61] Case C-381/98 *Ingmar* [2000] ECR I-9305; cf. infra 123ff.

analysis of these different systems suggests itself almost naturally. As far as the laws of nation states comes into play, the analysis throughout will focus on the situation in the following four countries: Germany, France, Belgium and England. They have been chosen for their particular role when it comes to both their law on commercial agency as well as their role in international commercial arbitration.

Germany and France are the two countries whose laws were used as a model for the Commercial Agents Directive, in particular in light of the German regime for indemnity and the French regime for compensation to the commercial agent after the contract has been terminated. They also are the two largest economies in terms of their GDP making them an important target for distribution of goods and services. As home to the ICC, the world's most important arbitral institution, France is also an obvious choice for the role it plays in the field of international commercial arbitration. Belgium has a long history of legislation protecting agents in distribution contracts which led to a transposition of the Directive with a number of peculiar elements. The special role of this legislation has traditionally played an important role in Belgian arbitral practice and the respective decisions by Belgian courts. The transposition applicable in England also transposed the Directive in peculiar fashion, allowing parties to choose between the German indemnity and the French compensation regime. At the same time, the LCIA, which handles the second largest case load in Europe after the ICC, is seated in London.

1.3.2 Law and Economics

So far, the questions which unfold with regard to the relationship between EU law and international commercial arbitration have mostly been tackled with an outlook towards either the need to apply EU law or towards the need to avoid infringements of the autonomy of arbitration.[62] The topic has, however, not yet been analysed comprehensively making use of economic tools of analysis.[63] An economic analysis of the tension between these two fields allows looking behind the biases of the two sides and allows focusing on striking a sound balance. The set of analytical tools provided by economics allows analysis of the consequences of regulation such as the Commercial Agents Directive. The modern economic toolset extends from approaches of tackling the imperfections of markets, through game theoretical approaches to approaches based on an understanding which focuses on the psychology of decision makers.[64]

[62]Shelkoplyas (2003), p. 15; cf. for general works: Zobel (2005); Shelkoplyas (2002); Eichstädt (2012); cf. for works with a focus on EU competition law: Hilbig (2006); Landolt (2006); Blanke and Landolt (2011).

[63]For the comparable situation in the United States cf. E. Posner (1999); Guzman (2000); Ginsburg (2010).

[64]Franck (2015), p. 71.

The field of substantive EU law is particularly qualified for an analysis in this respect. The EU is based on the 'principle of an open market economy with free competition'.[65] Although the EU also aims at realising social and cultural goals as well as the protection of consumers, public health and the environment, those goals are outweighed by the EU's economic goals.[66] In view of these predominantly economic goals, economic tools of analysis can be particularly insightful. This also holds true with regard to the main object of analysis in this respect, i.e. the Commercial Agents Directive. Commercial agency contracts can be analysed using the insights of the theories of international distribution. Those allow an understanding of the conditions under which parties prefer to conclude commercial agency contracts across borders and of the conditions under which they will refrain from doing so. At the same time, commercial agency services across borders are traded on a global market. The theoretical and empirical insights made in economics regarding the way in which markets react to interventions in favour of one party can be incorporated into an analysis of Arts 17 to 19 Commercial Agents Directive. At the same time the tools for the analysis of markets' inner workings allow identification of cases of market failure which could be understood as a call to regulatory action and more rigid oversight. The respective analysis in the aforementioned sense will be part of Chap. 3.

Equally, international commercial arbitration provides an apt subject for economic analysis. Traditional means of legal analysis often fail to adequately account for the flexibility under which arbitrators take their decisions.[67] The interplay of the different constraints under which arbitrators make their decisions can be analysed making use of game theory. It allows a better understanding of the interdependencies of the different stages which the resolution of a dispute in a cross-border commercial agency may go through if the contract includes an arbitration agreement. The sequential nature of the arbitral process, together with the decisions taken by the parties and reviewing courts, have been used as a field of application for game theory before,[68] but not yet with a focus on the application of mandatory EU law.[69] Therefore, Chap. 4 will include a game theoretical model on the application of Art. 17 Commercial Agents Directive by arbitral tribunals within the system of review.

[65]Cf. Art. 119 (1) TFEU, cf. also Arts 120 and 127 (1) TFEU.

[66]Basedow (2000), p. 21.

[67]Cf. Renner (2011), pp. 91–125, 199–304 for an analysis of the application of mandatory law in international commercial arbitration through the lens of system theory.

[68]Brams (2003); McKenna and Sadanand (1995).

[69]E. Posner (1999).

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Chapter 2
Balancing Party Autonomy and EU Law in the Member States' System of Review

The interaction of courts with the arbitral process during pre- and post-award review is shaped by the requirement of striking a balance between the goals enshrined in substantive mandatory law and the goal of maintaining arbitration as an effective means of dispute resolution. The former can require courts to limit the autonomy of international arbitration, the latter restricts them in their efforts in this respect. The dichotomy between those two interests becomes complicated where the substantive mandatory provisions have their origins in EU law.[1] Any inquiry into the systems of judicial review needs to take account of this dichotomy—in particular where substantive mandatory EU law intersects with arbitration.[2]

The following section will analyse the system of judicial review of arbitration agreements and arbitral awards. First, the system will be described using general terms and utilising the framework set out in international law, i.e. the New York Convention and the European Convention (Sect. 2.1). A second step will analyse the conditions for EU law to influence the framework of review (Sect. 2.2).

[1]Both interests are reflected in *Eco Swiss*. On the one hand, the ECJ stressed that the 'interest of efficient arbitration proceedings' requires that 'review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances' in para. 35. On the other hand, the court also took cognisance of Art. 101 TFEU's function as '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', see Case C-126/97 *Eco Swiss v Benetton* [1999] I-3055, para. 36.

[2]This is where some consider the dichotomy to turn into schizophrenia, cf. Benedettelli (2011), pp. 592ff.

J. Engelmann, *International Commercial Arbitration and the Commercial Agency Directive*, International Law and Economics, DOI 10.1007/978-3-319-47449-6_2

2.1 System of Review and Substantive Mandatory Law

State courts maintain their systems of review for arbitration agreements and arbitral awards in spite of the modern understanding which underlines the autonomy of arbitration. An arbitration agreement expresses the desire to waive the right to be heard by a state court. The corollary of admitting this waiver in principle is that states retain some degree of supervision as to which disputes go to arbitration and which awards result from it. The degree of supervision is influenced by the degree of effective self-regulation states presume to occur in arbitration. In this respect, international law has unified the system of review to a certain extent. Yet, the global system of review has not become unitary. As much as the global system leaves room for states to have idiosyncratic attitudes towards arbitration, those attitudes are reflected in their supervision regarding arbitration agreements and arbitral awards. Along those lines, review of the arbitration agreement occurring before an award has been rendered will be examined in a first step (Sect. 2.1.1). Then attention will be turned to the review of the award itself (Sect. 2.1.2).

2.1.1 Pre-award Review

The subject of pre-award review is the arbitration agreement. Pre-award review typically only entails indirect scenarios.[3] It can be triggered if one of the parties to an arbitration agreement disregards it and directly brings a matter covered by the agreement before a national court. The other party to the dispute is likely to request a referral to arbitration based on the arbitration agreement in response. In order to establish its own jurisdiction on the merits, the national court will have to analyse the arbitration agreement. This analysis is what is referred to as pre-award review in this inquiry. In this situation, the arbitration proceedings can already have been initiated simultaneously. A slightly different scenario occurs when arbitration proceedings are initiated first and only then does one party tackle the arbitration agreement before a national court in the aforementioned indirect manner.

Pre-award review in this sense is addressed in Art. II (3) New York Convention. This provision is applicable when a court of a ratifying state has to decide 'on a matter in respect of which the parties have made an arbitration agreement within the meaning of this article'. In that situation, Art. II (3) New York Convention calls

[3]Only a limited number of arbitration laws include a direct possibility of reviewing arbitration agreements. Direct review occurs when one of the parties is not content with the prospect of having to arbitrate a dispute under an agreement which it deems to suffer from certain defects and brings it to the attention of a state court. Neither the New York Convention nor the European Convention provide for this opportunity, cf. Arfazadeh (2001), p. 81. Among the countries which provide for direct review are Sweden (Art. 2 (2) Lag (1991:116) om skiljeförfarande), Germany (§ 1032 (2) Zivilprozessordnung (Germany), (cf. infra 32) and England (s 32 Arbitration Act 1996, (cf. infra 37).

upon the court to refer the parties to arbitration unless it finds that the arbitration agreement is 'null and void, inoperative or incapable of being performed'.[4] Art. VI European Convention regulates the matter in more detail.[5] If a respondent brings a plea as to the court's jurisdiction based on the existence of an arbitration agreement, Art. VI (2) European Convention allows review of the said arbitration agreement for its validity and for the question whether the dispute is capable of settlement by arbitration. In a situation in which the arbitration proceedings have already been initiated and a court is called upon to review the arbitration agreement in parallel, Art. VI (3) European Convention permits reviewing courts to rule on the arbitration agreement only if there is good and substantial reason to do so.

Both Art. II New York Convention and Art. VI European Convention reflect two dimensions of pre-award review along which review proceedings can be analysed in general. One is the measure of review against which arbitration agreements are held, the other is the level of scrutiny applied when doing so. The measure of review will be analysed first (Sect. 2.1.1.1) and the level of scrutiny second (Sect. 2.1.1.2). In a third step, the specific conditions of review under the arbitration laws of four Member States will be described (Sect. 2.1.1.3).

2.1.1.1 The Measure of Review in Pre-award Review

Measures of pre-award review incorporate general legal requirements as well as specific value judgements on the admissibility of arbitration. Along those lines, two main measures of review can be distinguished. First, national courts can decide not to enforce an arbitration agreement because they deem it to be null and void or a variation thereof (Sect. 2.1.1.1.1). Second, a lack of arbitrability can equally give reason to national courts not to refer parties to arbitration (Sect. 2.1.1.1.2).

2.1.1.1.1 Null and Void Arbitration Agreement

This measure of review reflects the principle that a court cannot refuse parties their right to be heard based on an arbitration agreement that is invalid. What exactly determines the validity of an arbitration agreement in this sense is not always clear. For example, the meaning of 'null and void, inoperative or incapable of being performed' as expressed in Art. II (3) New York Convention was not addressed in

[4]Pursuant to Art. II (3) New York Convention 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

[5]The European Convention applies in pre-award review if arbitration agreements are concluded between parties having their habitual place of residence or their seat in different contracting states, Art. I (1) European Convention. Among the states surveyed in this inquiry Belgium, Germany and France have ratified the Convention.

the *travaux préparatoires*.[6] Nevertheless, it has become a very influential provision mirrored in a number of arbitration laws.[7] The European's Convention's reference to the arbitration agreement's validity in Art. VI (2) and (3) is equally open to interpretation.

As the international conventions do not effectively address what renders an arbitration agreement null and void, the question which law decides over the question arises naturally. The European Convention gives a clear answer. According to the first sentence of Art. VI (2) European Convention the law chosen by the parties applies. In the absence of such an agreement, the law at the seat of arbitration becomes applicable. If there is no indication of a choice by the parties in respect of either of those two aspects, the reviewing court may apply its own rule of conflict. In contrast, the New York Convention does not give any guidelines on the law which should decide the validity of an arbitration agreement. Commentators and courts agree that the law which parties expressly choose to be applicable to their arbitration agreement should apply in this respect—yet regrettably, the parties hardly ever make such an express choice. There exist up to nine different theories under Art. II (3) New York Convention for determining the applicable law in the absence of an express choice: the law impliedly chosen by the parties, the law of the seat of arbitration, the law governing the underlying contract, the law of the place of conclusion, the law of the parties, the law of the country whose courts would have jurisdiction in the absence of an arbitration agreement, the law of the (probable) place of enforcement, a mixture of any of these and a-national fundamental principles.[8]

Without favouring any of these approaches, a desirable result would be to coordinate the law applicable in this respect with the law which is applicable in the post-award control of the validity of the arbitration agreement.[9] This view is supported by the desire that the potential invalidity of an arbitration agreement should be judged by a predictable and uniform standard in the courts of different legislations in pre-award review.[10] Equally, the same court should be prevented

[6]Which is probably connected with the fact that the provision was drafted 'in a race against time' during the New York Conference in 1958, van den Berg (1981), pp. 56, 154.

[7]Art. II (3) New York Convention heavily influenced Art. 8 (1) UNCITRAL Model Law, Holtzmann and Neuhaus (1989), p. 302. Art. 8 in turn provided a model for pre-award for numerous national arbitration laws. It has been adopted verbatim by around 45 jurisdictions worldwide, including EU Members Ireland and Cyprus; cf. Delvolvé et al. (2009), pp. 544–545. The pre-award level of scrutiny is also part of discussions surrounding Art. 8 UNCITRAL Model Law, cf. Bachand (2006); Binder (2010), para. 2-089.

[8]Blessing (1999b), p. 169; Liebscher (2004), p. 67; cf. also Poudret and Besson (2007), para. 336; Arfazadeh (2001), p. 80; Schramm, Geisinger and Pinsolle in: Kronke et al. (2010) Art. II, 103; Graffi (2011), p. 32.

[9]Art. V (1) (a) New York Convention provides that in post-award review the validity of the arbitration agreement is subject to the law to which the parties have subjected the arbitration agreement or failing any indication in this respect, the law of the country where the award was made.

[10]van den Berg (1981), p. 158.

from considering a given arbitration agreement valid applying a certain law in pre-award review, while having to refuse its enforcement under a different law applicable in post-award review. As long as the parties' original consent to have their disputes arbitrated can be ascertained, it is worth considering that specific standards which could endanger the validity of the arbitration agreement should only be applied with restraint.[11] Hindering parties from relying on an arbitration agreement based on overly unconventional standards and on one of many conceivable connecting factors could be in violation of the parties' original consent to have their disputes arbitrated. Any conceivable justification for intervening on the basis of such laws must be weighed against the willingness and ability of parties to enter into international commercial agreements, which typically include arbitration clauses.[12]

Irrespective of the law or standards considered applicable on the substantive validity of the arbitration agreement, it can be stated the courts' analysis in the context of the respective measures of review centres on the question whether the parties' consent is compromised.[13] Along the lines of the doctrine of severability, the lack of consent has to be related to the arbitration agreement specifically.[14] Both procedural and substantive categories of invalidity have emerged. Procedural notions include the foundation pillars of any judicial procedure, e.g. the right to be heard and to equal and impartial treatment by the adjudicators. If these cannot be guaranteed, the agreement is invalid. The more relevant substantive categories encompass the classic contractual defences—e.g. misrepresentation, duress, fraud, undue influence or incapacity to agree.[15] The connection between substantive mandatory provisions and the invalidity of arbitration agreements is straightforward. Provisions that invalidate or nullify the consent of parties are typically mandatory. There is, for example, no way to opt out of provisions that stipulate the invalidity of agreements obtained by fraud. An affected arbitration agreement loses all binding power on the parties and cannot be enforced at the pre-award stage.

[11] Born (2014), p. 642; Wilske and Fox in: Wolff (Ed.) (2012) Art. II, para. 307.

[12] *Scherk v Alberto-Culver Co.*, 417 US 506 (1974), 516 para. 14; cf. also para. 9: 'We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.'

[13] Bishop et al. (2008), p. 276.

[14] The doctrine of severability provides that the arbitration agreement is independent of the underlying contract. It is one of the conceptual cornerstones of international arbitration; cf. Born (2014), p. 348ff with further references; cf. also § 1040 (1) Zivilprozessordnung (Germany); Art. 1447 NCPC (France); Art. 1690 (1) Code Judiciaire; Section 7 Arbitration Act 1996 (England).

[15] van den Berg (1981), p. 156; Born (2014), pp. 833, 947; cf. also reference to the 'geläufige Rechtsgeschäftslehre' (my translation: 'common contract rules') for § 1029 Zivilprozessordnung (Germany) by Münch in: Krüger and Rauscher (Eds.) (2013), § 1029 ZPO, para. 16.

2.1.1.1.2 Arbitrability

Not all matters are capable of settlement by arbitration. The demarcation line between disputes which can fall within the jurisdiction of an arbitral tribunal and disputes which cannot is drawn by the concept of arbitrability. Arbitrability is included as a measure of review in Art. II New York Convention. Art. II (1) refers to arbitration agreements 'concerning a subject matter capable of settlement by arbitration'. This is widely understood to refer to arbitrability.[16] Art. II (3) New York Convention in turn calls upon courts to refer parties to arbitration if there exists 'an agreement within the meaning of this article' between them, i.e. an agreement that meets the arbitrability requirement in paragraph one of Art. II.[17] The European Convention permits refusal of the recognition of an arbitration agreement in view of arbitrability in the last sentence of Art. VI (2).[18]

Achieving a clear and sophisticated definition of the scope and purpose of arbitrability is a complex endeavour.[19] A narrow understanding of arbitrability limits the notion to the question whether legislation has authorised the adjudication of a certain cause of action by arbitral tribunals.[20] This is how arbitrability is predominantly understood in Europe. In contrast, the broader understanding prevailing in the United States encompasses every condition that must be met in order for a dispute to be 'able to be arbitrated'. This perspective is not one focused on public policy but on the arbitration agreement as a contract, implicating questions such as the existence of an agreement in the first place, time limits of the underlying claim and the principle of *res judicata*.[21] The present inquiry adopts the narrow European understanding, which also prevails internationally in legal doctrine.[22] It is also more suitable for analysing the treatment of EU law's influence on arbitration by courts in Member States.

This concept of arbitrability can further be refined by distinguishing between disputes that are excluded from arbitration by virtue of subjective criteria fulfilled by one or two parties (e.g. states and public entities) and those excluded by virtue of the dispute's subject matter. Regarding the latter, some jurisdictions additionally draw a distinction between the application of substantive arbitrability in domestic disputes and in international disputes.[23]

Reviewing an arbitration agreement in relation to international commercial arbitration for a lack of arbitrability raises a conflict of laws question, i.e. which

[16] Schramm, Geisinger and Pinsolle in: Kronke et al. (Eds.) (2010) Art. II, 67.

[17] van den Berg (1981), p. 155.

[18] Note that the European Convention clearly distinguishes between arbitrability and validity of the arbitration agreement in pre-award review in Art. VI (2).

[19] Mustill and Boyd (2001), p. 70 provides a list of eight possible understandings of arbitrability.

[20] Shore (2009), para. 4-3; Bermann (2012b), p. 10.

[21] Zekos (2008), p. 84; Bermann (2012b), p. 11; Paulsson (2013), pp. 72–77.

[22] Bermann (2012b), p. 11, n. 36.

[23] Born (2014), p. 956f.

law decides in pre-award review whether an arbitration agreement is capable of arbitration. The answer to this question can effectively predetermine which legislator gets to impose his regulatory concerns on a given arbitration agreement. The New York Convention does not address this question. In this respect, nearly every conceivable position has been taken.[24] The majority of courts understand arbitrability according to the *lex fori*.[25] This is frequently done without any apparent conflict of laws analysis.[26] But also courts engaging in this type of analysis often find sufficient links between the dispute and their *lex fori*.[27] In this respect, courts have repeatedly had reference to Art. V (2) (b) New York Convention, which provides that in post-award review the relevant standard of arbitrability is the *lex fori*, and have inferred that the same must apply to the pre-award review.[28] In contrast to the New York Convention, Art. VI (2) European Convention expressly stipulates that the *lex fori* decides arbitrability in the pre-award stage. A variation on the strict focus on the *lex fori* is the cumulative application of the *lex fori* and the law chosen by the parties for their arbitration agreement.[29] Another approach restricts the application of the *lex fori* only if there is a true jurisdictional conflict between an arbitral tribunal and the reviewing courts.[30] Another approach sidesteps conflict of laws and puts forward a uniform standard of arbitrability—based on the New York Convention's objective of fostering uniformity and enforcement of arbitration agreements a its 'constitutional' character.[31]

The understanding as to which type of dispute is arbitrable has evolved over time. It was traditionally understood to be closely connected with overriding mandatory provisions and public policy. This can be explained by the fact that historically arbitration developed as the coming together of equals to resolve contractual disputes over property rights.[32] Accordingly, it predominantly implicated private law questions and arbitrability was used as a tool to keep questions

[24]For an overview cf. Wilske and Fox in: Wolff (Ed.) (2012), Art. II, para. 159; Poudret and Besson (2007), paras. 335–336; Hanotiau (1996); Brekoulakis (2009a).

[25]Cour de cassation (Belgium), 16 November 2006, *Van Hopplynus Instruments S.A. v Coherent Inc*, Rev. dr. com. belge 2007, 889; Bundesgericht (Switzerland), 28 April 1992, YB Comm. Arb. XVIII (1993), 143, 146; *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*, Inc., 473 US 614, 639 (1985).

[26]Lew et al. (2003), para. 9–13.

[27]Corte di Cassazione (Italy), 27 April 1979, *COGECO SpA v Piersanti*, YB Comm. Arb. VI (1981), 229; Tribunale Bologna (Italy), 18 July 1987, *Coveme SpA v CFI*, YB Comm. Arb. XVII (1992), 534, 535; Cour de cassation (Belgium), 16 November 2006, *Van Hopplynus Instruments S.A. v Coherent Inc*., Rev. dr. com. belge 2007, 889.

[28]Cf. Tribunale Bologna (Italy), 18 July 1987, *Coveme SpA v CFI*, YB Comm. Arb. XVII (1992), 534, 535.

[29]Poudret and Besson (2007), para. 335.

[30]Brekoulakis (2009a), paras. 6–16f. *Brekoulakis* denies reviewing courts the right to review arbitration agreements unless the reviewing courts have exclusive jurisdiction over the specific dispute pending in the first place.

[31]Born (2014), p. 610; cf. *Meadows Indemnity Co v Baccala & Shoop In. Sers, Inc*., 760 F Supp 1036-1045 (EDNY 1991), YB Comm. Arb. XVII (1992), 686, paras. 7–10.

[32]Shalakany (2000), p. 455.

related to public policy within the exclusive domain of national courts.[33] It is against this background that pre-award review for arbitrability served as a type of entrance examination to distinguish between the two types of disputes. It was held to enable the promotion and enforcement of high-ranking national interests, which arbitration was not seen fit to provide.[34] Typical examples of a lack of arbitrability with a respective reasoning behind it are the inarbitrability of criminal law, family law and governmental sanctions matters. As those matters remain inarbitrable to date, it remains an accepted view that a rigid review of arbitration agreements under the spectre of arbitrability during the pre-award stage can be used to safeguard public policy.[35]

Yet, neither the question whether a particular provision is an overriding mandatory provision nor the question whether it expresses public policy should be confused with the question whether disputes implicating that particular provision are arbitrable.[36] Classifying a certain matter as inarbitrable implies that arbitration is an inadequate forum for the respective disputes. Classifying a certain provision as an overriding mandatory provision or as expressing public policy implies that it stipulates a (regulatory) goal from which there shall be no derogation. Therefore, there is no reason in principle to consider disputes relating to overriding mandatory provisions inarbitrable as long as there is no indication that arbitration is an inadequate forum for the respective dispute or tantamount to a derogation from the particular provision. Along the lines of this understanding, the range of arbitrable matters has extended throughout the last decades. At least since the seminal *Mitsubishi* decision by the Supreme Court of the United States in 1985, which in principle admitted the arbitration relating to the Sherman Act, substantive arbitrability has extended across jurisdictions to matters that once were regarded too significant for society at large to be subject to arbitration.[37] This extension has become one of the most remarkable developments in international commercial arbitration. It certainly arrived in the European legal landscape with the ECJ's decision in *Eco Swiss* but already had precursors in individual Member States.[38] More and more jurisdictions have adopted the understanding that there is nothing to suggest that matters relating to overriding mandatory provisions or public policy cannot be arbitrated *per se*.[39]

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[33]Guzman (2000), p. 1291.

[34]Youssef (2009), paras. 3–7ff; Bermann (2012b), p. 14, n. 48.

[35]Carbonneau and Janson (1994), pp. 193, 196; Brekoulakis (2009b), para. 2–3.

[36]Born (2014), p. 949ff; cf. for overriding mandatory rules and choice of court agreements Weller (2005), p. 166.

[37]Cf. *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc*., 473 US 614 (1985).

[38]Cf. regarding competition law: Bundesgerichtshof (Germany), 25 October 1966, KZR 7/65, *Schweißbolzen*, BGHZ 46, 365, 368 = NJW 1967, 1178; Cour d'appel de Paris (France), 19 May 1993, *Société Labinal v Sociétés Mors et Westland Aerospace*, Rev. Arb. 1993, 645–652.

[39]Cf. e.g. Cour d'appel de Paris (France), 29 March 1991, *Ganz v Société Nationale des Chemins de Fer Tunisiens (SNCFT)*, Rev. Arb. 1991, 478 (regarding allegations of fraud and expropriation); *Fiona Trust & Holding Corporation and Others v Privalov* [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep 267 (regarding allegations of fraud); *Premium Nafta Products Limited and others v Fili*

Accordingly, a more cogent reasoning for making certain matters inarbitrable is the preponderance of arguments as to why arbitrators should categorically not be entrusted with the decision over those matters. For example, arbitration has inherent flaws when it comes to dealing with the interests of third parties. Arbitral awards only have effect *inter partes* making them an inept tool to affect a circle of persons other than the parties to the arbitration agreement.[40] This elucidates the inarbitrability of disputes revolving around insolvency or the ownership of patents and trademarks.[41] It can also be called into question whether arbitration is an adequate means of dispute resolution when it comes to disputes involving structurally weaker parties such as consumers and employees.[42] That party's original consent to the arbitration agreement might be considered to be flawed due to an inferior bargaining position. Additionally the parties might have significantly different resources creating difficulties for the tribunal to allow both parties to equally present their case. Another inherent flaw is that arbitrators lack some of the authority of state courts as, for example, the arbitration agreement does not provide the tribunal with the authority to issue penalties or administrative sanctions. Thus, there is no merit in arbitrating disputes in the respective areas of competition law, trade sanctions or criminal law. Finally, the inarbitrability of legal relationships in the realm of family law, such as marriages law or parenthood can also be explained along those lines.

It can be concluded that overriding mandatory provisions and public policy considerations can impact pre-award review in the realm of arbitrability. Yet, it cannot be concluded that all disputes which implicate the application of overriding mandatory provisions are sweepingly inarbitrable. Unless arbitrating those disputes is explicitly restricted by the applicable law, additional reasons relating to the inadequacy of international commercial arbitration as a means of resolving the respective dispute must be present.

Whether a matter is arbitrable on the one hand and whether an arbitration agreement is valid on the other hand are related questions. Legislators concerned with the capabilities of arbitration as an adequate and just mechanism for the resolution of this type of dispute can reflect their respective attitudes in a certain

Shipping Company Limited and others [2007] UKHL 40 (regarding allegations of fraud); Bundesgericht (Switzerland), 23 June 1992, *Fincantieri-Cantieri Navali Italiani v Oto Melara and other*, (1995) XX YBCA 766 (regarding claims arising out of illegal activities).

[40]Brekoulakis (2009b), paras. 2-42 to 2-57.

[41]ibid.

[42]This consideration can also be tackled by voiding the respective arbitration agreement. This approach is reflected in Art. 6 (1) Unfair Terms Directive in connection with Annex 1 lit q, cf. Niedermaier (2014), pp. 12, 239. A comparable consideration is at the root of the discussion in the United States revolving around the adoption of the Arbitration Fairness Act (cf. H.R. 2087, 114th Cong.), which would retroactively void arbitration clauses in employment, consumer and franchise contracts, cf. e.g. Brin (2010); Rutledge and Howard (2010); Sussmann (2007).

concept of substantive arbitrability but also in provisions which nullify arbitration agreements under certain conditions. Both measures of reviews enshrine states' concerns in this respect. It is therefore not surprising that the two measures frequently become intermingled in practice.[43]

It has even been held that the distinction is merely a question of system without legal consequences.[44] Yet there exist notable differences between a lack of substantive arbitrability and an arbitration agreement that is null and void.[45] These are based on the fact that a null and void arbitration agreement is non-enforceable as a whole; a lack of substantive arbitrability pertains only to those matters that in fact are inarbitrable.[46] An arbitration agreement that can be extended to inarbitrable matters loses its enforceability only in respect of those matters but remains enforceable in relation to all arbitrable matters.[47] Additionally, different conflict of laws rules can be applicable for the different categories.[48]

2.1.1.2 Level of Pre-award Scrutiny

The level of scrutiny in pre-award review relates to a reviewing court's answer to a question of priority: who ultimately decides over jurisdiction—the state court or the arbitral tribunal? As such it pertains to the autonomy ultimately left to arbitrators and goes to the core of the question addressed in this inquiry—the mechanism of enforcing substantive mandatory EU law via-á-vis otherwise autonomous arbitrators.

An enforceable arbitration agreement in principle cancels state courts' jurisdiction and confers it on arbitrators. However, it does not have this effect if it is null and void or where the matter is inarbitrable. If the prospective application of overriding mandatory provisions plays a role in the court's assessment, it has to take cognisance of the subject matter and the claims that are presented. The importance of the level of scrutiny is seemingly smaller for arbitrability in view of its categorical nature—the subject matter either is arbitrable or it is not. Yet, the level of scrutiny can become relevant if the prospect of arbitral tribunals (mis-) applying an overriding mandatory provision is understood as rendering a dispute inarbitrable. The degree to which this prospect renders the dispute inarbitrable reflects the level of pre-award scrutiny. It strikes a balance between the moving

[43]Brekoulakis (2009b), paras. 2–58ff; Kröll (2009), para. 16–28; cf. also *Quinke's* critique of the German Bundesgerichtshof's decision of 15 June 1987 in Quinke (2007), p. 247: (. . .) blieb doch unklar, was genau das Gericht mit seiner Formulierung meinte, die Schiedsvereinbarung sei 'nicht anzuerkennen".

[44]van den Berg (1981), p. 155; cf. also Holtzmann and Neuhaus (1989), p. 304.

[45]Quinke in: Wolff (ed), New York Convention (2012) Art. V, para. 425.

[46]Born (2014), p. 835f; Lew et al. (2003), para. 9–18.

[47]Brekoulakis (2009b), paras. 2-66, 2-67; *Dean Witter Reynolds Inc. v Byrd*, 470 US 213, 217 (1985).

[48]See supra 22ff.

parties' right to be heard in court and the principle of Kompetenz-Kompetenz, i.e. the arbitral tribunal's right to decide its jurisdiction itself.[49]

The New York Convention gives no explicit guidance in this respect. The Convention is understood to enshrine a general 'pro-enforcement' bias, which, according to some commentators, only allows arbitration agreements to be declared invalid in manifest cases.[50] Yet, it should be noted that Art. VII (1) New York Convention—the principal witness in the case for what is perceived as the Convention's pro-enforcement bias—speaks of the award, not the agreement.[51] What can also be held against this notion are the *travaux préparatoires* of UNCITRAL Model Law.[52] The deliberations with regard to the provision outlining the mechanism of pre-award review took place in light of the New York Convention and its lack of a defined level of scrutiny in this regard. In view of this omission, it was proposed to limit the exception of the referral to arbitration in what became Art. 8 (1) UNCITRAL Model Law to cases of 'manifestly null and void' arbitration agreements.[53] The UNCITRAL Working Group understood the insertion of the word 'manifestly' to have the effect of limiting courts to a *prima facie*. However, the Working Group finally came to the conclusion that it wanted the issue 'to be settled by the court' of the respective state.[54] Consequently, the UNCITRAL Model Law did not include 'manifestly' in Art. 8 (1) but retained a wording essentially identical to Art. II (3) New York Convention.[55] In view of these considerations, it is not surprising that two leading commentators have come to the conclusion that nothing in the New York Convention suggests that pre-award review should be limited to the apparent existence of an arbitration agreement and/or that it should only be made *prima facie*.[56]

In contrast, the European Convention directly addresses the pre-award level of scrutiny in Art. VI (3)—albeit only for one particular constellation. If one party has already initiated the arbitration proceedings, then courts 'must stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good

[49]Kompetenz-Kompetenz seemingly owes its name to German law tradition—notwithstanding the fact that the phrase means something else under German law, cf. Schlosser (1989), paras. 546, 555.

[50]van den Berg (1981), p. 155, cf. *Scherk v Alberto-Culver Co*., 417 US 506, 517 (1974): '(. . .) goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts (. . .)'.

[51]Cf. however van den Berg (1981), p. 86 where the author considers this to be an unintentional omission.

[52]UN A/CN.9/233 (28 March 1983).

[53]ibid para. 77.

[54]ibid.

[55]Cf. Art. 8 (1) Model Law: 'unless it finds that the agreement is null and void, inoperative or incapable of being performed'; Art. II (3) New York Convention: 'unless it finds that the said agreement is null and void, inoperative or incapable of being performed'.

[56]Poudret and Besson (2007), para. 489; cf. also Lew et al. (2003), para. 14–54; Wilske and Fox in: Wolff (Ed.) (2012), Art. II, para. 299.

and substantial reasons to the contrary'. The requirement of good and substantial reasons is assumed to be met if the court cannot establish a *prima facie* agreement to arbitrate.[57] This level of scrutiny is triggered entirely by the chronological priority of arbitral proceedings. The provision does not include restrictions on the level of scrutiny as long as no party has initiated arbitration, i.e. as long as no party has indicated that it will file a request for arbitration.

As was mentioned before, the concept of Kompetenz-Kompetenz reflects on the pre-award level of scrutiny. The positive effect of Kompetenz-Kompetenz means that arbitral tribunals can determine their own jurisdiction. It allows an arbitral tribunal to render an enforceable award stating that it lacks jurisdiction without contradicting itself.[58] What is of more interest for the pre-award level of scrutiny is the negative effect of Kompetenz-Kompetenz.[59] It refers to the extent to which national courts are conversely excluded from determining the arbitral tribunal's jurisdiction.[60] The extent to which this preclusive effect is recognised mirrors the general attitude adopted towards arbitration. A mere *prima facie* review of arbitration agreements indicates that arbitration is in principle seen as a fully fledged alternative to state court litigation, i.e. arbitration must only be pre-empted if the arbitration agreement suffers from manifest defects. Arbitrators are trusted to deal with non-manifest defects correctly. In contrast, if doubts as to the autonomy and effectiveness of dispute resolution by arbitration persist, pre-award review of the arbitration agreement will be more thorough and possibly result in a full review of the arbitration agreement's validity and the dispute's arbitrability.[61]

A general observation of a court's task in pre-award review in the case of disputes implicating the application of a particular substantive mandatory provision is that they are essentially engaged in a prognosis of the arbitral tribunal's decision on the application of the said provision. Before the award is rendered it cannot make an actual assessment of the way the respective provisions will be applied—i.e. it cannot yet assess whether the arbitral tribunal adequately will take cognisance of a lack of arbitrability, a provision invalidating the parties consent to arbitrate or at least the considerations which stand behind the respective provision. At that stage the court has to make an *ex ante* prognosis of the admissibility of what it predicts will occur in arbitration. In that sense a pre-award declaration by a state court to the effect that a certain dispute lacks arbitrability needs to be understood as a statement about the capabilities of arbitration as a just mechanism for the resolution of the dispute at hand. In other words, the court declares that, based on the available information, arbitration is not a trustworthy venue for handling a certain dispute in the way intended by the legislator. In doing so, the parties' will to put the jurisdictional questions primarily in the hands of the arbitral tribunal is swept

[57]Gaillard and Savage (1999), para. 674; Barceló (2003), p. 1127.

[58]Born (2014), p. 1049f; Poudret and Besson (2007), para. 457.

[59]Wilske and Fox in: Wolff (Ed.) (2012), Art. II, para. 299.

[60]Gaillard and Banifatemi (2008), p. 258; Poudret and Besson (2007), para. 458.

[61]Gaillard and Banifatemi (2008), p. 269; Poudret and Besson (2007), para. 457; Barceló (2003), p. 1119.

aside in favour of the court's or legislator's evaluation of what they predict arbitral tribunals will decide. The said prognosis of the court will reflect a certain level of scrutiny balancing the interests which are involved in this respect. The level of scrutiny can fall somewhere between the extremes of a mere *prima facie* review of the arbitration agreement and an exhaustive review dealing fully and finally with all matters relating to the arbitration agreement.

2.1.1.3 The System of Pre-award Review in Selected Member States

Not only international conventions, but also national arbitration laws include provisions which provide for the possibility to carry out pre-award review. Those national rules are typically only applicable outside the scope of the relevant international conventions. Nevertheless, the approach developed under the national provisions of pre-award review can be considered to inform courts also when carrying out a pre-award review under the rules provided for in international conventions. Although the New York Convention has harmonised how national courts should treat arbitration agreements which could ultimately provide the basis for a foreign award, there still remains considerable leeway in the interpretation of the respective provisions. To a lesser extent, the same can be said in regard to the European Convention. Furthermore, the New York Convention includes a 'more favourable provision' clause, which allows other conventions and particularly national laws to decrease the requirements set out in the conventions if done so in favour of the autonomy of arbitration.[62] Ratifying states can therefore always adopt a more arbitration-friendly regime without violating the New York Convention. Courts can be considered to make use of the aforementioned leeway in a way that reflects how much the negative effect of Kompetenz-Kompetenz is accepted in their national arbitration law and their respective practice regarding international arbitration. The respective variations will be outlined for four countries: Germany (Sect. 2.1.1.3.1), France (Sect. 2.1.1.3.2), Belgium (Sect. 2.1.1.3.3) and England (Sect. 2.1.1.3.4).

2.1.1.3.1 Pre-award Review in Germany

German courts carry out pre-award review according to Art. II (3) New York Convention if it can be expected that any award based on the respective arbitration agreement would be a foreign award in the sense of Art. I (1) New York Convention.[63] The consensus among commentators on German practice regarding the law applicable to determine whether a certain arbitration agreement is null and void appears to be that the law applicable to the arbitration agreement should be

[62] Art. VII (1) New York Convention.

[63] Schwab and Walter (2005), Kap. 42, para. 10; Adolphsen in: Krüger and Rauscher (Eds.) (2013), § 1061 ZPO Anh. 1 UNÜ, Art. II, para. 6.

applied.[64] German commentators predominantly presume that the law which determines whether a matter is arbitrable is the *lex fori*, i.e. German law where German courts are called upon.[65] § 1030 Zivilprozessordnung defines arbitrability. It grants arbitrability to all claims involving an economic interest and to claims not involving an economic interest to the extent that parties are entitled to conclude a settlement on the issue in dispute. Additionally, one provision of the Statute on Trade in Securities declares all disputes involving financial or investment services inarbitrable if they involve a consumer.[66] Where German courts decide arbitrability, they apply their own notion of arbitrability.[67]

German arbitration law provides for pre-award review of those arbitration agreements which will not produce a foreign arbitral award in § 1032 (1) Zivilprozessordnung. Those cases might revolve around international commercial arbitration nonetheless. Unlike pre-award review in most countries, where the arbitration agreement is deemed enforceable the court will not stay the matter and refer the parties to arbitration but will reject the action brought by the claimant as inadmissible. § 1032 (1) Zivilprozessordnung only allows courts to refuse do so if the arbitration agreement is 'nichtig, unwirksam oder undurchführbar', replicating the 'null and void' measure of review in Art. II (3) New York Convention. In contrast, arbitrability is not provided for in an explicit and self-contained measure of pre-award review. Nevertheless, § 1030 Zivilprozessordnung, which merely defines the content of arbitrability, is also applied as a measure of pre-award review.[68]

Under German arbitration law a party can also directly seek declaratory pre-award review of the arbitration agreement in cases where there is no substantive claim before the court.[69] § 1032 (2) Zivilprozessordnung[70] allows parties to request that a court determine the admissibility of arbitration after one party has signalled its intention to begin arbitral proceedings and before the arbitral tribunal is constituted.[71] In that situation both a positive and a negative declaration regarding the admissibility of arbitration can be sought.

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[64]Schwab and Walter (2005), Kap. 7, para. 5; Adolphsen in: Krüger and Rauscher (Eds.) (2013), Art. II UNÜ, para. 29.

[65]Schwab and Walter (2005), Kap. 44, para. 1; Adolphsen in: Krüger and Rauscher (Eds.) (2013), Art. II UNÜ, para. 6; Schlosser (1989), para. 299.

[66]Section 37h Wertpapierhandelsgesetz (Germany).

[67]BT-Drucksache 13/5274, 43; cf. also Wagner (1998), p. 362.

[68]Bayerisches Oberlandesgericht (Germany), 9 September 1999, 4 Z SchH 3/99, BayObLGZ 1999, 255, 268–269; Münch (2013) § 1030, para. 1; Huber and Bach in: Böckstiegel et al. (2015) § 1032, para. 19.

[69]Schroeter (2004), p. 288.

[70]Which provides: 'Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether arbitration is admissible or inadmissible.' (my translation).

[71]Schlosser in: Bork and Roth (2014), § 1032, para. 40.

The level of scrutiny in pre-award review is not addressed in German law.[72] In practice, however, German courts do not grant the arbitral tribunal priority to rule over the matters relevant in pre-award review. If a German court concludes at the pre-award stage that the respective matter is inarbitrable or that the arbitration agreement is invalid, the result reached on that question by the arbitrators will lose relevance.[73] Correspondingly, the ability to directly control the arbitration agreement according to § 1032 (2) Zivilprozessordnung reflects a willingness to forestall the tribunal's decision on its own jurisdiction. When carrying out their review in the pre-award stage, German courts do not merely carry out a *prima facie* review and do not limit themselves to cases of manifest invalidity. Instead they carry out a full review of the arbitration agreement within the scope of the relevant measure of review.[74] Hence, Germany can be considered to have a hostile attitude to the negative effect of Kompetenz-Kompetenz.[75]

2.1.1.3.2 Pre-award Review in France

French Arbitration Law received a major overhaul in 2011.[76] Historically, French legislation has been one of the earliest to emphasise the autonomy of international arbitration. The recent reform served to further reinforce this notion. French arbitration law designates some of its provisions as exclusively applicable in international arbitration, while others are applicable to both international and domestic arbitration.[77] According to Art. 1504 Nouveau Code de Procédure Civil (NCPC), an arbitration is international if international trade interests are at stake. In so far as the scope of the French provisions directed at international arbitration overlaps with the respective provisions in the New York Convention or the European Convention, it is argued that the French provisions are more favourable to the autonomy of arbitration. Therefore, French courts apply the respective provisions in the NCPC instead of the provisions set forth in the conventions.[78]

Art. 1448 (1) NCPC regulates pre-award review of international arbitration agreements.[79] It refers to the voidness and inapplicability of an arbitration agreement and expressly incorporates the 'null and void' measure of pre-award review.

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[72]It has been argued that the obligation to reject an action as inadmissible under § 1032 (1) Zivilprozessordnung (instead of staying the action and referring the parties to arbitration) implies that German courts must engage in a comprehensive review of the existence of a valid arbitration clause and cannot limit themselves to a *prima facie* review, Huber and Bach in: Böckstiegel et al. (Eds.) (2015), § 1032, para. 7.

[73]Poudret and Besson (2007), para. 495.

[74]Schlosser in: Bork and Roth (Eds.) (2014), § 1032, para. 18a; Wilske and Fox in: Wolff (Ed.) (2012), Art. II, para. 300; Poudret and Besson (2007), para. 495.

[75]Poudret and Besson (2007), para. 495.

[76]Décret no 2011-48 of 13 January 2011.

[77]Cf. Arts 1504–1527 and particularly Art. 1506 NCPC.

[78]Bensaude (2010), p. 874.

[79]Which is applicable in international arbitration according to Art. 1506 (1) NCPC.

The validity of the award is not determined by applying a particular law but instead by following an autonomous standard which provides that arbitration agreements are valid in principle unless they violate international public policy.[80] Art. 1448 (1) NCPC expressly addresses the level of scrutiny and stipulates that the respective violation has to be manifest.[81] This is understood to refer to cases where the invalidity is clear from the face of the arbitration agreement.[82] This very broad provision mirrors the openness of the French system towards the negative effect of Kompetenz-Kompetenz.[83]

French law does not include a self-contained review mechanism for a lack of arbitrability in pre-award review. However, Art. 1448 (1) NCPC is understood to also allow a refusal to refer parties to arbitration where an arbitration agreement is obviously inarbitrable.[84] Art. 2059 Code Civil generally sets out that all persons may agree to arbitration in relation to rights which they are free to dispose of. Exceptions to this rule are provided for in Art. 2060 Code Civil, which excludes from arbitration matters of civil status and capacity of individuals, matters relating to divorce or judicial separation of spouses or disputes concerning public communities and public establishments, and more generally all matters which concern public policy. However, French courts have significantly decreased this seemingly large number of inarbitrable matters in relation to international disputes.[85] It would contradict the French case law of the past decades if matters which concern public policy were considered to be excluded from arbitrability under the French understanding, e.g. in relation to matters such as competition, antitrust, securities law and intellectual property.[86] Instead, the French approach to subject matter arbitrability in international arbitration does not focus on public policy as an abstract category but has developed concrete 'non-arbitrable blocks'[87] limiting inarbitrability to areas

[80]Cour de cassation (France), 5 January 1999, *Zanzi v de Coninck*, Rev arb. 1999, p. 260; Schramm, Geisinger and Pinsolle in: Kronke et al. (Eds.) (2010) Art. II, 103; Bishop et al. (2008), p. 288.

[81]It allows the referral to arbitration to be refused if the arbitration agreement is 'manifestement nulle ou manifestement inapplicable'.

[82]Delvolvé et al. (2009), para. 141.

[83]Cf. Gaillard and Banifatemi (2008), p. 262; Gaillard and Savage (1999), para. 672. It is noteworthy that this largesse towards arbitration is limited to international arbitration.

[84]Schramm, Geisinger and Pinsolle in: Kronke et al. (Eds.) (2010) Art. II, 96.

[85]Gaillard and Savage (1999), paras. 560–579; Delvolvé et al. (2009), para. 67; Born (2014), p. 961ff.

[86]Born (2014), p. 961; cf. Cour d'appel de Paris, 29 March 1991, *Ganz v Société Nationale des Chemins de Fer Tunisiens (SNCFT)*, Rev. Arb. 1991, 478 (regarding allegations of fraud and expropriation); Cour d'appel de Paris (France), 19 May 1993, *Société Labinal v Sociétés Mors et Westland Aerospace*, Rev. Arb. 1993, 645–652 (regarding EC competition law); Cour de cassation (France), 19 November 1991, *Société des Grands Moulins de Strasbourg v Société Compagnie Continentale France*, Rev. Arb. 1992, 76 (regarding securities law); Cour d'appel de Paris (France), 24 March 1994, *Deko v Dingler*, Rev. Arb. 1994, 515 (regarding the interpretation of a patent).

[87]Gaillard and Savage (1999), para. 569 with reference to Level (1992), p. 213.

such as family law, human rights violations, annulment of patents etc.[88] Finally, parties cannot directly request French courts to render declaratory judgments on the validity of arbitration agreements.[89]

2.1.1.3.3 Pre-award Review in Belgium

After a revision in 2013, Belgian arbitration law is now codified in Arts 1676 to 1723 Code Judiciaire.[90] It was originally based on the European Convention Providing a Uniform Law on Arbitration which the Council of Europe had published in 1966.[91] This attempt at harmonisation of arbitration laws failed at large as Belgium remained the only country to transpose it into its national law in 1972.[92] Belgian arbitration law applies without distinction of domestic and international cases as long as the seat of arbitration is located in Belgium.[93] A seat of arbitration outside Belgium renders the respective international conventions applicable. There was a long-standing debate in the past as to what was the applicable law on the question of arbitrability in relation to Art. II (3) New York Convention. The two main competing views were the application of the law applicable to the arbitration agreement and the *lex fori*.[94] The Cour de cassation clarified the Belgian position on this point in 2006 and held that arbitrability is to be decided according to the *lex fori* during pre-award review.[95] In contrast, the law deciding the validity of the arbitration agreement is the law which is applicable to the arbitration agreement.[96]

[88]Gaillard and Savage (1999), para. 572; Delvolvé et al. (2009), para. 89.

[89]Poudret and Besson (2007), para. 487.

[90]The revised version entered into force on 1 September 2013, cf. Chambre des représentants de Belgique, 16 May 2013, Projet de loi modifiant la sixième partie du Code judiciare relative à l'arbitrage, Doc. 53/ 2743/005.

[91]Keutgen and Dal (2006), para. 20; for the original text see European Convention Providing a Uniform Law on Arbitration, Strasbourg, 20 January 1966, ETS No 56.

[92]The Convention has consequently been described as 'stillborn' by Radicati di Brozolo (2011), p. 425.

[93]Hollander and Draye (2012), p. 2.

[94]Hollander (2005), p. 29; Kleinheisterkamp (2009b), p. 95.

[95]Cour de cassation (Belgium), 16 November 2006, *Van Hopplynus Instruments S.A. v Coherent Inc*., Rev. dr. com. belge 2007, 889; cf. Cour de cassation (Belgium), 14 January 2010, *Sebastian International Inc v Common Market Cosmetics NV*, R.W. 2010–2011, 1087; cf. Kleinheisterkamp (2009b), p. 96; Wautelet (2012), p. 219; Poudret and Besson (2007), para. 335.

[96]van Houtte and Looyens (1997), p. 165; Huys and Keutgen (1981), para. 670; cf. Cour de cassation (Belgium), 5 April 2012, C.11.0430.N., *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, [2012] Pas. No 219, available at http:/jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20120405-2 accessed 26 November 2016.

Art. 1682 (1) Code Judiciaire regulates pre-award review by Belgian courts. It establishes that a court should declare itself without jurisdiction over disputes which are subject to an arbitration agreement unless the arbitration agreement is invalid or has ceased to exist. Pre-award review for a lack of arbitrability is carried out, yet without a self-contained provision.[97] According to Art. 1676 (1) Code Judiciaire any pecuniary claim as well as any non-pecuniary claim in regard to which a settlement agreement may be made is arbitrable. Exceptions to arbitrability can, however, exist in specific legislation pursuant to Art. 1676 (4) Code Judiciaire.[98] The Belgian provision does not mention the level of scrutiny to be applied in pre-award review. Yet, the negative effect of competence-competence is not appreciated by Belgian arbitration law. The arbitral tribunal's ruling on the arbitration agreement has no priority over the court's ruling on its own jurisdiction when faced with a claim on the merits.[99] Accordingly, Belgian courts adopt a rather high level of scrutiny in pre-award review. Lastly, Belgian law does not allow direct and independent applications to the courts to affirm the validity of an arbitration agreement.[100]

2.1.1.3.4 Pre-award Review in England

The Arbitration Act 1996 is the arbitration law for England, Wales and Northern Ireland.[101] It is the product of a series of statutory reforms beginning in 1889 and has been continuously updated to provide a unitary and non-interventionist regime for commercial arbitration.[102]

Section 9 (4) Arbitration Act 1996 regulates pre-award review in England where the arbitration agreement is raised as a defence against the jurisdiction of an English court in proceedings on the merits.[103] Section 9 (4) is also applied where the seat of arbitration is in another country.[104] According to Section 9 (4) Arbitration Act 1996, the reviewing court shall stay proceedings on the merits where confronted with an arbitration agreement (thereby indirectly referring the parties to arbitration)[105]—unless satisfied that the arbitration agreement is null and void,

[97] Cf. Keutgen and Dal (2006), paras. 100ff; Keutgen and Dal (2012), paras. 762–763.

[98] Keutgen and Dal (2006), para. 100.

[99] Poudret and Besson (2007), para. 496.

[100] ibid para. 487.

[101] This inquiry will use a generalised reference to 'England' for linguistic convenience. In Scotland the Arbitration (Scotland) Act 2010 applies, cf. Davidson et al. (2010).

[102] Veeder (1997), p. 2.

[103] Cf. Mustill (2008), p. 4 for England's historical development regarding the enforcement of arbitration agreements.

[104] Section 2 (2) Arbitration Act 1996; cf. *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB); *Heifer International Inc v Helge Christiansen & Ors* [2007] EWHC 3015 (TCC).

[105] Sutton et al. (2007), paras. 7-010; Lew et al. (2003), para. 14–65.

inoperative, or incapable of being performed. The law that decides those questions is the law that governs the arbitration agreement.[106] Pre-award review for a lack of arbitrability can be carried out as a subset of an inoperative arbitration agreement addressed in Section 9 (4).[107] Courts can be considered to apply the English concept of arbitrability when reviewing an arbitration agreement in this sense. Yet, the concept of arbitrability appears to stand on the sidelines of both arbitral practice and doctrine in England. It has not received any form of codification in the Arbitration Act and is based on a dwindling body of case law.[108] Apart from rather obvious examples such as proceedings relating to the custody of children and insolvency, the case law equally fails to provide serviceable guidance in this matter.[109]

The English legislator cannot be understood to have implied any particular level of scrutiny in the realm of pre-award review.[110] Practically, courts have an inherent jurisdiction to decide whether to stay their proceedings for arbitration or not.[111] In its decision in *Fiona Trust*, the House of Lords held that 'it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute'.[112] This concession of priority can be read as a general acknowledgement of the negative effect of Kompetenz-Kompetenz.[113] The retained level of scrutiny is applied pragmatically, giving way to considerations of costs and litigation management.[114]

Pre-award review can occur directly if a party is alleged to be a party to arbitral proceedings but takes no part in them. Section 72 then permits that party to apply to the English courts for a declaratory determination to the effect that there is no valid arbitration agreement. If the party takes part in the proceedings, it can also have the validity of the arbitration agreement reviewed according to Section 32 Arbitration

[106]The parties can expressly designate a law to apply to their arbitration. Otherwise, the law at the seat of arbitration is predominantly seen as the law governing the arbitration agreement, cf. *C v D* [2007] EWHC 1541 (Comm.); Blackaby et al. (2009), para. 3.20. Yet, there also exists a court decision in which the law governing the main contract was applied, cf. *Union of India v McDonnell Douglas Corp* [1993] Lloyd's Rep 48 (QB).

[107]Sheppard (2010), p. 735.

[108]Mustill and Boyd (1989), pp. 149–150; Mustill and Boyd (2001), p. 70ff.

[109]Cf. Sheppard (2010), p. 844.

[110]Gaillard and Banifatemi (2008), p. 268; cf. also Lew et al. (2003), para. 14–63.

[111]Häberlein (2008), p. 25; cf. also Section 6.2 Civil Procedure Rules Practice Directions 49G.

[112]*Fiona Trust & Holding Corporation and Others v Privalov* [2007] EWCA Civ 20, [2007] 2 Lloyd's Rep 267.

[113]Gaillard and Banifatemi (2008), p. 267.

[114]Cf. LJ Waller' statement: 'I would in fact accept that on a proper construction of section 9 it can be said with force that a Court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the Court can grant a stay under that section. But a stay under the inherent jurisdiction may in fact be sensible in a situation where the Court cannot be sure of those matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first' in *Al-Naimi v Islamic Press Agency Inc* [2000] EWCA Civ 17, [2000] 1 Lloyd's Rep 522, 525; cf. also *Halki Shipping v Sopex Oils* [1997] 3 All ER 833 (QB).

Act 1996, which allows declaratory pre-award review. The provision allows for review of the arbitration agreement even after the tribunal is constituted. It is comparable to § 1032 (2) Zivilprozessordnung but sets up certain requirements which its German counterpart lacks.[115]

2.1.1.4 Conclusion

Legislators can express general reservations against arbitration by providing for a high level of scrutiny. Particular reservations regarding certain substantive matters can be addressed by expressly rendering them inarbitrable or by voiding the respective agreements through law. The courts can be considered to further refine this mechanism by allowing their level of appreciation for the negative effect of Kompetenz-Kompetenz to show. The analysis above reveals that the four different Member States all provide for pre-award review but do so with notable differences. Those differences relate to both the understanding of what constitutes a measure of review and the permissible level of scrutiny. These differences persist in spite of European harmonisation. It is conceivable that a case revolving around the application of harmonised substantive EU law will be reviewed in more than one Member State at a time and become subject to different understandings of, for example, which law determines arbitrability and how obvious the inarbitrability has to be to impede a referral to arbitration.[116]

In addition to their attitude to the negative effect of Kompetenz-Kompetenz, the significance which courts attach to the application of certain provisions can also guide their decision in pre-award review. It is in this respect that the harmonisation through EU law can at least indirectly assimilate the conditions of pre-award review by harmonising the content of the measure of review and setting up certain requirements for the level of scrutiny.

The analysis does not allow the conclusion that there exists a far-reaching exception for all disputes pertaining to the application of overriding mandatory provisions in any of the surveyed states. The measures of review in the arbitration laws of all four Member States are too broad to allow for this and the levels of scrutiny are too vague. The decision whether arbitrators should be trusted with handling a certain dispute ultimately lies in the hands of the reviewing court.

[115] Section 32 (2) Arbitration Act 1996 (England) requires the respective application to be made with the agreement of all parties to the proceedings in writing. Failing this, the application can be allowed if it is made with the permission of the tribunal, was made without undue delay, would likely lead to substantial savings in costs and if there is good reason why the matter should be decided by the court.

[116] See infra 59f on the role of arbitration in the revised Brussels I Regulation.

2.1.2 Post-award Review

Post-award review occurs if one party is dissatisfied with the award and challenges it. Any review of an award in the context of substantive mandatory provisions is faced with a dilemma. If the review fails to detect the violation of such provisions, the regulatory goal enshrined therein is ultimately neglected. If the review is able to detect the violation and consequentially renders the award worthless to the parties, the benefits of arbitration may be lost, e.g. predictability, neutrality and minimisation of costs.[117] This dilemma expresses itself differently in the two possible types of post-award review, i.e. in annulment proceedings and in enforcement proceedings. While the two are generally carried out under different conditions, they also share a large number of characteristics. For the purpose of outlining the general system of review in light of substantive mandatory EU law, the idiosyncrasies of the two types of review will first be described in abstract terms (Sect. 2.1.2.1). The common elements of both types of review will be set forth in a second step (Sect. 2.1.2.2). In a third step, the conditions of post-award review in Member States will be outlined (Sect. 2.1.2.3).

2.1.2.1 Idiosyncrasies of Post-award Review in Annulment Proceedings and Enforcement Proceedings

2.1.2.1.1 Annulment Proceedings

Review in annulment proceedings takes place at the seat of arbitration and at the application of the party which aims to have the award annulled. The conditions for annulment proceedings are set out in the applicable arbitration law. All modern systems allow holding an award against the standards for arbitrability and public policy in annulment proceedings. Arbitration laws also typically include a measure of review that relates to the invalidity of the arbitration agreement or the lack of substantive jurisdiction for the arbitral tribunal.[118] Additionally, principles of procedural fairness can be encountered across the board.[119] Apart from this relative consensus, national laws add more specific measures of review. These include annulling an award if it suffers from legal errors,[120] if it lacks sufficient reasoning,[121] if its reasoning is uncertain, ambiguous or contradictory[122] or if it was obtained by fraud or corruption.[123]

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[117] E. Posner (1999), p. 650.

[118] Poudret and Besson (2007), para. 792.

[119] As reflected e.g. in Art. 34 UNCITRAL Model Law.

[120] Section 69 Arbitration Act 1996 (England).

[121] Art. 1065 (1) (d) WBR (Netherlands); Art. 829 (5) Codice di procedura civile (Italy).

[122] Section 68 (2) (f) Arbitration Act 1996 (England); Art. 829 (11) Codice di procedura civile (Italy).

[123] Section 68 (2) (g) Arbitration Act 1996 (England); Art 34 (2) (a) (v), Law Reform (Misc. Provisions) (Scotland) Act 1990.

International law has only had a limited and indirect influence on how annulment proceedings are carried out. The New York Convention and the European Convention address them only in so far as the annulment of an award can have an impact on enforcement proceedings. The New York Convention stipulates in Art. V (1) (e) that courts may refuse to recognise and enforce an award which has been annulled. In situations where both states involved are contracting states to the New York Convention as well as the European Convention, Art. XI (2) European Convention limits the effect of Art. V (1) (e) New York Convention to awards annulled for reasons other than a lack of arbitrability or because of public policy violations.[124] One practical effect of Art. V (1) (e) New York Convention is that parties which fall victim to any irregularities do not have to go from country to country to oppose decisions in enforcement proceedings. Provided that countries do not enforce annulled awards, annulment proceedings foster confidence in arbitration and ensure that it will not be a lottery of erratic results by incentivising arbitrators to do their job properly.[125] However, according to the predominant interpretation in a number of contracting states including France, Art. V (1) (e) does not create a duty to refuse enforcement of annulled awards.[126] It reflects the transnational understanding of international arbitration as a legal order whose awards do not belong to any legal system—so that an award remains in existence even if annulled at the seat of arbitration.[127] This practice of enforcing annulled awards is harshly criticised, especially in light of the application of EU law, as it causes more uncertainty as to what level of scrutiny is going to be the decisive one for EU law.[128]

Annulment proceedings themselves stand in the tradition of the monolocal approach.[129] Accordingly, jurisdictions which are leaning towards a more modern line of thinking have also directly lessened the importance of annulment proceedings in recent years. The opportunities to do so range from permitting parties to waive the possibility of annulment proceedings[130] to the (ultimately abandoned)

[124]So far, however, this exception has not played a role in with regard to substantive mandatory EU law. It is a conceivable scenario nonetheless.

[125]Park (2001), p. 599; cf. Born (2014), p. 3356.

[126]Cf. Cour de cassation (France), 23 March 1994, *Hilmarton Ltd. v OTV*, YB Comm. Arb. XX (1995), 663; Cour de cassation (France), 29 June 2007, *PT Putrabali Adyamulia v Rena Holding et Société Mnogutia Est Epices*, Rev. arb. 2007, 507; cf. also Gerechtshof Amsterdam (Netherlands), 28 April 2009, *Yukos Capital s.a.r.l. v OAO Rosneft*, YB Comm. Arb. XXXIV (2009), 703, 706–713; *Chromalloy Aeroservices Inc. v The Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996), YB Comm. Arb. XXII (1997), 1001, 1012.

[127]The questions pertaining to the enforcement of annulled awards are not part of this inquiry. For an overview of the extensive debate cf. Gaillard (2010a), p. 135.

[128]Described as 'besonders schockierend' and 'vollends absurd' by Schlosser (2009), p. 133.

[129]Cf. Park (1983); Mann (1973); Gaillard (2010a), p. 135.

[130]E.g. Art. 1718 Code Judiciaire (Belgium); Art. 1522 NCPC (France); Art. 192 (1) Bundesgesetz über das International Privatrecht (Switzerland).

Belgian experiment of abolishing them altogether in international cases.[131] Currently all four surveyed countries allow for annulment proceedings at least as the default solution.

2.1.2.1.2 Enforcement Proceedings

Enforcement proceedings occur where the losing party does not voluntarily comply with the award. The winning party will then typically initiate proceedings for the recognition and enforcement of the award in the course of which the award will be reviewed by the courts seized. Accordingly, the location of enforcement proceedings is determined by the location of the losing party's assets known to (or suspected by) the winning party.

International law has a much greater influence on enforcement proceedings than on annulment proceedings. Enforcement proceedings in relation to foreign arbitral awards are the primary subject matter of the New York Convention and the European Convention. The two conventions have created a high degree of harmonisation with regard to the measures of review, especially when compared to the situation in annulment proceedings outlined above. The widely harmonised measures of review in enforcement proceedings include principles of procedural fairness, respect for party autonomy, arbitrability and public policy. However, Art. VII (1) New York Convention includes a 'more favourable provision' clause, which allows other conventions, and particularly national laws, to decrease the requirements for the enforcement of awards below the threshold provided for in the conventions.[132] One of those more favourable provisions is the aforementioned Art. XI (2) European Convention.[133] The European Convention itself does not include any specific tools for the enforcement of arbitral awards but merely has ancillary function to individual questions which arise in post-award review.

The existence of review in enforcement stages can be explained by the fact that recognising an award implicates granting the seizure of assets or the stay of court action. The risk that enforcement is refused can be understood as the price parties pay for the opportunity to have *res judicata* effect attached to the award. Additionally, the connection which typically exists between the losing party and the country where enforcement is sought would allow the assumption that review in enforcement proceedings can be used to employ certain protectionist policies in favour of the residents of that country. Yet, this would go against the common understanding

[131] Cf. Art. 1717 (4) of Code judiciaire (Belgium) as enacted in 1985 provided: 'Les tribunaux belges ne peuvent connaître d'une demande en annulation que lorsqu'au moins une partie au différend tranché par la sentence arbitrale est soit une personne physique ayant la nationalité belge ou une résidence en Belgique, soit une personne morale constituée en Belgique ou y ayant une succursale ou un siège quelconque d'opération.' The provision was revoked on 19 May 1998 (effective 17 August 1998).

[132] Art. VII (1) New York Convention.

[133] Cf. supra 40.

of the New York Convention and the European Convention. Both are understood to enshrine a pro-enforcement bias opposing any protectionist tendencies.[134]

2.1.2.2 Common Elements of Post-award Review in Light of Substantive Mandatory Law

Apart from the differences described above, annulment and enforcement proceedings share the property that arbitral awards are at the centre of the courts' respective analyses. This parallelism of annulment and enforcement proceedings can be illustrated by the almost complete parallelism of the system of review for annulment proceedings in Art. 34 UNCITRAL Model Law and the system of review for enforcement proceedings in Art. V (2) New York Convention. Along those lines, the measure of review (Sect. 2.1.2.2.1) and the level of scrutiny (Sect. 2.1.2.2.2) can be identified as two distinct dimensions of post-award review for both annulment and enforcement proceedings.

2.1.2.2.1 Measure of Post-award Review

Three measures of post-award review come into play regarding the application of substantive mandatory law. Those are the public policy exception, the arbitrability of the related dispute and the invalidity of the arbitration agreement. While courts will carry out review under the spectre of the two first measures *ex officio*, the invalidity of the arbitration agreement will only be analysed if one of the parties relies on the invalidity of the arbitration agreement.

2.1.2.2.1.1 Public Policy

Public policy in post-award review must be differentiated from public policy in conflict of laws analysis.[135] The regulatory framework applicable in all surveyed conventions and countries includes public policy as a measure of post-award review.[136] As far as the enforcement of international arbitral awards is concerned, Art. V (2) (b) New York Convention is the most pivotal provision. It provides that the courts in the country where recognition and enforcement of a foreign arbitral award is sought may refuse to do so where it would be contrary to the public policy of that country. It finds its counterpart in the UNCITRAL Model Law's Art. 34 (2) (b) (ii), which reproduces this measure of review for annulment proceedings

[134] Cf. *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] EWHC (Comm) 697 (QB), para. 22; Bundesgerichtshof (Germany), VII ZR 32/67, NJW 1969, 2093; van den Berg (1981), p. 243.

[135] As distinct from public policy as a measure for the application of conflict rules as in Art. 21 Rome I Regulation or Art. 26 Rome II Regulation, cf. Hilbig (2006), p. 9.

[136] See infra 48ff.

and allows courts to annul awards if they violate the law of the country where the reviewing court is seated.

The logical foundation for public policy's role in post-award review is the desire to avoid a discrepancy between the award and certain standards of law, morality or justice.[137] Further outlining the content of public policy in an abstract manner is a daunting task.[138] In general, public policy accounts for the fundamental principles at the core of a legal order. Outlining the different nuances and facets of public policy serves to structure the ways in which substantive mandatory EU law and arbitration can come into contact.

First and foremost, public policy can be divided into internal public policy and international public policy. Internal public policy is the broader notion and encompasses all mandatory provisions of a given legal order. The review of purely domestic awards is carried out in light of internal public policy.[139] Internal public policy comprises all or most internally mandatory provisions of a given legal order.[140] Enforcing provisions as internal public policy can serve a variety of purposes, e.g. pre-empting parties from opting out of them and ensuring that courts can cure or sanction violations at any time.[141] Foreign arbitration awards tend to be reviewed in light of narrower international public policy.[142] International public policy encompasses the fundamental principles of a given legal order which require to be enforced also in light of awards which were rendered in another country.[143] Despite its name, it refers to the domestic legal system and it is only the situation in which it is applied which is international. International public policy represents a bastion against decisions by foreign legislators, judges and international arbitrators. Its scope has been outlined as the forum state's most basic notions of morality and justice,[144] its good morality and social order[145] or its fundamental principles where any violation would be unbearable in view of the forum's sense of justice.[146] The

[137]This perspective is commonly referred to as the negative function of public policy as opposed to the positive function focusing on the unconditional application of the forum's law, cf. Basedow (2004), p. 297.

[138]As reflected in the famous statement by the English Judge Burrough as early as 1824: 'Public policy is a very unruly horse and once you get astride it you never know where it will carry you. It may lead you from the sound law.' *Richardson v Mellish* [1824-1834] All ER 258 (Common Pleas), cf. also Lew et al. (2003), para. 26-115.

[139]Hilbig (2006), p. 9; cf. International Law Association (2003).

[140]Basedow (2004), p. 295.

[141]ibid.

[142]van den Berg (1996), p. 502; International Law Association (2003), p. 250; Born (2014), p. 3656.

[143]Basedow (2004), p. 295.

[144]*Parsons & Whittemore v RAKTA*, 508 F.2d 969 (2d Cir 1974), para. 9.

[145]Supreme Court of Korea (South Korea), 14 February 1995, No. 93Da53054, *Adviso N.V. v Korea Overseas Construction Corp.*, YB Comm. Arb. XXI (1996), 612, 615.

[146]Camera di Esecuzione e Fallimenti, Canton Tessin (Switzerland), *K.S. AG v C.C. SA*, 19 June 1990, YB Comm. Arb. XX (1995), 762, 764.

difference between internal and international public policy shows that public policy is a relative measure of review. It is relative in that it depends on the degree of connection between the reviewing jurisdiction and the subject matter. Where there are few connections, courts take a more liberal approach.[147]

The structural difference between public policy and overriding mandatory rules is that review in light of public policy does not imply supervising the correct application of certain provisions but rather comparing the results created by a judgment or award with the standard set by public policy. If, for example, an overriding mandatory provision aims at establishing a certain financial balance between parties, a review in light of public policy does not focus on whether the said provision was correctly applied but on whether the envisaged balance was in fact generated. Saying that a provision constitutes public policy or is part of public policy can therefore be misleading. It is more to the point to state that a certain provision reflects what is public policy.

The notion of transnational public policy additionally comes into play in the context of international commercial arbitration. While internal as well as international public policy relates to national legal orders and their regulatory core, transnational public policy presupposes the existence of public policy standards which are detached from a single country's legal order. It was originally conceptualised in the works of Lalive. He focused on the commonalities and the consensus between countries instead of the demarcation lines between the spheres of influence drawn by a particular country.[148] Accordingly, transnational public policy has been defined as what 'civilised nations' accept as fundamental rules of natural law, principles of universal justice, *ius cogens* in public international law and the general principles of morality.[149] Specific rules that are frequently mentioned in this instance are *pacta sunt servanda*, the rules of good faith and the prohibition of *fraus legis*.[150] The concept is recognised by many arbitral practitioners. There is no record of courts expressly applying transnational public policy in the review of arbitral awards,[151] and the number of mere references to the concept incorporated in the notion of transnational public policy by reviewing courts is also small and declining.[152]

[147]Mayer and Sheppard (2003), p. 259.

[148]Lalive (1987); cf. Renner (2009), p. 542.

[149]Lalive (1987), p. 273; Gaillard and Savage (1999), para. 1648; Poudret and Besson (2007), para. 933; International Law Association (2003), p. 220.

[150]International Law Association (2003), p. 234.

[151]International Law Association (2003), p. 221.

[152]The notion has been used by Swiss courts in the past, e.g. in Bundesgericht (Switzerland), 30 December 1994, *F., U. v W. Inc.*, ASA Bull. 1995, 217, 224. The Bundesgericht seems to have abandoned the concept recently and has replaced it with Swiss international public policy, cf. Bundesgericht (Switzerland), 8 March 2006, *X. S.p.A. v Y. S.r.l.*, ASA Bull. 2006, 550, 554–556; Poudret and Besson (2007), paras. 824, 825.

2.1.2.2.1.2 Arbitrability

Arbitrability as a measure of review has already been outlined for pre-award review.[153] It reappears as a measure of review in post-award review. Arbitrability essentially has the same meaning in both stages of review. Of note is that the national arbitration laws governing the annulment proceedings invariably include a provision expressly referring to arbitrability as outlined by the *lex fori*.[154] In spite of this seeming uniformity, different opinions exist regarding the law which determines arbitrability in post-award review. Individual commentators support applying the law to which the parties have subjected the validity of the arbitration agreement.[155] In accordance with the wording of Art. V (2) (a) New York Convention and Art. 34 (2) (b) (i) UNCITRAL Model Law, the prevailing view is, however, that the substantive law on arbitrability at the place where post-award review decides the matter.[156]

The aforementioned connection between arbitrability and public policy considerations has led some to call for the abolition of arbitrability as a self-contained measure of post-award review.[157] However, there is an unequivocal difference between the roles of arbitrability and public policy in the review of awards. Public policy is directed at the result reached in an award and its compliance with public policy. Even if certain provisions that reflect public policy principles were violated by an arbitrator in reaching a certain result, the award will not be annulled and enforced respectively unless the result itself violates public policy. In contrast, arbitrability focuses on the inadmissibility of the arbitral process. Any award rendered in an inarbitrable matter must be annulled and refused enforcement—even if the substantive result is the same that would have been reached by a state court. This categorical approach differs from the results-oriented approach applied in analysis in view of the public policy exception. Therefore, arbitrability should be retained as a measure of review.

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[153] See supra 24ff.

[154] Art. 34 (2) (b) (i) UNCITRAL Model Law: 'the subject matter of the difference is not capable of settlement by arbitration *under the law of that country*' [emphasis added]; Art. V (2) (a) New York Convention: 'The subject matter of the difference is not capable of settlement by arbitration *under the law of that country*' [emphasis added].

[155] These voices consider arbitrability to be a condition of the validity of the arbitration agreement and apply the conflict rule of Art. V (1) (a) New York Convention *mutatis mutandis* on arbitrability; see Quinke in: Wolff (Ed.) (2012), Art. V, para. 447 with further references.

[156] van den Berg (1981), p. 288; Schlosser in: Bork and Roth (Eds.) (2014), § 1059, para. 49, and Anhang zu § 1061, para. 313.

[157] Paulsson (1999), p. 581. The necessity for a self-contained measure of review in the New York Convention was questioned by the French delegate as early as during the drafting of the New York Convention, cf. UN Doc E/CONF.26/SR.11 (12 September 1958), p. 7.

2.1.2.2.1.3 Invalidity of the Arbitration Agreement

Art. V (1) (a) New York Convention includes a measure of review which allows recognition and enforcement to be refused if the arbitration agreement is invalid. To a certain extent it can be considered to be the post-award counterpart of the measure of pre-award review of an arbitration agreement for being null and void. Yet, unlike pre-award review, the law applicable to the question whether the arbitration agreement is invalid is expressly stipulated in the New York Convention. If the parties subject their arbitration agreement to a certain law that law will decide its validity. Failing any indication thereon, the law at the seat of arbitration will be applicable. The law applicable according to Art. V (1) (a) New York Convention in principle governs the validity of the arbitration agreement even if the arbitration agreement is invalid or illegal under the mandatory law of another state, e.g. the state where recognition and enforcement is sought.[158] Different positions exist as to whether the law applicable in this sense is only the arbitration law[159] or the conflict of laws rules of the respective country (including the rules on the application of foreign overriding mandatory provisions).[160]

Parties rarely explicitly choose the law applicable to the arbitration agreement. They are assumed to frequently refrain from doing so because they understand their choice of law relating to the substance of the contract to extend to the arbitration clause contained in that contract.[161] Accordingly, their choice of law is often read to impliedly extend to the validity of the arbitration agreement.[162] To a certain degree this approach is in contrast with the doctrine of severability which requires courts to treat the main contract and the arbitration agreement as two separate contracts. Yet, it is noteworthy that the limited number of authorities which refuse to extend the choice of law relating to the substance in this sense do so in particular where the chosen law would otherwise invalidate the arbitration agreement.[163] If the reviewing court determines that the parties have not agreed on the applicable law on the validity of the arbitration agreement, the law of the country where the award was made will decide the validity of the arbitration agreement.[164]

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[158] Born (2014), p. 595.

[159] van den Berg (1981), p. 291; Adolphsen in: Krüger and Rauscher (Eds.) (2013), Art. V UNÜ, para. 21; Nacimiento in: Kronke et al. (2010), Art. V (1) (a), 227.

[160] Born (2014), p. 595f.

[161] ibid 444; Graffi (2011), p. 28.

[162] Lew et al. (2003), para. 6–24; Nacimiento in: Kronke et al. (Eds.) (2010), Art. V (1) (a), 224 with reference to Oberlandesgericht Frankfurt, 24 October 2006, 26 Sch 6/06, SchiedsVZ 2006, 217.

[163] Born (2014), p. 583; cf. Gaillard and Savage (1999), para. 425; ICC Award 7453/1994, *Agent v Principal and Managing Director of Principal*, YB Comm. Arb. XXII (1997), p. 107.

[164] Art. V (1) (a) New York Convention. The choice of the seat of arbitration may also be understood as an implied choice of law, cf. Nacimiento in: Kronke et al. (Eds.) (2010), Art. V (1) (a), 225; Corte di Cassazione, 15 December 1982, *Rocco Giuseppe e Figli s.n.c. v Federal Commerce and Navigation Ltd.*, YB Comm. Arb. X (1985), 464, 465.

2.1.2.2.2 Level of Post-award Scrutiny

The level of post-award scrutiny describes the level of compliance required between the award and the applicable measure of review. In this respect, it is necessary to make a distinction between a review of the arbitral tribunal's decision on its jurisdiction and its decision on the merits. As far as the review relates to the validity of the arbitration agreement as well as the dispute's arbitrability, the reviewing court can carry out a full review.[165] Unlike pre-award review, an actual assessment of the tribunal's decision on jurisdiction can be made at this point. The positive effect of Kompetenz-Kompetenz gives arbitrators priority for the decision on jurisdiction, but it does not give them immunity from the review of the result they reach. In contrast, the court's review relating to the arbitral tribunal's decision on a dispute's subject matter is restricted by the prohibition of the *révision au fond*.[166] The level of scrutiny in this respect can be described by focusing on two different elements—the degree of violation needed to require intervention and the depth of the court's review into the award.[167]

First, courts engaged in post-award review analyse an award for its violation of considerations reflected in public policy. In particular as far as public policy is concerned, the question is whether there is a certain margin of tolerance in which a violation does not automatically entail annulment or refusal of recognition. Different perspectives on what constitutes a violation are conceivable—e.g. only non-recognition of an award that entirely disregards rules which reflect public policy, non-recognition of an award that egregiously misinterprets them, non-recognition of an award that adopts an untenable understanding of them or even the non-recognition of an award that adopts an understanding different from the ECJ, albeit objectively tenable.[168] Again unlike the situation in pre-award review, post-award review allows an actual assessment of the arbitral tribunal's treatment of the relevant provisions, including the degree of violation.

Second, the level of scrutiny also characterises the depth of the reviewing court's inquiry into the legal and factual side of the treatment of substantive mandatory EU law. The practical methods employed by the court in identifying a potential violation characterise the level of scrutiny in this respect. The relevant questions relate to the degree to which courts are bound by the arbitral tribunal's factual and legal findings as well as to the extent of the award which is reviewed, i.e. the whole award or merely its dispositive part. Again different perspectives can be conceived.

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[165] Lew et al. (2003), para. 14–28; Berger (2007), p. 311.

[166] In this respect, restraint of any review is a well-recognised principle. Cf. also Art. 45 (1) (a) Brussels I Regulation.

[167] Hilbig (2006), pp. 23ff, 52ff. Obviously, the two factors influence each other. For example, a very grave violation is likely to manifest itself in a way which does not necessitate a particularly thorough review of the award and the underlying facts.

[168] Cf. ibid 23 with particular reference to EU law and its influence on public policy.

Courts can leave it at a *prima facie* analysis of the wording of an award[169]—or submit questions of public policy to detailed factual and legal scrutiny.[170]

Courts can apply different levels of scrutiny somewhere on the spectrum between the conceivable extremes. This shows how post-award review involves balancing the finality of the award against the importance attached to public policy. In particular regarding the depth of the inquiry into the award, the post-award level of scrutiny reflects the degree to which the courts consider arbitration to be a fully fledged alternative to state court litigation—much like the pre-award level of scrutiny.[171] The connection to the pre-award level of scrutiny goes further. In particular supporters of a higher level of scrutiny emphasise that any decrease in intensity of pre-award review needs to be countered with an increased post-award level of scrutiny.[172] The logic of this 'second look' at the matter was put in the spotlight by the Supreme Court of the United States in 1985. It held that the mere possibility that the antitrust law of the United States would not be applied by the arbitrator did not require striking down the arbitration agreement in pre-award review. Yet, it went on to stress that 'the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed'.[173] Neither the New York Convention nor the European Convention expressly addresses the level of scrutiny to be applied in post-award review. As will be seen below, different countries apply different levels of scrutiny in enforcement proceedings.

2.1.2.3 The System of Post-award Review in Selected Member States

2.1.2.3.1 Post-award Review in Germany

The annulment of an award rendered by an arbitral tribunal seated in Germany is carried out in accordance with § 1059 Zivilprozessordnung. The provision is based on Art. 34 UNCITRAL Model Law, which in turn is based on Art. V New York Convention. § 1059 (2) No. 1 (a) Zivilprozessordnung stipulates that the invalidity of the arbitration agreement can be reviewed on the application of one party. The applicable law is the one chosen by the parties or, where the parties did not make a choice in this respect, the law at the seat of arbitration. If annulment is requested, questions relating to arbitrability and public policy can be reviewed *ex officio* according to § 1059 (2) No. 2 (a) and (b). German courts construe both measures of review in accordance with German Law, i.e. arbitrability as envisaged in § 1030 Zivilprozessordnung and public policy as characterised by principles of German

[169] Derains (2001), p. 816.

[170] Hanotiau and Caprasse (2008), p. 815; cf. generally Gaillard and Savage (1999), para. 1605.

[171] See supra 28ff.

[172] Gaillard and Savage (1999), para. 1605; Park (1989), p. 669.

[173] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.*, 473 US 614, 638 (1985).

Law.[174] A violation of public policy in § 1059 (2) No. 2 (b) Zivilprozessordnung does not refer to the content of the award but to the result of the recognition of the respective award.[175] Rules that have public policy status in Germany are those that regulate questions that pertain to the 'Grundlagen des staatlichen und wirtschaftlichen Lebens in zwingender, dem Parteibelieben entzogener Weise'.[176] It has also been paraphrased as principles serving the country's vital interests[177] and as its fundamental conceptions of justice.[178] The distinction between internal public policy and international public policy plays a limited role in Germany. Internal public policy is already relatively restricted making further restrictions unnecessary to account for the specific conditions of foreign awards.[179] Limitations on what is considered public policy in international cases rather stem from emphasising its public policy's relative nature.[180]

The recognition and enforcement of foreign awards in Germany is provided for in § 1061 Zivilprozessordnung, which refers to the New York Convention.[181] The relevant measures of review are those stipulated in Art. V (1) (a) (invalid arbitration agreement), Art. V (2) (a) (arbitrability) and Art. V (2) (b) (public policy). German courts have approximated the requirements for annulment and enforcement proceedings to a large extent.[182] Although German courts distinguish between international and internal public policy, what is decisive is the relative degree of connectedness between the dispute and the German legal order.[183] A slightly different regime applies for awards involving a party from Germany on one side and from the United States on the other side. These awards fall into the scope of

[174]Schlosser in: Bork and Roth (Eds.) (2014), § 1059, para. 50 and Anhang zu § 1061, paras. 313, 316; Kröll and Kraft in: Böckstiegel et al. (Eds.) (2015), § 1059 ZPO, paras. 81, 83.

[175]Even more than Art. V (2) (b) does in this respect, cf. Schlosser in: Bork and Roth (Eds.) (2014), Anhang zu § 1061, para. 314.

[176]'Rules regulating the basis of public and economic life in a mandatory way' (my translation); cf. Oberlandesgericht Hamburg (Germany), 15 June 1954, IV ZR 304/54, BB 1955, 618; Oberlandesgericht Celle (Germany), 1 November 1957, 11 U 78/57, BB 1958, 1107; Bundesgerichtshof (Germany), 12 July 1990, III ZR 174/89, NJW 1990, 3210, 3211; Bundesgerichtshof (Germany), 30 October 2008, III ZB 17/08, NJW 2009, 1215, 1216; see also Reichsgericht (Germany), 27 May 1910, 485/09, RGZ 73, 366, 369: 'Grundlagen des deutschen staatlichen und wirtschaftlichen Lebens'.

[177]Bundesgerichtshof (Germany), 12 May 1958, VII ZR 436/56, NJW 1958, 1538.

[178]Bundesgerichtshof (Germany), 30 October 2008, III ZB 17/08, NJW 2009, 1215, 1216.

[179]Adolphsen in: Krüger and Rauscher (Eds.) (2013), Art. V UNÜ, para. 69; Schwab and Walter (2005), Kap. 24, para. 37.

[180]Kröll and Kraft in: Böckstiegel et al. (Eds.) (2015), § 1059 ZPO, para. 84.

[181]As Germany has already ratified the New York Convention on 30 June 1961, § 1061 Zivilprozessordnung has an almost completely declaratory nature, cf. Münch (2013) § 1061, para. 6; Kröll in: Böckstiegel et al. (Eds.) (2015), § 1061, para. 1.

[182]Schlosser in: Bork and Roth (Eds.) (2014), Anhang zu § 1061, para. 314.

[183]German jurisprudence uses the French terminology *ordre public international* and *ordre public interne*. German courts do not, however, use it in the same way as French courts, cf. Schlosser in: Bork and Roth (Eds.) (2014), Anhang zu § 1061, para. 316.

application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany. According to Art. VI (2) of this treaty, a final and enforceable award rendered in the United States can only be reviewed for public policy violations.

German Law does currently not include any references to the level of scrutiny which is to be applied in annulment or enforcement proceedings under the spectre of public policy.[184] German courts recognise the prohibition of a *révision au fond*.[185] They do not, however, consider themselves to be bound by the factual or legal findings of the arbitral tribunal.[186] The case law does not give clear guidance regarding the degree of violation of rules reflecting public policy required to entail annulment or a refusal of recognition. There are cases in which it was argued that any violation of a rule which reflects public policy leads to the unenforceability of the respective award without any room for discretion.[187] At the same time, other court decisions require the violation to be obvious.[188] Generally, if it is merely possible that recognising the award violates a rule reflecting public policy but not ascertained beyond doubt, the award will be recognised.[189]

2.1.2.3.2 Post-award Review in France

The only recourse against an award rendered in international arbitration seated in France is the annulment of the award.[190] The different measures of review in that

[184]The provisions that regulated annulment and enforcement proceedings until 1998 both included a reference to the level of scrutiny regarding violations of public policy. They warranted annulment of an award only if it was 'offensichtlich' [obvious] that the recognition of the award was not compatible with fundamental principles of German Law. The abolition of the obviousness requirement from the wording of the public policy exception was not understood as a change in substance by some, cf. Kröll and Kraft in: Böckstiegel et al. (Eds.) (2015), § 1059, para. 83, n. 189 with further references.

[185]Oberlandesgericht Köln (Germany), SchiedsVZ 2005, 163, 165 = YB Comm. Arb. XXX (2005), 557; Oberlandesgericht Zweibrücken, YB Comm. Arb. XX (1979), 262; Oberlandesgericht Thüringen (Germany), 8 August 2007, 4 Sch 03/06, SchiedsVZ 2008, 44.

[186]Bundesgerichtshof (Germany), 12 May 1958, VII ZR 436/56, BGHZ, 27, 249, 254; Bundesgerichtshof (Germany), 23 April 1959, *Flugplatz*, BGHZ 30, 89, 95–96.

[187]Oberlandesgericht Düsseldorf (Germany), 21 July 2004, VI-Sch (Kart) 1/02 (available online at 'juris-Database (subject to charge) www.juris.de accessed 27 July 2016) with reference to Bundesgerichtshof (Germany), 25 October 1966, KZR 7/65, *Schweißbolzen*, BGHZ 46, 365, 368 = NJW 1967, 1178.

[188]Oberlandesgericht Hamburg (Germany), 14 May 1999, 1 Sch 02/99, OLGR Hamburg 2000, 19, 21 = CLOUT case No. 457; Oberlandesgericht Schleswig (Germany), 30 March 2000, 16 SchH 5/99, RIW 2000, 706 (709) = YB Comm. Arb. XXXI (2006), 652, 661.

[189]BGH, 23 April 1959 (Germany), IV ZR 311/58, *Flugplatz*, BGHZ 30, 89, 94; Bundesgerichtshof (Germany), 20 May 1966, KZR 10/64, *Zimcofot*, GRUR 1966, 576, 579; Oberlandesgericht Thüringen (Germany), 8 August 2007, 4 Sch 03/06, SchiedsVZ 2008, 44, 46.

[190]Cf. Art. 1518 NCPC. An arbitration is international pursuant to Art. 1504 NCPC if interests of international trade are at stake.

context are specified in Art. 1520 NCPC. In view of the role of mandatory substantive provisions, Art. 1520 (1) and (5) are the most relevant. Art. 1520 (1) refers to awards rendered by an arbitral tribunal which wrongly upheld or declined jurisdiction.[191] It refers to arbitration agreements which are null and void as well as to inarbitrable matters.[192] The validity of the arbitration agreement is only subject to mandatory rules of French law and international public policy.[193] As far as the recognition and the enforcement of the award itself is concerned, international public policy is stipulated as a self-contained measure of review in Art. 1520 (5).[194] International public policy is understood to encompass 'l'ensemble des règles et des valeurs dont l'ordre juridique français ne peut souffrir la méconnaissance, même dans des situations à caractère international'.[195] A distinctive feature of French arbitration law is that Art. 1522 (1) NCPC allows parties to agree on a waiver of their right to seek annulment of an award at any time.

As far as enforcement proceedings are concerned, it must be noted that the requirements are more arbitration friendly in French arbitration law than in the New York Convention. In this context, French courts rely on Art. VII (1) New York Convention. This escape clause for more pro-arbitration provisions in national laws provides a basis for the specific French system of enforcement. In fact, French courts generally take the position that the entire French system of review of foreign awards is more advantageous to the party seeking to have a foreign award enforced than the New York Convention. Consequently, the grounds in the New York Convention are not applied in France as a whole.[196] Instead the grounds provided for in the NCPC gain priority. A well-known example in this context is the willingness of French courts to declare awards enforceable which had been annulled by courts of the seat of arbitration.[197] French courts have also done so in

[191] What constitutes wrongly upholding jurisdiction is determined by the case law and commentary on Art. 1502 (1) NCPC as in force until 2011. The major innovation of the overhaul of French arbitration law in 2011 was the explicit inclusion of awards wrongfully declining jurisdiction. French courts had already interpreted the former Art. 1502 (1) NCPC to extend to that situation, cf. Cour de cassation (France), 6 October 2010, *Fondation Joseph Abela Family Foundation v Fondation Albert Abela Family Foundation*, Rev. Arb., 2010, 813. Some commentators understand the new Art. 1520 (1) NCPC to codify this case law, cf. Honlet et al. (2011), p. 167.

[192] Gaillard and Savage (1999), p. 1616; in particular in relation to arbitrability cf. Delvolvé et al. (2009), para. 429.

[193] Cour de cassation, 20 December 1993, *Comité populaire de la municipalité de Khoms El Mergeb v Dalico Contractors*, Rev. Arb. 1994, 116; Lew et al. (2003), para. 6–65; Delvolvé et al. (2009), paras. 425, 432.

[194] France is one of the few states that explicitly reference to *international* public policy in their arbitration law, Hilbig (2006), p. 36.

[195] Cour d'appel de Paris (France), 27 October 1994, *Lebanese traders distributors et consultants LTDC v Société Reynolds*, Rev. Arb. 1994, 709, 712; see aso Cour d'appel de Paris (France), 15 February 1996, *Renosol France et al. v Coverall North America*, Rev. Arb. 1996, 414; Cour d'appel de Paris (France), 14 June 2001, *SA Compcagnie commerciale André v SA Tradigrain France*, Rev. Arb. 2001, 773, 774.

[196] Delvolvé et al. (2009), para. 395–401.

[197] Cf. supra 40.

case of awards which had been annulled by other Member State courts.[198] This becomes possible under French arbitration law, which lacks a measure of review comparable to Art. V (1) (e) New York Convention.

Enforcement proceedings in France are organised in a two-tiered system. In an initial step a foreign award is recognised or enforced in France if the party relying on it can prove its existence and if the award is not manifestly contrary to international public policy. The level of scrutiny for compliance with international public policy in this first step clearly accounts for nothing more than a *prima facie* review.[199] In a subsequent step of review according to Art. 1525 NCPC, the initial order granting or denying enforcement of an award made abroad may be appealed before the Cour d'appel. According to Art. 1525 (4) NCPC, the order may only be appealed on the grounds listed in Art. 1520, i.e. the measures of review applicable during proceedings for the annulment of an award made in France. Art. 1520 (1) referring to the validity of the arbitration agreement and (5) referring to public policy are the most relevant for the present inquiry.

As far as public policy is concerned, the level of scrutiny for reviewing the tribunal's substantive result is the comparatively low standard of a 'flagrant, effectif et concret' violation of international public policy.[200] This standard is applied in annulment proceedings as well as enforcement proceedings. A flagrant violation is one that that 'crève les yeux' or in other words is as plain as the nose on the face.[201] However, in three recent cases in which post-award review centred on allegations of corruption, the Cour d'appel de Paris abandoned the requirement of a flagrant violation of international public policy.[202] Consequently, the court investigated the elements relevant to rule on the question of corruption on its own—i.e. beyond the face of the award. Nevertheless, all three awards were ultimately confirmed.

[198]Cour de cassation (France), 29 July 2007, *Putrabali Adyamulia/Société Est Epices*, Rev. Arb 2007, 512–513 (deciding in favour of the enforcement that had been annulled by the English Commercial Court in 2003 in *Putrabali Adyamulia/Société Est Epices* [2003] 2 Lloyd's Rep 703 (Comm); Cour de cassation (France), 4 June 2008, *SNF SAS/Cytec Industries BV*, YB Comm. Arb. XXXIII (2008), 489–490 (deciding in favour of the enforcement that had been annulled by the Tribunal de première instance de Bruxelles (Belgium), 8 March 2007, 2005/7721/A, *Cytec Industries BV v. SNF SAS*, YB Comm. Arb. XXXII (2007), 282–283).

[199]Gaillard and Savage (1999), para. 1577.

[200]Cour de cassation (France), 19 November 1991, *Société des Grands Moulins de Strasbourg v Société Compagnie Continentale France*, Rev. Arb. 1992, 76; Cour d'appel de Paris, 18 November 2004, *Thalès Air Defence v Euromissile*, JDI 2004, 357, 360; Cour de cassation (France), 4 June 2008, *SNF SAS v Cytec Industries BV*, YB Comm. Arb. XXXIII (2008), 489.

[201]Cour d'appel de Paris, 18 November 2004, *Thalès Air Defence v Euromissile*, JDI 2004, 357, 360; Derains (2001), p. 817; Bensaude (2005) p. 242; cf. also Hilbig (2006), p. 51, using 'steche ins Auge' as a translation into German.

[202]Cour d'appel de Paris, 4 March 2014, Societé Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France, Rev. arb. 2014, 955, 957f; Cour d'appel de Paris, 14 October 2014, République du Congo v. SA Commissions Import Export, Rev. arb. 2014, 1030; Cour d'appel de Paris, 4 November 2014, SAS Man Diesel & Turbo France v Sté Al Maimana General Trading Company Ltd, Rev. Arb. 2014, 543.

Whether this development is limited to allegations as serious as that of corruption or whether it implies that French courts will reshape the level of post-award scrutiny at large remains to be seen in the future.[203]

2.1.2.3.3 Post-award Review in Belgium

The grounds for annulling an award before Belgian courts are enumerated in Art. 1717 Code Judiciaire. The following three measures of review stipulated in the third paragraph of that provision are most pertinent to the present inquiry: an invalid arbitration agreement in (3) (a) (i), arbitrability in (3) (b) (i) and public policy in (3) (b) (ii).[204] The validity of the arbitration agreement is expressly determined according to the law governing the arbitration agreement, i.e. the law to which the parties have subjected it or alternatively Belgian law as the law at the seat of arbitration. In parallel to the approach of the UNCITRAL Model Law, the law applicable to arbitrability and public policy is the *lex fori*.[205] A particularity of Belgian arbitration law is that Art. 1718 Code Judiciaire allows parties to waive annulment proceedings for their award if neither of the parties is a Belgian national or resident, or a legal person with a seat or branch in Belgium. The parties are, however, required to waive such proceedings in the form of a 'déclaration expresse'. The level of scrutiny for a violation of public policy is not addressed in the Code Judiciaire. In practice, Belgian courts take cognisance of all possible breaches of rules reflecting public policy and explicitly not only of those that are 'flagrante, effective et concrète'.[206] Yet, the Belgian courts neither re-examine the dispute in detail nor substitute the arbitral tribunal's appreciation of the case for their own.[207]

If an award has been rendered in another contracting state, Belgian courts apply the New York Convention in enforcement proceedings.[208] If no convention applies between Belgium and the state where the award was rendered, Art. 1723 Code Judiciaire provides that an award can be refused enforcement if it can still be

[203]For further commentary cf. Fouchard (2014), p. 559ff; Delanoy (2014), p. 959ff; Martínez Lage (2016), pp. 137ff.

[204]The revision of Belgian arbitration law in 2013 incorporated measures of review based on the UNCITRAL Model Law which are more sophisticated than the predecessors, which were based on the European Convention Providing a Uniform Law on Arbitration.

[205]Keutgen and Dal (2006), para. 564, 568.

[206]Tribunal de première instance de Bruxelles (Belgium), 8 March 2007, 2005/7721/A, *Cytec Industries BV v. SNF SAS*, YB Comm. Arb. XXXII (2007), 282–283; Cour d'appel de Bruxelles (Belgium), 22 June 2009, 2007/AR/1742, *Cytec Industries BV v SNF SAS*, Rev. Arb. 2009, 574–575.

[207]Keutgen and Dal (2006), para. 566.

[208]Cf. Art. I (3) New York Convention; specific conventions apply for the recognition of awards rendered in France, the Netherlands, Germany, Switzerland and Austria, cf. Keutgen and Dal (2006), paras. 635ff.

appealed, if there is a violation of public policy, if the dispute lacked arbitrability or if a violation of one of the measures of review of Art. 1704 is established.[209] Public policy is understood as international public policy as far as the enforcement of foreign arbitral awards is concerned. The difference between internal and international public policy is circumscribed in the following manner:

> [U]ne loi d'ordre public interne n'est d'ordre public international que si, par les dispositions de cette loi, le législateur a entendu consacrer un principe qu'il considère comme essentiel à l'ordre moral, politique ou économique et qui, pour ce motif, doit nécessairement exclure l'application en Belgique de toute règle contraire ou différente d'un droit étranger, même lorsque celle-ci est applicable suivant les règles ordinaires des conflits de lois.[210]

As far as the level of scrutiny in enforcement proceedings is concerned, there is no indication that Belgian courts would adopt a different standard from the one in annulment proceedings. This means any violation will entail the refusal of recognition of enforcement and not only a 'flagrante, effective et concrète' violation.

2.1.2.3.4 Post-award Review in England

The regime for the annulment of awards rendered in England and Wales is addressed in Sections 66 to 71 Arbitration Act 1996. In respect of substantive mandatory EU law, especially Sections 67 and 69 come into play. Section 67 allows annulment of awards rendered in spite of a lack of substantive jurisdiction. An award can be appealed on a point of law in accordance with Section 69. This means that the award is reviewed for compliance with English law, while facts or questions of foreign law are not reviewed.[211] Parties can, however, agree to exclude the applicability of Section 69. If they do not, it is nevertheless required that the court gives leave to appeal. The court will do so if—among other requirements—the point of law affects the rights of one or more of the parties and if the decision by the tribunal is obviously wrong or at least open to serious doubt if it pertains to a question of general public importance.[212] Although not explicitly mentioning public policy, this implicates a comparable measure of review. At the same time, it implicates a relatively low level of scrutiny. The review under Section 69 Arbitration Act 1996 is not limited to questions of public policy but also encompasses the general interpretation of the contract.[213] There exists a further possibility

[209] In this respect, the revision of 2013 will bring a major change. Art. 1723 replicates the measures of review included for the enforcement of awards in Art. 35 UNCITRAL Model Law.

[210] Cour de cassation (Belgium), 4 May 1950, *Vigouroux v Vigouroux*, Pasicrisie Belge 1950 I, 624, 626.

[211] Veeder (1997), p. 60; Sheppard (2010), p. 827.

[212] Cf. Section 69 (3) Arbitration Act 1996.

[213] *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2005] Lloyd's Rep 606.

to review arbitral awards in accordance with Section 69 under the residual common law power for a lack of arbitrability and on grounds of public policy.[214]

Awards rendered in a country that has ratified the New York Convention are enforced in accordance with Sections 100 to 104 Arbitration Act 1996. Those provisions implement the New York Convention with amendments. Section 101 (1) stipulates that a New York Convention award shall be recognised as binding on the persons between whom it was made and may be relied on by those persons by way of defence, set-off or otherwise in legal proceedings before the courts. If, however, the person against whom an award is invoked can prove that the underlying arbitration agreement is invalid, the enforcement of any award can be refused pursuant to Section 103 (2) (b). Where an award relates to an inarbitrable dispute or violates public policy, it can be refused enforcement pursuant to Section 103 (3) Arbitration Act *ex officio*. The relevant law for arbitrability is English law.[215] For foreign awards the relevant measure of review is international public policy.[216] The level of scrutiny is not addressed in the Arbitration Act 1996 in this respect. English courts have, however, indicated that they do not equate their *ex officio* review to a preliminary analysis of whether the purpose of a certain consideration of public policy has been met in the award.[217] Review is considered to be unnecessary where it is already clear from the award's reasoning that the arbitrators have adequately analysed the impact of the consideration of public policy and reflected their respective conclusions in their award.[218] If the analysis reveals that the arbitral tribunal ignored the fact that the contract was palpably and indisputably illegal under a rule reflecting public policy, the award will be subject to a more thorough

[214] Mustill and Boyd (2001), p. 371; cf. Landolt (2006), para. 5-09.

[215] Sheppard (2010), p. 865.

[216] ibid 866.

[217] *Westacre Investments v Jugoimport* [1999] EWCA Civ 1401, [1999] APP LR 05/12 para. 71: 'For my part I have some difficulty with the concept (of a preliminary inquiry) and even greater concerns about its application in practice (. . .)'; *R v V* [2008] EWHC (Comm) 1531, [2008] APP LR 07/03 paras. 30–31: 'The difficulty with the concept of some form of preliminary inquiry is of course assessing how far that inquiry has to go. (. . .) Even assuming it is appropriate in the present application to conduct some form of assessment: (i) There was plenty of material before the tribunal that the contract was not illegal under Libyan law (. . .) (ii) The arbitrators have expressly found that the contract was not illegal. (iii) The tribunal is made up of arbitrators who are well known, experienced and highly competent and who are fully familiar with the international commercial law scene. (iv) There is no material whatsoever to suggest that there has been collusion or bad faith in obtaining the award. In short, it is correct in my judgment to accord the award full faith and credit, even if it were appropriate to embark on any form of preliminary inquiry.' This was directed at an argument raised in *Soleimany v Soleimany*, i.e. the sole case regarding domestic arbitration where public policy was successfully invoked. In that case it was argued that if there is *prima facie* evidence from one side that the award violates public policy the reviewing court can embark on a preliminary review short of a full-scale trial of those matters, cf. *Soleimany v Soleimany* [1999] QB 785 (EWCA) para. 51.

[218] *R v V* [2008] EWHC (Comm) 1531, [2008] APP LR 07/03 para. 30.

review.[219] This distinction is applicable in proceedings both for the annulment of awards and for recognition and enforcement.[220]

2.1.2.4 Conclusion

The New York Convention has contributed to a harmonisation of the relevant standards in this respect—in particular by limiting the possible measures of review to an exhaustive list in Art. V and by creating a minimum standard of the protection of arbitration through Art. VII (1). Furthermore, the New York Convention has acted as a common blueprint for national arbitration laws and thus contributed to a far-reaching harmonisation of the systems of review among those laws.

This allows arbitral tribunals to make certain assumptions about the way in which review will be carried out. They can safely assume that both an arbitration agreement and an arbitral award will be recognised in principle and only be refused recognition under exceptional circumstances. The measures of review are phrased in a recurrent way in the different bodies of law addressing review, which facilitates predictability of potential conflicts and allows them to be addressed in the award.

However, unification is only possible to a limited extent and so are the possible assumptions. Especially the level of scrutiny to be applied in the review is difficult to predict. Also the question of which substantive provisions actually reflect public policy or implicate inarbitrability raises difficult questions. The same caveat applies for the law which is applied to determine the measure of review, e.g. whether a certain matter is arbitrable in the sense of Art. II (1) New York Convention. It is in these areas that the approach taken by an individual jurisdiction towards arbitration can be reflected in the stance taken in review proceedings. The New York Convention leaves enough leeway to the contracting states to circumvent the Convention's enforcement-friendly approach.[221] It remains possible that the two courts will come to different results when reviewing the same arbitration agreement or the same arbitral award.[222]

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[219] *Soleimany v Soleimany* [1999] QB 785 (EWCA). Another phrase used by the court in this respect was 'illegal on its face'.

[220] *R v V* [2008] EWHC (Comm) 1531, [2008] APP LR 07/03 para. 34; cf. Grierson (2009), p. 4.

[221] Cf. Quinke in: Wolff (Ed.) (2012), Art. V, para. 500.

[222] Cf. the following conflicting decisions: Cour de cassation (France), 4 June 2008, *SNF SAS/Cytec Industries BV*, YB Comm. Arb. XXXIII (2008), 489–490 and Cour d'appel de Bruxelles (Belgium), 22 June 2009, 2007/AR/1742, *Cytec Industries BV v. SNF SAS*, Rev. Arb. 2009, 574–575; Cour de cassation (France), 29 July 2007, *Putrabali Adyamulia/Société Est Epices*, Rev. Arb 2007, 512–513 and Commercial Court, 9 May 2003, *Putrabali Adyamulia/Société Est Epices* [2003] 2 Lloyd's Rep 703 (Comm); Cour de cassation (France), 23 March 1994, *Hilmarton Ltd. v OTV*, YB Comm. Arb. XX (1999), 663 and Court of Appeal Geneva (Switzerland), *Hilmarton v. OTV*, YB Comm. Arb. XIX (1994), 214–222.

2.2 The Specific Influence of EU Law on the System of Review

In areas in which the overlapping influence of individual jurisdictions can make it difficult for arbitrators to correctly assess the results of review they are facing, the influence of EU law can theoretically have a harmonising effect. This can be the case for both the substantive policies which can become relevant through the different measures of review but also for the procedural conditions within which arbitrators are monitored in pre- and post-award review.

In order to analyse the capacity of EU law to influence the decisions made in international commercial arbitration, its general status in EU law will be analysed first (Sect. 2.2.1). In a second step, the focus will be turned towards EU law's influence on its Member States' substantive law (Sect. 2.2.2). Third, the influence exerted on the procedural law of the Member States is analysed (Sect. 2.2.3).

2.2.1 The Status of International Commercial Arbitration in EU Law

In the past, the relationship between international commercial arbitration and EU law has been compared to that of 'distant planets whose orbits hardly ever intersected'.[223] The legal nature of both fields creates barriers and filters for interdependencies of the two. The way in which EU law can directly constrain arbitral practice is mitigated both by the fact that to a certain extent EU law itself excludes arbitrators from its sphere of influence and the fact that some of arbitration's properties withdraw it from EU law.

One of the main reasons for the perceived distance between arbitration and EU law is that the latter is primarily directed at states while arbitration is operated by private individuals and primarily deals with disputes between private parties. Accordingly, arbitration is not perceived as part of the judicial apparatus explicitly entrusted with the enforcement of EU law. Art. 4 (3) EU Treaty calls upon its Member States to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. This obligation is binding on all the authorities of the Member States and especially on their courts.[224] An arbitral tribunal cannot be likened to an authority of a Member State—whether seated in a Member State or not.[225] The obligations which arise from Art. 4 (3) EU Treaty thus do not extend to arbitrators.

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[223] Shelkoplyas (2003), p. ix; cf. also *Liebscher* who interprets the ECJ's ruling in *Rich* to imply 'the attitude of the ECJ that arbitration is a world apart from the EC legal system', cf. Liebscher (2011), para. 23-045 with reference to Case C-190/89 *Rich* [1991] I-3855, para. 18.

[224] Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, para. 24.

[225] Shelkoplyas (2002), p. 574; Zobel (2005), p. 112.

The exclusion of arbitral tribunals from the EU's legal order also leads to excluding arbitral tribunals from referring questions to the ECJ for preliminary rulings. The ECJ ultimately drew this conclusion when it decided over a referral by a non-statutory arbitral tribunal seated in Bremen, Germany in its *Nordsee* decision in 1982.[226] In doing so, the ECJ stressed that, unlike proceedings before state courts, parties can opt out of an arbitration agreement at any time and that public authorities at the seat of arbitration cannot intervene to ensure compliance with EU law.[227] Based on these differences between state courts and arbitral tribunals, the link between an arbitral tribunal and its seat (in a Member State) was deemed to be too weak to allow the arbitral tribunal to refer questions for preliminary references to the ECJ.[228] In its subsequent case law, the Court developed at least six factors which characterize those courts and tribunals which are in fact able to refer questions. These factors relate to whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.[229]

However, *Nordsee* and the subsequent decisions on this question do not signify that the ECJ views arbitral tribunals as uninvolved bystanders to the EU's legal order. The court stressed that the parties' agreement cannot create exceptions to mandatory rules created by EU law.[230] Yet, it is decisive that already in *Nordsee* the ECJ described the enforcement of consequential requirements imposed on arbitral tribunals by referring to auxiliary proceedings by state courts as well as the various ways of pre- and post-award review.[231] The Court obviously proceeds from the assumption that judicial review is the only way to check that parties do not use arbitration as a tool to evade mandatory rules created by EU law. In this sense,

[226]Case 102/81 *Nordsee v Reederei Mond* [1982] 1095; cf. also Case C-393/92 *Almelo* [1994] I-1477, para. 21; Case C-126/97 *Eco Swiss v Benetton* [1999] I-3055, para. 28; Case C-125/04 *Denuit and Cordenier* [2005] ECR I-923, para. 13.

[227]Case 102/81 *Nordsee v Reederei Mond* [1982] ECR 1095, para. 11f.

[228]ibid para. 13.

[229]Basedow (2015), p. 371 with reference to Case C-125/04, *Guy Denuit & Betty Cordonnier v. Transorient-Mosaïque Voyages & Culture S.A* [2005] I-925, para. 12; Case C-394/11, *Belov v. CHEZ Elektro Balgaria AD et al*., EU:C:2013:48, para. 38; Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, S.A. v. Autoridade Tributária e Aduanaera*, EU:C:2014:1754, para. 23.

[230]Case 102/81 *Nordsee v Reederei Mond* [1982] ECR 1095, para. 14.

[231]ibid para. 14: '(. . .) Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it. In that context attention must be drawn to the fact *that if questions of Community law are raised in an arbitration* resorted to by agreement *the ordinary courts may be called upon to examine them* either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award—which may be more or less extensive depending on the circumstances—and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation' [emphasis added].

Nordsee underlined the extramural status of arbitration within the EU legal order.[232] Thus, the requirement for arbitrators to apply EU law can only be deemed to exist imperfectly and impliedly.[233]

Primary EU law scarcely refers to arbitration.[234] One of the few references is included in Art. 272 TFEU. It allows the ECJ's General Court to act as an arbitral tribunal under an arbitration clause concluded by or on behalf of the Union.[235] Unless an arbitration clause conveys this power to the ECJ, Member States' courts decide disputes to which the Union is a party.[236] The procedure that unravels before the General Court in those circumstances is, however, different from international commercial arbitration in that it produces a judgment and not an arbitral award. Most importantly, the judgment can be enforced under Art. 299 TFEU or appealed before the ECJ.[237] Furthermore, disputes between the EU and its partners in Association Agreements can typically be resolved by arbitration.[238]

Another reference to arbitration could be found in Art. 293 TEC. It encouraged negotiations among the Member States regarding 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'. Negotiations directed at a comprehensive EC or EU regime for the recognition and enforcement of arbitral awards were, however, never initiated. Art. 293 TEC did lead to the Brussels Convention of 27 September 1968. The Brussels Convention, however, excluded arbitration from its realm since the European Convention and the New York Convention were considered to cover the issue extensively.[239] The Brussels Convention was the predecessor of Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation).[240] The Brussels I Regulation equally excludes arbitration in its Art. 1 (2) (d). Yet the possibility of a (partial) inclusion of arbitral matters in an amended version of the Brussels I Regulation has gained considerable attention

[232]Cf. Landolt (2006), para. 3-15.

[233]ibid para. 7-48.

[234]Basedow (2015), p. 368.

[235]Cf. Council Decision amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice, 26 April 2004, 2004/407/EC, Euratom [2004] OJ L132.

[236]Cf. Art. 274 TFEU.

[237]Lenaerts et al. (2006), para. 3-15.

[238]Cf. Arts 305 (6), 306–326 EU-Ukraine Association Agreement [2014] OJ L161/126ff; Art. 25 (4) EEC-Turkey Association Agreement [1973] OJ C113/7.

[239]Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968) [1979] OJ C59/1, 13; Case C-190/89 *Rich* [1991] I-3894, para. 18.

[240]Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1. The legal basis for Regulation 44/2001 was Art. 61 (c) and Art. 67 (1) TEC, which, unlike Art. 293 TEC, did not explicitly refer to arbitration.

in recent years.[241] On 12 December 2012 a recast version of the Brussels I Regulation was adopted and replaced the former version on 10 January 2015.[242] The exclusion of arbitration was ultimately maintained in Art. 1 (2) (d) of the recast Regulation after being at the centre of a heated debate in relation to recasting the Brussels I Regulation.[243] The recast version reiterates in its recital 12 that

> [n]othing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

These developments convey the fact that the tide has not turned for an inclusion of arbitration into the realm of European legislation.

2.2.2 EU and Its Member States' Substantive Legal Orders

Although EU law does not directly put international commercial arbitrators under a duty to adhere to it, arbitrators still operate within the reach of review mechanisms which attach importance to the application of substantive mandatory EU law. In order to understand the role played by EU law in general and substantive mandatory EU law in particular, the general principles of the application of EU law by Member States will be sketched first (Sect. 2.2.2.1). Then the notion of substantive mandatory EU law will be outlined, focusing on its impact on international commercial arbitration (Sect. 2.2.2.2).

2.2.2.1 The Member States' Legal Order and EU Law

2.2.2.1.1 Primacy

The primacy of EU law has been developed in the case law of the ECJ. Starting with the decision in *Costa v ENEL* in 1964 the ECJ has repeatedly held that its Member States must resolve conflicts between their national law and EU law in favour of the

[241] Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 12 April 2009, COM (2009) 175 final; *Hess/Pfeiffer/Schlosser,* Brussels I Regulation (EC) No. 44/2001: The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (2008); Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2010) 748 final.

[242] Council Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

[243] Cf. Case C-536/13 *Gazprom OAO* [2015] OJ C236/8; cf. more generally Lazić (2012), p. 46; Illmer (2011), p. 670; van Haersolte-van Hof (2011).

latter.[244] The primacy of EU law makes national law inapplicable in that situation. The ECJ bases the primacy of EU law on the Member States' permanent and unconditional transfer of sovereignty in the Treaties.[245] The principle of primacy never found its way into the Treaties themselves but is expressly referred to in the Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.[246]

2.2.2.1.2 Direct Effect

In view of EU law's supremacy, the question arises whether and how individuals can rely on rights conferred on them by EU law before national courts. In 1963 the ECJ addressed this question in *Van Gend en Loos*. It held that EU law must in fact be interpreted as 'producing direct effects and creating individual rights which national courts must protect'.[247] In its reasoning the ECJ underlined that the objective of the EEC Treaty itself was of direct concern to individuals—that objective being the establishment of a common market. It also stressed the status of the Community as a 'new legal order of international law' in connection with which the Member States had limited their sovereign rights. Yet, the ECJ limited the direct effect to legal norms that are clear, precise, unconditional and that do not require any further implementation.[248] Therefore binding EU norms that fulfil these conditions can have direct effect. This can principally hold true for provisions included in the Treaties[249] and in Regulations.[250] Special attention may be drawn to the fact that the ECJ has unequivocally given direct effect to the competition law regime in Arts 101 and 102 TFEU in horizontal relationships between individuals.[251]

In contrast to the Treaties and Regulations, the direct effect of decisions and norms included in Directives is subject to certain restrictions. A Directive itself is addressed at the Member State not at individuals.[252] This explains why a Directive

[244]Case 6/64 *Costa v ENEL* [1964] ECR, 585, 594; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 1979, 629, para. 17; Already in 1963 the ECJ had addressed the limitation of Member States' sovereign rights through EU law in favour of individuals in Case 26/62 *Van Gend en Loos v Nederlandse Administratis der Belastingen* [1963] ECR 1, 12.

[245]Case 6/64, *Costa v ENEL* [1964] ECR, 585, 593 and 594.

[246]Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon [2010] OJ C83/344.

[247]Cf. Case 26/62 *Van Gend en Loos v Nederlandse Administratis der Belastingen* [1963] ECR, 1, 13.

[248]ibid.

[249]Case 43/75, *Defrenne v Sabena* [1976] ECR 455, para. 31.

[250]Case 43/71 *Politi v Italy* [1971] ECR 1039, para. 9.

[251]Case C-234/89 *Delimitis* [1991] ECR I-4139, para. 45.

[252]Cf. Art. 288 TFEU'(. . .) A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. (. . .)'.

has direct effect as far as it gives the individual a right in its relationship with the Member State in case it has not been (correctly) implemented by the Member State.[253] This so-called vertical direct effect has its counterpart in the horizontal direct effect, which refers to the direct effect of EU law between different individuals. The ECJ explicitly rejected the horizontal direct effect in *Marshall v Southampton and South-West Hampshire Area Health Authority*.[254] In that case, the ECJ held that a Directive of itself may not impose obligations on individuals and that a provision in a Directive may not be relied upon as such against individuals.

2.2.2.1.3 Consistent Interpretation

Under the doctrine of consistent interpretation national courts are required to interpret national law and particularly legislation adopted for the implementation of Directives in conformity with the requirements of EU law as far as possible.[255] This can create an indirect effect for all sources of EU law.[256] The ECJ has used the concept of consistent interpretation especially to supplement and substitute the concept of direct effect in order to give effect also to Directives in horizontal situations.[257] When the ECJ is confronted with preliminary references regarding legislation implementing Directives, it usually interprets the Directive for itself and leaves it to the Member States to give effect to its understanding under the doctrine of consistent interpretation. For example, when confronted with questions regarding a Directive and its impact on a cross-border relationship between individuals, it interpreted the Directive in isolation and held that the relevant provisions must be applied under all circumstances.[258] Hence, the ECJ required Member States to intervene into horizontal contractual relationships under the doctrine of consistent interpretation based on its understanding of the Directive's purpose.[259]

2.2.2.2 General Principles at the Interface with International Commercial Arbitration

Courts in Member States are bound by these principles when engaging in the review of arbitration agreements or arbitral awards. Their decisions are embedded in their

[253]Case 148/78 *Publico Ministero v Ratti* [1979] ECR 1629, paras. 22–23.

[254]Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, para. 48.

[255]Case 14/83 *von Colson and Kamann/Land Nordrhein-Westfalen* [1984] ECR 1891, para. 28; Case C-106/89 *Marleasing* [1990] ECR I-4135, para. 8.

[256]Case C-144/04 *Mangold* [2005] ECR I-9981, Opinion of AG Tizzano, para. 117.

[257]Shelkoplyas (2003), p. 47.

[258]Case C-381/98 *Ingmar* [2000] ECR I-9305, paras. 25–26.

[259]Betlem (2002), p. 90; Shelkoplyas (2003), p. 62.

national legal systems, in which EU law enjoys supremacy and in which provisions included in the Treaties, Regulations and Decisions have direct effect.

As far as Directives are involved, it must be noted that international commercial arbitration characteristically involves disputes between individuals. Therefore, the structure of international commercial arbitration does not allow Directives to become relevant through horizontal effect.[260] This does not, however, lead to the assumption that Directives and their status in the EU regime cannot impact the review of arbitration agreements and arbitral awards.[261] This only holds true, as far as Directives are concerned as independent legal texts. National legislation transposing any given Directive remains in the realm of EU law. Transpositions are to be interpreted in the light of the Directive's wording, the respective interpretation by the ECJ and the purpose of the Directive.[262] This influences the respective review and as such the decisions made by arbitrators in the shadow of any looming review.

2.2.3 EU Law Constraints on the Procedure of Reviewing Arbitration Agreements and Arbitral Awards

The EU does not have a comprehensive system of courts at its command. Neither does there exist an EU law instrument which would replace the national codes of civil procedure. EU law is applied and enforced within the framework of its Member States' courts. This constellation causes tensions between EU law and the Member States' legal systems. The concept of procedural autonomy aims at alleviating these tensions. It also comes into play when Member State courts are called upon to enforce substantive mandatory EU law vis-à-vis international commercial arbitration. Therefore this section will outline the extent and restrictions of the Member States' procedural autonomy first (Sect. 2.2.3.1). In a second step the role played by the preliminary reference procedure at the interface with international commercial arbitration is analysed as the major procedural link between the Member States and the ECJ (Sect. 2.2.3.2). Lastly, the influence EU law exerts on the Member States' procedural rules for reviewing arbitration agreements and arbitral awards is examined (Sect. 2.2.3.3).

2.2.3.1 Procedural Autonomy

Member States enjoy what is referred to as procedural autonomy when enforcing EU law.[263] It means that substantive EU law is enforced according to the Member

[260] Shelkoplyas (2003), p. 71.

[261] *Shelkoplyas* ibid does in fact exclude Directives from her inquiry for that reason.

[262] Case 14/83 *von Colson and Kamann/Land Nordrhein-Westfalen* [1984] ECR 1891, para. 26.

[263] A term coined by the ECJ itself, cf. Case C-55/06 *Arcor/Federal Republic of Germany* [2008] ECR I-2931, para. 170; cf. Basedow (2014), p. 350.

States' own procedure. In the absence of EU law governing enforcement, each Member State is required to designate the courts having jurisdiction and to determine the procedural conditions governing the enforcement of EU law.[264] These procedural conditions can, for example, relate to rules of evidence, rules regarding *res judicata*, and rules pertaining to the passivity of judges or the role of parties etc.[265] Art. 19 (1) TEU recorded the principle to a certain extent in its second sentence by providing that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

The ECJ's case law has mostly concentrated on the Member States' autonomy to impose certain time limits on parties.[266] Apart from sporadic specific restrictions in EU law, procedural autonomy also finds general restrictions which translate the primacy and direct effect of EU law into the procedural context. Any complication of the conditions under which a substantive right is enforced procedurally affects the impact of the substantive right itself.[267] Procedural autonomy accordingly needs to be restricted in order to enable individuals to claim the full enforcement and protection of their rights derived from EU law.[268] These restrictions are the principles of effectiveness and equivalence.

The principle of equivalence requires Member States' rules for the enforcement of EU law to not be less favourable than those governing similar domestic actions.[269] In order to decide whether procedural rules are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar.[270] In this verification process, the court needs to take into account both the role played by those rules in the procedure as a whole and the operation of that procedure and any special features of those rules.[271]

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[264]Settled case law, cf. e.g. Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989 para. 5; Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705, para. 17; Case C-453/99 *Courage and Crehan* [2011] ECR I-6297, para. 29.

[265]Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR I-3595, para. 14; Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705, para. 22; Case C-242/95 *GT-Link v De Danske Statsbaner* [1997] ECR I-4449, para. 27; Case C-40/08, *Asturcom Telecomunicaciones* [2009] ECR I-9579, para. 37.

[266]Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989 para. 5; Case 45/76, *Comet v Produktschap voor Siergewassen* [1976] ECR 2053, para. 19; Biondi (1999); Baudenbacher and Higgins (2002), p. 8.

[267]Herb (2006), p. 184.

[268]Lenaerts et al. (2006), para. 3-003.

[269]Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989 para. 5; Case 199/82*Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR I-3595, para. 12; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, para. 43; Case C-430/93 and C-431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705, para. 17; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para. 74; cf. also Art. 325 (2) TFEU.

[270]Case C-78/98 *Preston and Others* [2000] ECR I-3201, para. 63.

[271]ibid.

The principle of effectiveness requires that national procedural rules for the enforcement of EU law are not framed so as to make it too difficult to exercise the rights conferred by EU law.[272] This standard calls for considerably less than providing EU law with the highest degree of effectiveness possible.[273] The precise threshold of difficulty that is required to verify a lack of effective procedural conditions has also changed over time. While at first the ECJ required the exercise of the rights derived from EU law to be practically impossible under the respective conditions,[274] it now also precludes Member States from setting up conditions that are excessively difficult to comply with.[275] The change in terminology conveys an increase in the pressure exerted by the principle of effectiveness on the procedural autonomy of Member States.

According to the 'rule of reason' test, the question whether a certain procedural rule makes the application of EU law impossible or excessively difficult must be determined with reference to the significance of that provision in the various national laws and the general principles of the domestic judicial system (e.g. legal certainty, proper conduct of the procedure).[276] This significance is then held against the impact of the rule on the application of a particular rule of EU law. The court makes this assessment on a case-by-case basis. Furthermore, the ECJ has substantiated the principle of effectiveness for EU law provisions which do not provide for sanctions for the case of infringement themselves. In that case Member States are called upon to set up 'effective, proportionate and dissuasive' sanctions.[277] After developing this standard in the field of criminal law, it was later extended to sanctions in administrative and civil law.[278]

[272]Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989 para. 5; Case 199/82, *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR I-3595, para. 12; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, para. 43; Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705, para. 17; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para. 74.

[273]Basedow (2014), p. 350.

[274]Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989 para. 5: 'impossible in practice'; Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR I-3595, para. 12: 'virtually impossible'.

[275]Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705, para. 17: 'virtually impossible or excessively difficult'; Case C-473/00 *Cofidis* [2002] ECR I-10875, para. 35: 'excessively difficult'; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, para. 28: 'in practice impossible or excessively difficult'.

[276]Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705, para. 19; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 14; Joined Cases 205/82 to 215/85 *Deutsche Milchkontor* [1983] ECR 2633, para. 30; cf. Meijer (2014), p. 45; Shelkoplyas (2003), p. 92.

[277]Case 68/88 *Commission v Hellenic Republic* [1989] ECR 2965, para. 24.

[278]Wagner (2006), pp. 352, 412.

2.2.3.2 Preliminary Reference

Along the lines of the doctrine of consistent interpretation, the ECJ has repeatedly found that every provision of EU law should be given a uniform interpretation irrespective of the circumstances in which it is applied.[279] In the court's view, honouring uniform interpretation is manifestly in the interest of the Community legal order in order to forestall differences of interpretation. National courts engaged in review proceedings at the interface with international commercial arbitration are explicitly called upon to ensure the uniform application of EU law.[280] It stands to reason that this statement was inspired by the fact that arbitrators are excluded from dispelling any uncertainties through a referral to the ECJ.[281]

2.2.3.3 The Review of Arbitration Agreements and Arbitral Awards

Within the limits of procedural autonomy, Member States can in principle autonomously regulate the procedure for the review of arbitration agreements and arbitral awards also in view of substantive EU law. However, the restrictions on procedural autonomy as expressed in the principles of equivalence and effectiveness also set boundaries in this respect. The effect of these boundaries will be analysed as they relate to the question whether the existence of review mechanisms is required at all Sect. 2.2.3.3.1 as well as the particular conditions for pre- and post-award review Sect. 2.2.3.3.2.

2.2.3.3.1 Existence of Review

In relation to the monitoring of awards for public policy violations the ECJ held in *Eco Swiss* that a Member State's court shall annul awards that violate Art. 85 EC Treaty (now Art. 101 TFEU) 'where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.'[282] Accordingly, it could therefore be argued that it would not violate the principle of equivalence if domestic rules of procedure did not allow for review in general and therefore also with regard to EU law.[283] Yet at least the principle of effectiveness requires a review. A wholesale exclusion of state court review would meet the threshold of making the exercise of rights under substantive mandatory EU law impossible or excessively difficult in practice—especially since the extramural

[279]Case C-88/91 *Federconsorzi* [1992] ECR I-4035, para. 7; Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, para. 40.

[280]Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, para. 40.

[281]Case 102/81 *Nordsee/Reederei Mond* [1982] ECR 1095. See supra 58.

[282]Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, para. 41.

[283]Cf. the position of Eilmansberger (2006), pp. 13–14.

status of international commercial arbitration in EU law jeopardises a self-sufficient exercise of those rights in arbitration.[284] A complete lack of review mechanisms would violate the ECJ's finding that there is a need that the application of EU law can be raised at least once before an instance that has the power to make a preliminary reference to the Court.[285] Accordingly, if a Member State excluded any review of arbitration agreements and arbitral awards for violations of EU law, the principle of effectiveness would require courts of that Member State to carry out such a review in light of rights conferred by EU law nonetheless.[286] As one opportunity for such a review is enough, it would appear that post-award review alone would be sufficient for this requirement, making pre-award review an autonomous choice by Member States.

2.2.3.3.2 Conditions of Review

Like all measures for the enforcement of EU law, the Member States' general system of review is also subject to the restrictions imposed upon them by the principles of equivalence and effectiveness. At the same time the ECJ and other EU institutions appreciate arbitration as an effective means of dispute resolution.[287] The way in which these preferences are balanced can influence a number of factors in the review mechanisms, most prominently the measure of review (Sect. 2.2.3.3.1) and the level of scrutiny (Sect. 2.2.3.3.2).

2.2.3.3.2.1 The Principle of Equivalence and the Measure of Review

When confronted with the Member States' systems of review, the ECJ repeatedly had to deal with procedural questions which arose because parties had failed to raise substantive mandatory EU law during arbitration. This brought about the question of whether national provisions precluding parties from doing so for the first time in the post-award stage were in accordance with EU law. The ECJ used the principle of equivalence to deal with the underlying problem within the procedural conditions already existing under the laws and conventions applicable in the Member

[284] See supra 57ff.

[285] Case C-312/93, *Peterbroeck* [1995] ECR I-4599, para. 17; cf. C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, Opinion of AG Saggio, paras. 41–42; Shelkoplyas (2003), p. 133.

[286] Hilbig (2006), p. 180 with reference to Case C-213/89 *Factortame and Others* [1990] ECR 2433.

[287] Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, para. 35; Proposal for a Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), COM (2011) 793 final; European Parliament, Resolution on encouraging recourse to arbitration to settle legal disputes, A3-0318/94 [1994] OJ C205/519-521; cf. also the Commission's use of arbitration clauses as commitments in merger control starting with Commission decision, 4 September 1992, IV/M.235, *Elf Aquitaine-Thyssen/Minol*, reported in [1992] OJ C232/14.

States. As the principle of equivalence requires that the enforcement of EU law is not less favourable than that of similar domestic actions, the ECJ repeatedly determined that only the protection of national rules of public policy is similar to the enforcement of mandatory substantive EU law. As will be outlined below, this can be pinpointed both in regard to competition law and the Unfair Terms Directive.

In *Eco Swiss* the Hoge Raad requested the ECJ to answer a question regarding the influence of EU law on the admissible extent of judicial passivity towards violations of EU competition law. Neither of the parties had relied upon a violation of EU competition law prior to the proceedings for the annulment of the award.[288] Under Dutch Law the courts were neither able to consider pleas on points of law advanced for the first time in annulment proceedings beyond the ambit of the dispute defined by the parties themselves nor to rely on facts or circumstances other than those which the claim had been based on in arbitration.[289] The referring court asked the ECJ whether EU law required it to allow the proceedings for annulment nonetheless.[290] In order to understand the approach which the ECJ took to this question it must be reiterated that the New York Convention and the Member States' arbitration laws require courts to review awards for potential violations of public policy *ex officio*.[291] Also under the applicable Dutch law, a rule that falls into the public policy exception is always reviewable and no restrictions of a procedural nature prevent its application.[292] Against this background, the ECJ dealt with the question on judicial passivity by effectively putting an equals sign between EU competition law and public policy.[293] As a consequence of this categorisation, the ECJ concluded that there was no need to directly answer the Hoge Raad's question on judicial passivity and preclusion as it had already done so indirectly by picking public policy as the measure of review.[294] The view that EU competition law has public policy character was already the common understanding of many courts even prior to *Eco Swiss*.[295]

The technique of answering questions on preclusion and judicial passivity by taking the roundabout route of choosing public policy as the applicable measure of review reappears in two cases decided by the ECJ in relation to the Unfair Terms

[288]Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, para. 14.

[289]Case C-126/97 *Eco Swiss v Benetton* [1999] I-3055, Opinion of AG Saggio, para. 12.

[290]ibid para. 30 (third question).

[291]Cf. Art. V (2) New York Convention, which allows refusal of recognition and enforcement 'if the competent authority (. . .) finds that 'the dispute lacked arbitrability or that recognition and enforcement of the award violates public policy'. In contrast, Art. V (1) New York Convention provides that recognition and enforcement may only be refused 'at the request of the party against whom it is invoked'.

[292]Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, para. 24.

[293]ibid paras. 37, 42; cf. Shelkoplyas (2003), p. 126.

[294]Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, para. 42.

[295]Cf. e.g. Bundesgerichtshof (Germany), 27 February 1969, *Fruchtsäfte*, NJW 1969, 978, 979–980; Cour d'appel de Paris (France), 14 October 1993, *Société Aplix v Société Velcro*, Rev. Arb. 1994, 165.

Directive. Unlike competition law, the Unfair Terms Directive was not commonly categorised as reflecting public policy. In *Mostaza Claro* a consumer only raised the unfairness of an arbitration agreement under the Spanish implementation of the Unfair Terms Directive in annulment proceedings, not having raised it in arbitration.[296] In *Asturcom* the consumer raised the unfairness in enforcement proceedings of a final award after neither participating in arbitration nor bringing an action for annulment of the award.[297] The Spanish courts requested the ECJ to determine whether it was in compliance with EU law to consider the consumers to be precluded from raising the unfairness of the arbitration agreement in annulment proceedings.

In both cases, the ECJ effectively again dealt with the underlying procedural questions in an indirect manner by replicating the Member States' existing systems of review and by utilising the principle of equivalence to determine public policy as the applicable measure of review. The provisions in dispute in *Mostaza Claro* and *Asturcom* were Art. 3 and Annex 1 (q) of the Unfair Terms Directive. They free a consumer from being bound by contractual terms that have the object or effect of excluding or hindering the consumer's right to exercise legal remedies. Annex 1 (q) specifically mentions terms requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions. Hence, the protection of the consumer's due process of law, fair access to justice and its relation to the validity of the arbitration agreement in post-award review was at the core of both *Mostaza Claro* and *Asturcom*.[298] The ECJ, however, did not focus on the measures of post-award review designed to safeguard due process or the validity of an arbitration agreement such as those included in Art. 41 (1) (a)–(d) of the Spanish Arbitration Law.[299] Instead, in *Asturcom* the court ultimately employed the principle of equivalence to weave the Unfair Terms Directive into the Member States' public policy as a measure of post-award review.[300] This allowed the ECJ to circumvent the questions relating to judicial passivity as courts review the adherence to a rule of public policy *ex officio*—while the arbitration agreement's validity and

[296]Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, paras. 17–18.

[297]Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, para. 47.

[298]Piers (2010), p. 224.

[299]Art. 41 Ley 60/2003 de 23 de diciembre, de Arbitraje: 'El laudo sólo podrá ser anulado cuando la parte que solicita la anulación alegue y pruebe (a.) que el convenio arbitral no existe o no es valido; (b.) que no ha sido debidamente notificada de la designación de un árbitro o de las actuaciones arbitrales o no ha podido, por cualquier otra razón, hacer valer sus derechos; (c.) que los árbitros han resuelto sobre cuestiones no sometidas a su decisión; (d.) que la designación de los árbitros o el procedimiento arbitral no se han ajustado al acuerdo entre las partes, salvo que dicho acuerdo fuera contrario a una norma imperativa de esta Ley, o, a falta de dicho acuerdo, que no se han ajustado a esta Ley.' (English version in ASA Bull. 2004, 695–721); cf. Poudret and Besson (2007), para. 786 for a comparative study showing that these questions are dealt with in a large variety of modern arbitration laws.

[300]Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, para. 52: '(. . .) 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'.

considerations of due process is not reviewed unless a party has raised it before the reviewing court.[301] Even more importantly, the defence of an invalid arbitration agreement is subject to preclusion if the party has not already relied on the invalidity before that arbitral tribunal. In contrast, the public policy exception is not subject to preclusion under Dutch, Spanish or any other modern arbitration law. Accordingly, the ECJ did not have to address the question whether the party relying on the Unfair Terms Directive was precluded from doing so.[302]

The ECJ has repeatedly pointed out that 'review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances'.[303] By consistently reaching for the top shelf and determining the public policy exception to be applicable in all of its decisions on the post-award review of arbitral awards, the ECJ found a way to safeguard the ability of Member State courts always to review arbitral awards in this respect. Thus, the ECJ put itself in a position to determine the procedural conditions which apply for review in this context. The differentiated system of review that has been established in the laws and conventions on international arbitration was not ignored but at least reinterpreted to meet the EU's policy goals. In particular the rigour with which the ECJ asserted the possibility of reviewing arbitral awards for their compliance with the Unfair Terms Directive, raises the question whether this was in effect an unwarranted violation of the Member States' procedural autonomy.[304] Nevertheless, the decisions stand and have raised the level of consumer protection in post-award review of arbitral awards, i.e. an area where an increase of cases has been expected and in fact promoted by the EU.[305]

Eco Swiss, *Mostaza Claro* and *Asturcom* relate to post-award review. As far as pre-award review is concerned, the decisions allow indirect conclusions. These conclusions are shaped by the substantive content of the respective piece of substantive mandatory EU law and can hardly be generalised. As far as the two decisions on the Unfair Terms Directive are concerned, there is a straightforward

[301] Piers (2010), p. 225; Bermann (2012a), p. 417.

[302] With regard to the Unfair Terms Directive, cf. Wagner (2007), p. 50. Note, however, that the ECJ held in *Asturcom* that peremptory time limits can be reasonable even in the case of potential public policy violations, cf. Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, paras. 44–48.

[303] Case *Eco Swiss v Benetton International* [1999] ECR I-3055, para. 35; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, para. 34.

[304] As implied by Wagner (2007), p. 49 and Piers (2010), p. 227.

[305] Cf. Commission Recommendation 98/257 of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes [1998] OJ L115/3; Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes [2000] OJ C155/1; Proposal for a Directive on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), COM (2011) 793 final; Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM (2011) 794 final.

connection between the mandatory nature of Art. 6 (1) Unfair Terms Directive[306] and an arbitration agreement having to be declared 'null and void' in pre-award review in the case of violation of mandatory law.[307] *Mostaza Claro* and *Asturcom* can be understood to assign reviewing courts the task of checking arbitration agreements for compliance in this respect. The two decisions have been interpreted to the effect that a national court must review arbitration agreements *ex officio* if a consumer raises the Directive at any point.[308] In contrast, EU competition law can affect the pre-award review of arbitration agreements on the level of arbitrability.[309] The arbitrability of disputes relating to EU competition law has received a sweeping acceptance in recent years. This is often credited to the ECJ's decision in *Eco Swiss*.[310] Although not explicitly dealing with arbitrability the decision can be held to signify the ECJ's indirect approval of arbitrability in this respect.[311]

2.2.3.3.2.2 The Principle of Effectiveness and the Level of Scrutiny

The principle of effectiveness requires the procedural rules not to be framed so as to make it too difficult to exercise the rights conferred by EU law.[312] This implies that those rights could in principle be exercised if the respective procedural rules did not

[306]Cf. Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, para. 36; Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, para. 52.

[307]See generally supra 21ff.

[308]Bermann (2012a), p. 417.

[309]Technically, an arbitration agreement can be 'null and void' if it is affected by Art. 101 (2) TFEU where it was prohibited under Art. 101 (1) TFEU and did not fall under an exception as provided for in Art. 101 (3) TFEU is void. The obvious object and effect of an arbitration agreement is merely providing a particular means of dispute resolution which makes per se anti-competitive effects of an arbitration agreement highly unlikely. Over 35 years ago the Commission mentioned that a trade association agreement that included an ouster of the jurisdiction of ordinary courts for the assertion of competition law rights constituted an aggravated violation of Art. 101 (1) TFEU which was further aggravated by the creation of an arbitral tribunal (Commission Decision, 2 December 1977, 78/59/EEC, *Centraal Bureau voor de Rijwielhandel* [1978] OJ L20, 18–27, para. 28). The topicality of this approach is more than doubtful given the Commission's move towards encouraging recourse to arbitration and using arbitration clauses as commitments in merger control starting with Commission Decision, 4 September 1992, IV/M.235, *Elf Aquitaine-Thyssen/Minol*, reported in [1992] OJ C232/14 and Art. 5 (3) Commission Regulation 1475/1995 of 28 June 1995 on the Application of Art. 85(3) of the Treaty to Certain Categories of Motor Vehicle Distribution and Servicing Agreements [1995] OJ L145/25. For more cases cf. Komninos (2001), p. 217, who coined the term 'from distrust to embrace' for the Commission's attitude to arbitration.

[310]Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055.

[311]Lew et al. (2003), para. 9–43; Mourre (2011), para. 1-144. Otherwise Eco Swiss would have been improper in developing standards for a review on public policy instead of arbitrability grounds, Hilbig (2006), p. 88; cf. Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055, paras. 36 and 37.

[312]Cf. supra 65.

exist.[313] This in turn allows the calling into question of whether rules establishing pre- or post-award review even qualify as procedural rules which can be measured against the principle of effectiveness.[314] After all, neither a referral to arbitration nor the recognition of an award, but only an agreement between the parties, can directly curtail rights conferred by the EU.[315] However, as far as it can be assumed that arbitration is an unfit venue for protecting those rights in the case of disputes, the decision in pre- and post-award review becomes a decision that is at least indirectly influenced by the principle of effectiveness. This indirect nature calls upon courts to set more lenient limits based on the principle of effectiveness—which are limits nonetheless.[316] Within those limits, Member State courts execute their review under EU law's 'state liability' doctrine.[317] This means that the enforcement of an arbitration agreement which causes a sufficiently serious or manifest breach of EU law may even make the respective Member State liable in damages.[318]

The aforementioned limits express themselves by requiring a certain level of scrutiny. If arbitration agreements or arbitral awards are reviewed too superficially, the level of scrutiny could ultimately (albeit indirectly) make it excessively difficult to successfully rely on a violation of substantive mandatory EU law. Depending on the particular part of substantive mandatory EU law in dispute, a review that is too superficial could be considered not to be 'effective, proportionate and dissuasive'.[319] In this context the ECJ has repeatedly referred to the requirement of judicial control underlying the constitutional traditions common to the Member States as well as Arts 6 and 13 European Convention for the Protection of Human Rights and Fundamental Freedom.[320]

The principle of effectiveness can have a different impact on the level of scrutiny depending on whether review occurs at the pre-award or the post-award stage.

The Principle of Effectiveness and the Pre-award Level of Scrutiny In pre-award review, the level of scrutiny relates to a prognosis made by the reviewing court. As a referral to arbitration is tantamount to a restriction of the parties' right to be heard by a national court in relation to rights conferred by EU law, it is a justified question under which conditions a referral violates the principle of effectiveness. On the one hand, it touches upon the question whether arbitration is an adequate

[313] Basedow (2014), p. 350.

[314] ibid.

[315] ibid.

[316] ibid.

[317] Cf. Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357; Case C-221/89 *Factortame and Others* [1991] ECR I-3596; Case C-224-01, *Köbler* [2009] ECR I-10290; cf. generally Aalto (2011).

[318] Blanke (2013), p. 248 with reference to the High Court's decision in *Cooper v Attorney General* [2008] EWHC 2178 (QB).

[319] Cf. Case 68/88 *Commission v Hellenic Republic* [1989] ECR 2965, para. 24.

[320] Case 222/84 *Johnston* [1986] ECR 1651, para. 18.

means for the resolution of disputes relating to EU law. So far, the ECJ has not directly decided on this question or on pre-award review in general.

Yet it gave some indications as to how courts should approach this question in its decision in *Evans* in 2003. In that decision, the Court decided that it does not automatically constitute a violation of the principle of effectiveness if parties who are asserting rights under a Directive are initially required to arbitrate disputes relating to rights arising under a Directive.[321] The case in question revolved around the judicial protection of victims under the English transposition of Art. 1 (4) of the Second Council Directive 85/4/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.[322] The English transposition gives a right to compensation to victims of accidents caused by uninsured or untraced vehicles against the Motor Insurers' Bureau. The Motor Insurers' Bureau is a private company which is funded by a portion of every insured driver's premium. When any application for a payment is made by a victim, the Motor Insurers' Bureau decides the amount owed but also gives victims a right of appeal to an arbitrator against their decision. The basis for arbitration could be found in an agreement concluded between the Motor Insurers' Bureau and the Secretary of State for the Environment, Transport and the Regions, which transposes Art. 1 (4) of the Second Council Directive on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.[323] The question that was ultimately referred to the ECJ was whether this use of arbitration as a primary remedy and the consequential restrictions of the victim's right to be heard in a court of law violates the principle of effectiveness.

[321] Case C-63/01 *Evans* [2003] ECR I-14447, paras. 47–58. What is noteworthy in this context is that the party in this case was a victim asserting its rights against an insurance company under the Second Council Directive on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles. Although insured individuals relying on their rights against an insurance company are often considered weaker parties who deserve special protection, the ECJ did not consider arbitration to be an inadequate means of dispute resolution *per se*.

[322] Which provides: 'Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied. This provision shall be without prejudice to the right of the Member States to regard compensation by that body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between that body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident.'

[323] The decision related to Clause 11 Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) Agreement 1998: '(1) The applicant shall have a right of appeal to an arbitrator against any decision notified to him by MIB (. . .)'. In its current version, the Agreement provides for arbitration in Clauses 18–25, cf. http://www.mib.org.uk/media/166886/2003-england-scotland-and-wales-untraced-drivers-agreement.pdf accessed 26 November 2016.

The court emphasised that there existed a number of opportunities for post-award review, including a challenge for serious irregularity of the award under Art. 68, a challenge on a point of law under Section 69 Arbitration Act (if granted leave by the High Court of Justice) and the possibility to appeal the decisions taken in the respective proceedings.[324] Additionally, the ECJ pointed out that it is necessary to ascertain that the right to a fair trial, such as being made aware of any matter that might be used against a party and having the opportunity to submit comments thereon, is made available in arbitration.[325] The ECJ put the required assessment in the hands of national courts.[326] The ECJ also referred to the fact that the arbitrator was to determine the amount of the compensation under the same conditions as those under which a court would do so pursuant to the provisions in force in the United Kingdom.[327]

This decision allows the conclusion that the principle of effectiveness requires any abstract assessment of the admissibility of arbitration to comprehensively take into account the conditions which will govern the procedure in arbitration itself and the extent of the possibilities to challenge the award. If the conditions under which arbitration occurs prevented the application of substantive mandatory EU law with certainty and if this was not correctable through the system of post-award review, referring the parties to arbitration would be a violation of the principle of effectiveness. But also where the violation could still be corrected in post-award review, the time and money expended in arbitration and possibly in unsuccessful pre-award review proceedings could still make it excessively difficult to assert rights under EU law. In *Evans*, the ECJ stressed that the use of arbitration allows the victim advantages in terms of speed and economy of legal costs.[328] If, however, the referral to arbitration becomes tantamount to a disproportionate increase of costs or a decrease of speed for the party asserting rights conferred by EU law, it can be conceived that at a certain point a violation of the principle of effectiveness becomes imminent. However, it should be stressed that there never is certainty *ex ante* as to what an arbitral tribunal will decide in regard to substantive mandatory EU law or how time- and money-consuming the procedure will be.[329] Pre-award review always involves a prognosis which at best can determine what a tribunal will probably do, but can never ascertain what it will do. The consequential question is whether the principle of effectiveness requires courts to refuse to refer parties to arbitration where the probability that an arbitral tribunal will ignore substantive

[324] Case C-63/01 *Evans* [2003] ECR I-14447, paras. 51–52, cf. supra 54ff.

[325] Case C-63/01 *Evans* [2003] ECR I-14447, para. 56.

[326] ibid para. 57.

[327] ibid para. 48.

[328] ibid para. 53.

[329] *Quinke* considers that it is already 'certain' that arbitrators will disregard the interests protected by substantive mandatory EU law if the parties have agreed on institutional arbitration in favour of an institution which regularly appoints arbitrators who do so, cf. Quinke (2007), pp. 249, 253. Although this might increase the likelihood that the arbitrator ultimately appointed will ignore substantive mandatory EU law, it does not constitute certainty.

mandatory EU law reaches a certain threshold. This question has widely been answered affirmatively, yet there is no consensus as to how this threshold should be defined.[330] The ECJ's stance in *Evans* implies that the principle of effectiveness does not require a fixed threshold which could be determined by reference to terms such as the (high) likelihood or the obvious risk that the respective provisions will not be applied. Instead it appears to require a context-sensitive analysis of the interplay of the conditions prevailing under the individual arbitration agreement and governing post-award review.

The Principle of Effectiveness and the Post-award Level of Scrutiny The post-award level of scrutiny relates to the degree of violation of substantive mandatory EU law required to merit an intervention as well as to the depth of the reviewing court's inquiry into the arbitral tribunal's decision on the merits. The required degree of violation has not received any direct attention by the ECJ as far as post-award review is concerned. Yet, a statement by the ECJ that is potentially relevant in an indirect way was made in reference to the review of foreign judgments under the Brussels Convention in the *Renault v Maxicar* decision in 2000. The ECJ held that although the Convention's wording does not indicate this, the review employed for the public policy exception in Art. 27 (1) Brussels Convention is limited to manifest breaches.[331] It conveys that mere errors of fact or law need not always suffice to trigger the public policy exception at the enforcement stage.[332] If this characterisation of the breach required was transferred to the review of arbitral awards under the spectre of public policy, it would be reminiscent of the French practice, which requires a violation of international public policy to be 'flagrant, effectif et concret'.[333]

However, the ECJ's motivation behind *Renault v Maxicar* makes it questionable whether it can be directly transferred to the review of arbitral awards. The facts of *Renault v Maxicar* involved the Corte d'Appello di Torino using public policy as a means to evade an obligation under EU law, i.e. to recognise a decision by the Cour d'appel de Dijon in accordance with Art. 26 Brussels Convention. Fostering the 'free movement of judgments' and limiting the power of Member States' courts in

[330]Kleinheisterkamp (2009a), p. 836; Rühl (2007b), p. 899; Quinke (2007), pp. 249, 253; Weller (2005), p. 184 with reference to choice-of-court agreements.

[331]Case C-38/98 *Renault v Maxicar and Formento* [2000] ECR I-3009, para. 30: 'In order for the prohibition of any review of the foreign judgment as to its substance to be observed, *the infringement would have to constitute a manifest breach* of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order' [emphasis added]. Cf. also Art. 45 (1) (a) Brussels I Regulation: 'On the application of any interested party, the recognition of a judgment shall be refused: if such recognition is *manifestly contrary* to public policy (ordre public) in the Member State addressed' [emphasis added]; Art. 21 Rome I Regulation: 'The application of a provision of the law of any country specified by this Regulation may be refused only if such application is *manifestly incompatible* with the public policy (ordre public) of the forum' [emphasis added].

[332]Bermann (2012a), p. 427, n. 121.

[333]Cf. supra 52f.

this respect can be singled out as driving factors behind the result reached in the decision.[334] The ECJ had an interest in admonishing the Italian court to respect the free movement of judgments instituted by an EU law instrument and had jurisdiction to do so. In contrast, the duty to recognise arbitral awards is not connected to an EU law instrument but to international conventions such as the New York Convention, where the ECJ lacks interpretative powers.[335] In fact, recital 12 Brussels Regulation [recast] points out specifically that its rules for the recognition of foreign judgments should not prejudice 'the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958'.[336] What decisively adds to this point is that arbitral tribunals can neither refer questions to the ECJ nor are directly bound by Art. 4 (3) EU Treaty—unlike the Italian Courts in *Renault v Maxicar*.[337] Accordingly, the arguments in favour of leniency in respect of a Member State court's decision do not hold the same currency in respect of arbitral awards.[338] Hence, it is doubtful whether *Renault v Maxicar* predetermines the ECJ's position towards the level of scrutiny in arbitral matters.[339] It should be noted that the ECJ did not take up any of the chances to extend the requirement of a manifest violation to the realm of the review of arbitral awards in its decisions in this area.

At first sight the depth of courts' post-award inquiries into arbitral tribunals' decisions has been addressed in a little more detail than the required degree of violation. The ECJ has stressed on two occasions that the Member States courts' review of arbitration awards 'may be more or less extensive depending on the circumstances'.[340] When read in context, however, this in fact was a description of the existing conditions of review in the Member States' arbitration laws, which do in fact differ and did not relate to requirements which there may be under EU law.[341] As a consequence, these decisions have been considered entirely silent on the level of scrutiny.[342]

At least Advocate General Saggio addressed the level of scrutiny more directly in his opinion on *Eco Swiss*, i.e. on one of the two occasions where the ECJ used the 'more or less extensive depending on the circumstances' description of post-award

[334]Liebscher (2011), para. 23-109.

[335]Bermann (2012a), p. 427, n. 121.

[336]Recital 12 of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

[337]Cf. reference in Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055, para. 40.

[338]Basedow (2004), p. 315; Hilbig (2006), p. 25; cf. also Baudenbacher and Higgins (2002), p. 13.

[339]Liebscher (2011), para. 23-109. The same caveat applies for Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1956, para. 37.

[340]Case 102/81 *Nordsee v Reederei Mond* [1982] ECR 1095, para. 14; Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055, para. 32.

[341]Landolt (2012), p. 4.

[342]ibid; Hilbig (2006), p. 53; Liebscher (1999), p. 93.

review. According to Advocate General Saggio's opinion, a potential violation of a public policy rule may

> be raised by the court that is called upon to determine the validity of the award even if, as in the present case, its task is confined to reviewing the legality of the decision, provided however that the grounds for nullity are apparent from the documents in the case and no specific inquiry has to be undertaken into matters of fact.[343]

The Advocate General's line of thought is echoed in one specific reference in *Asturcom*. As pointed out earlier, in *Asturcom* the ECJ utilised the principle of equivalence to hold that potential violations of the Unfair Terms Directive must be reviewed *ex officio* under the spectre of public policy. What is interesting is that the ECJ found this to be the case for situations where the reviewing court 'has available to it the legal and factual elements necessary for that task'.[344] Hence, it would seem that the ECJ does not require specific inquiries to be made if the court does not have the necessary legal and factual elements available to it. It remains unclear whether courts are then also prevented from making specific inquiries in this respect as envisaged by Advocate General Saggio in his opinion in *Eco Swiss*. The comment does not also convey what constitutes necessary elements in this sense. These developments reveal an appreciation of at least a certain degree of restraint by reviewing courts on the part of the ECJ. What this degree exactly is and in particular what degree would be too low to conform to the principle of effectiveness cannot be gathered from the ECJ's case law.[345]

2.2.4 *EU Law Constraints on the System of Review Through Conflict of Laws Rules*

The EU has extended its regulatory efforts to the field of conflict of laws significantly in recent years. Whether and how this impacts the law applicable in international commercial arbitration and the respective review by Member State courts is part of an expansive debate. It has recently rekindled with the introduction of Regulation (EC) 593/2008 (Rome I Regulation).[346] In order to analyse the ability of

[343]Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, Opinion of AG Saggio, para. 42.

[344]Case C-40/08, *Asturcom Telecomunicaciones* [2009] ECR I-9579, para. 53. In this respect the ECJ referred to *Pannon* where it had used this restriction when describing the Member States' courts' role when carrying out an *ex officio* review for the effectiveness of the protection under the Unfair Terms Directive in case the parties concluded a choice of court agreement; cf. Case C-243/08 *Pannon v Erzsébet Sustikné Győrfi* [2009] ECR I-4713, paras. 32, 37. The court reiterated this restriction with repsect to the review of arbitral awards in Case C-76/10, *Pohotovost'* [2011] ECR I-11561, paras. 51, 53.

[345]Cf. Landolt (2012), p. 4, who asserts that these statements will at least be relevant when the question of the level of scrutiny in Member State public policy review of international arbitrations finally arrives before the ECJ.

[346]Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6.

EU law to constrain arbitral tribunals to adhere to substantive mandatory EU law by means of the Rome I Regulation, the content and status of existent conflict of laws rules within the regulatory framework sustaining international commercial arbitration will be outlined first (Sect. 2.2.4.1). Second, the Rome I Regulation and its ability as an effective constraint regarding the application of overriding mandatory provisions in international commercial arbitration will be analysed (Sect. 2.2.4.2).

2.2.4.1 Conflict of Laws Rules in the Regulatory Framework for International Commercial Arbitration

The regulatory framework for international commercial arbitration provides a possible starting point for the decision by arbitrators as to what law to apply and whether to override a certain choice of law. The impact in this respect can be differentiated between situations in which the party made a choice of law and situations in which they failed to do so. The two situations will be addressed separately, turning first to the situation in which the parties made a choice of law (Sect. 2.2.4.1.1) and second to the situations in which they failed to do so (Sect. 2.2.4.1.2).

2.2.4.1.1 Parties Making a Choice of Law

In principle, all rules which can become relevant in this respect give preference to the law chosen by the parties. This applies, for example, to the European Convention[347] as well as the Belgian,[348] English,[349] French[350] and German[351] arbitration

[347] Art. VII (1) European Convention on International Commercial Arbitration: 'Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.'

[348] Art. 1710 (1) Judicial Code (Belgium): 'The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.'

[349] Art. 46 (3) Arbitration Act (England): 'If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. The UNCITRAL Model Law adopts a comparable approach', cf. Art. 28 (1) UNCITRAL Model Law: 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.'

[350] Art. 1511 Nouveau Code de Procédure Civile (France): 'The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties (. . .).'

[351] § 1051 (2) Zivilprozessordnung (Germany): 'Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected.'

laws. Also the arbitration rules of all major institutions acknowledge that the law chosen by the parties should govern the resolution of their dispute on the merits.[352]

The conflict of laws rules directly addressing arbitral tribunals allow for a high degree of freedom for parties to choose rules which can be argued to not belong to the category of laws in the traditional sense—e.g. the *lex mercatoria*.[353] While the nature and content of such a *lex mercatoria* is subject to fierce debate, it has had an irrefutable influence on arbitral practice.[354] Parties to arbitration agreement are also considered to enjoy the liberty to have their dispute decided by 'rules of law'[355] or 'other considerations'.[356] In this instance several bodies of a-national soft law may be used, e.g. the UNIDROIT Principles of International Commercial Contracts[357]or the Principles of European Contract Law. The range of possibly relevant sources extends even further under the notion of *lex mercatoria* to customs, practices and usages perceived as common in a certain sector of trade.[358] Furthermore, it is widely recognised that parties may free the arbitral tribunal from a duty to apply legal principles by authorising it to act as *amiables compositeurs*, i.e. allowing for an award based on motivations of equity and fairness.[359] It is therefore equally possible that the parties choose a Directive to be applied directly.[360] Unlike the realm of Member States where Directives cannot be directly relied upon, the liberty with which the law applicable in arbitration is determined allows parties to make this choice if accompanied by an arbitration agreement. Arbitral practice provides examples in which an arbitral tribunal directly applied the Directives themselves.[361]

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[352]E.g. according to Art. 17 (1) ICC Rules; Art. 22.3 LCIA Rules; Art. 33 (1) Swiss Rules of International Arbitration; Art. 28 (1) AAA International Arbitration Rules; Section 23 (1) DIS Arbitration Rules; Art. 24 (1) VIAC Arbitration Rules; Section 26 (1) Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation; Rule 27.1 SIAC Rules; Art. 59 (a) WIPO Rules.

[353]Shelkoplyas (2002), p. 265.

[354]*Dasser* provides a collection of awards were *lex mercatoria* was applied, cf. Dasser (1989), p. 75ff.

[355]Art. 28 (1) UNCITRAL Model Law; § 1051 (1) Zivilprozessordnung (Germany).

[356]Art. 46 (1) (b) Arbitration Act (United Kingdom).

[357]Cf. Wichard (1996), p. 269; Vischer (1998/99), pp. 208–209.

[358]For a more detailed analysis of the content of the *lex mercatoria*, cf. Dasser (1989), p. 75ff, Grigera Naón (1992), p. 26ff.

[359]Cf. Art. 28 (3) UNCITRAL Model Law, § 1051 (3) Zivilprozessordung (Germany).

[360]ICC Award 12045/2003, Clunet 2006, 1434, 1435. Disdain for the otherwise applicable strict Belgian transposition of the Commercial Agents Directive provided the parties' obvious point of departure for drafting such a choice of law. The arbitral tribunal applied the Directive directly relying on the express choice of the parties. Arbitrators facing a similar choice of law clause today could consider the effect of the ECJ's decision in *Unamar v NMB* and in particular the pending decision by the Cour de cassation as to how crucial they consider the elevated level of protection in the Belgian transposition to be, cf. infra 202ff.

[361]ICC Award 9032/1998, 12 ICC Bull. (2001), 123; ICC Award 12045/2003, Clunet 2006, 1434, 1435.

Yet the application of (overriding) mandatory provisions is never addressed specifically in conflict of laws rules addressing arbitral tribunals.[362] Thus, they would not interfere with a choice by the arbitrator to uphold a choice of a law which negates the applicability of substantive mandatory EU law.[363] The arbitral tribunal's treatment of the parties' choice of law is subject to post-award review in some countries, but only in so far as the arbitrator ignores the choice made by the parties. This is the case, for example, for France where Art. 1520 (3) NCPC is understood to imply that an award will be annulled if the parties' choice of law is ignored.[364]

2.2.4.1.2 Parties Not Making a Choice of Law

Parties do not always make use of their freedom to choose the law applicable to the merits.[365] The applicable law or rules must then be determined by the arbitral tribunal. The arbitrators will connect the dispute with one or several sets of rules upon which they will base their decision. In doing so arbitrators can choose the substantive law without reference to any conflict rules ('direct approach' or 'voie directe') or they can adhere to conflict rules set out in a certain legislative text which they deem applicable ('indirect approach').[366] In either of the two cases, they will have to find connecting factors between the dispute and their decision on the applicable law. In doing so, the arbitrators can be guided by the connection of the dispute with the seat of arbitration, the place of performance, the nationality or domicile of the parties, a combination of connecting factors etc.[367] Where the

[362] Ungeheuer (1996), p. 167.

[363] In ICC Arbitration, a minor bump in the road to the application of the law thus chosen by the parties could be Art. 6 of the Internal Rules of the International Court of Arbitration according to which '(. . .) the court considers to the extent practicable the requirements of the mandatory law at the place of arbitration.' This provision, however, only refers to the scrutiny which is carried out by the International Court of Arbitration after the arbitral tribunal has drafted the award. This is not truly a restriction on the conflict of laws analysis of the arbitral tribunal but instead a measure to safeguard the finality of the award, cf. generally Wilkens (2012), pp. 259–260.

[364] Gaillard and Savage (1999), para. 1637; Delvolvé et al. (2009), para. 445; cf. Born (2014), p. 2776 with reference to *Compare Stawski Distributing Co. v Browary Zwiec SA*, 2005 US App LEXIS 4143 (7th Cir 2005).

[365] Two somewhat outdated accounts show that only around 25–30% of all contracts surfacing in arbitration proceedings include a choice of law clause by the parties, Gaudet (1989), p. 308; ICC International Court of Arbitration (1990), p. 22; a more recent study concluded that a choice of law had been made in 80–85% of the requests for arbitration filed with the ICC, Cuniberti (2014), p. 398.

[366] Within the realm a possible source of reference for arbitrators is, for example, the Convention on the Law Applicable on Agency of 1978. The Convention entered into force on 1 May 1992 for France, Argentina and Portugal and on 10 October 1992 for the Netherlands. It provides in Art. 6 that in the absence of a choice by the parties, the internal relationship of the principal and the agent is governed by the law of the country where the agent has his business establishments. If the agent has to carry out his activities in the principal's country, the law of that country applies, cf. generally Basedow (1981), p. 206; Verhagen (1995), pp. 126–131, 210–225.

[367] Lew et al. (2003), paras. 17–49ff.

tribunal ultimately arrives at the applicability of a Member State's law, this does not automatically imply that overriding mandatory EU law is also applicable.[368]

The European Convention includes a provision directly addressing which law an arbitrator should apply if the parties do not make a choice.[369] It obliges arbitral tribunals to apply a rule of conflict to arrive at the proper law of the contract. The arbitrators are free to choose which of the numerous conflict of laws approaches they deem applicable without there being any qualification of what should be deemed applicable. This might include applying the conflict of laws rules of the seat of arbitration, the place most closely connected with the contract, or the place where the parties have their place of business etc. Additionally, the Convention describes the arbitrators' task as a search for the 'proper law' implying the possible choice is limited to national laws, hence ruling out the application of a-national rules of law. National arbitration laws typically include a provision which stipulates how arbitrators should determine the law which is to be applied by an arbitrator in the absence of a choice of law by the parties. They follow slightly different approaches. French arbitration law leaves it to the arbitral tribunal to directly apply the applicable substantive rules of law.[370] Under this regime, the arbitral tribunal is free to decide which method it will use to determine the applicable law, i.e. adopting a conventional conflict of laws method, combining a number of methods or choosing a substantive law directly. Additionally, it can choose a-national rules of law such as the UNIDROIT Principles of International Commercial Contracts etc. A comparable category of arbitration laws such as the one in Spain[371] and the one in Hungary[372] limits the arbitrators' choice to the substantive laws of states but leaves it to them how they arrive there. In contrast, English[373] and

[368] Beulker (2005), p. 241.

[369] Art. VII (1) European Convention on International Commercial Arbitration: 'Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.'

[370] Art. 1511 Nouveau Code de Procédure Civile (France): 'The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate.' cf. Art. 1054 para. 2 WBR (Netherlands): 'If a choice is made by the parties, the arbitral tribunal shall make the award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall make the award in accordance with the rules of law which it considers appropriate.' (my translation).

[371] Art. 34 (2) Ley 60/2003 de 23 de diciembre, de Arbitraje (Spain): 'Failing any designation by the parties, the arbitrators shall apply the law that they consider appropriate.'

[372] Section 49 (2) Act LXXI of 1994 on Arbitration (Hungary): 'Failing any designation of law by the parties, the applicable law shall be determined by the arbitral tribunal.'

[373] Section 46 (3) Arbitration Act (England): 'If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.' The UNCITRAL Model Law adopts a comparable approach, cf. Art. 28 (1) UNCITRAL Model Law: 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.'

Belgian[374] arbitration law mirror the approach taken by the European Convention, i.e. they leave it to the arbitral tribunal which conflict of laws rules it applies but only admit it to arrive at laws in the proper sense. Lastly, a number of arbitration laws equally oblige arbitral tribunals to apply a conflict of laws rule but do not give them the freedom to choose the conflict of laws. German arbitration law prescribes specialised conflict of laws rules, i.e. the arbitral tribunal is bound to apply the law with which the case is connected most closely.[375] As far as arbitration rules are concerned, it can succinctly be concluded that all of the world's leading arbitration institutions permit the arbitral tribunal to apply the laws or rules of laws which it deems applicable—whether with reference to a certain conflict of laws approach or not.[376]

Yet those individual provisions are not mandatory in a strict sense as to constrict arbitrators to decide in accordance with them.[377] A leading treatise on international commercial arbitration understands even the most specific conflict of laws rules in the various arbitration laws as a mere tool that arbitrators may refer to—without any obligation to actually apply them.[378] This holds true with regard to the more liberal provisions contained in the French and Belgian legislation, but also regarding stricter regimes. Even strict regimes such as the one in Germany cannot be considered to actually constrain arbitrators as they are not directly linked to any sanction on arbitrators who ignore the respective provisions. Accordingly, a choice of law decision that deviates from the respective provisions does not in and of itself create the potential for setting the respective award aside or refusing its enforcement. Limits for the application of substantive law only become apparent when an award disregards certain substantive law provisions which a reviewing court deems to be applicable and if as a consequence the award interferes with the public policy of the reviewing state. What can be concluded despite the differences among the individual jurisdictions is that in the absence of an agreement by the parties arbitral tribunals in fact enjoy virtually unrestricted freedom to determine the law applicable with respect to choice of law.[379]

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[374] Art. 1710 (2) Judicial Code (Belgium): 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.'

[375] § 1051 (2) Zivilprozessordnung (Germany): 'Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected.'; cf. Art. 834 Codice di Procedura Civile (Italy): 'If the parties do not make a choice, the law with which the relationship has its closest connection shall apply.'

[376] E.g. Art. 17 (1) ICC Rules; Art. 22.3 LCIA Rules; Art. 33 (1) Swiss Rules of International Arbitration; Art. 28 (1) AAA International Arbitration Rules; Section 23.1 DIS Arbitration Rules; Art. 24 (1) VIAC Arbitration Rules; Section 26 (1) Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation; Rule 27.1 SIAC Rules; Art. 59 (a) WIPO Rules.

[377] Blessing (1999a), p. 219; Jacobs (2015), p. 293.

[378] Kleinheisterkamp (2009b), p. 107: 'Arbitrators are simply not bound by the conflict-of-laws rules binding judges.'; Lew et al. (2003), para. 17–45, cf. para. 17–43 referring to § 1051 Zivilprozessordnung (Germany).

[379] Grigera Naón (1992), p. 41; Blessing (1999a), p. 212; Shelkoplyas (2003), p. 266; Silberman and Ferrari (2011), p. 309; cf. ICC Award 1422/1966, Clunet 101 (1974), 884 basing its decision on a self-established 'discretion' in choosing the applicable law.

2.2.4.2 Conflict of Laws Rules in the Rome I Regulation

Apart from rules specifically addressing the decision taken by arbitrators, the general conflict of laws rules which primarily address national courts could become relevant in respect to the question whether a choice of a non-Member State law should be overridden. In contrast to the rules specifically addressing arbitral tribunals, those rules often include specific provisions for the application of overriding mandatory provisions.[380] An analysis of whether this type of provision effectively constrains arbitral tribunals can be carried out for the Rome I Regulation. The Rome I Regulation provides for the parties' freedom of choice regarding the law applicable to a contract in Art. 3 (1). The potential scope of laws in this sense is generally understood to exclude non-state bodies of rules such as the *lex mercatoria* or the UNIDROIT Principles of International Contract Law.[381] Where the parties failed to make a choice of law, Art. 4 (1) Rome I Regulation stipulates a differentiated system to determine the applicable law for a number of contract types.

Unlike the conflict rules in arbitration's regulatory framework, the Rome I Regulation directly addresses the application of mandatory law. In this respect, the Regulation includes a differentiated system on the law applicable in contractual relationships and also addresses how Member States' courts are to deal with 'overriding mandatory provisions' and 'provisions which cannot be derogated from by agreement'.[382] Mandatory provisions are defined in Art. 9 (1) according to which

> [o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.[383]

Overriding mandatory provisions in force at the forum are enforced regardless of any choice of law by the parties or other connecting factors pointing towards another law.[384] If the contract is performed in another state, overriding mandatory provisions of that state may be given effect according to Art. 9 (3) insofar as they

[380] Cf. Art. 7 (1) Rome Convention; Art. 19 §187(2) of the Restatement (Second) Conflict of Laws (USA); Arts 18, 19 Bundesgesetz über das International Privatrecht (Switzerland).

[381] Mankowski (2011a), pp. 30, 40; Martiny in: Säcker et al. (Eds.) (2015), Art. 3 VO (EG) 593/2008, para. 33.

[382] See Recital 37.

[383] The definition was inspired by Joined Cases C-369/96 and C-376/96 *Arblade and others* [1999] ECR I-8453, para. 30.

[384] Martiny in: Säcker et al. (Eds.) (2015), Art. 9 VO (EG) 593/2008, para. 104.

render the performance of the contract unlawful. Despite the fact that Art. 9 (1) requires provisions to be regarded as crucial for a country, the provision is also regarded to apply where that crucial nature is conferred by the EU.[385]

In addition to overriding mandatory provisions, the Rome I Regulation addresses the application of provisions which cannot be derogated from by agreement. The latter are required to be construed less restrictively than overriding mandatory provisions.[386] What is meant by provisions which cannot be derogated from by agreement is essentially the same as internally mandatory provisions.[387] For example, according to Art. 3 (3), the applicability of those provisions cannot be displaced in a situation where a contract is objectively connected only with the law that includes these provisions but the parties choose another law. Art. 3 (4) extends this notion to EU law which cannot be derogated from by agreement where a choice of law would make the law of a non-EU member applicable for a contract exclusively connected to the EU.[388] In this respect particular account must be taken of the Directives and implementations of Directives.[389] Provisions which cannot be derogated from by agreement are also provided for in other parts of the Regulation limiting the parties' freedom to choose the law applicable in contracts involving consumers (Art. 6 (2)), in employment contracts (Art. 8 (1)) and regarding requirements of form in contracts of rights *in rem* in immovable property or the tenancy of immovable property (Art. 11 (5)).

Art. 3 (3), Art. 3 (4) and Art. 9 Rome I Regulation pose direct answers to the challenge arbitrators encounter in relation to the application of substantive mandatory EU law. The obvious question is whether the Rome I Regulation is a direct constraint on arbitral tribunals if they are seated in a Member State. As far as the arbitration agreement is concerned, Art. 1 (2) (e) Rome I Regulation expressly excludes arbitration agreements from its scope. However, in respect of the law applicable on all other contractual obligations which can play a role in arbitration, it remains a controversial question whether the Rome I Regulation is applicable in arbitration. The majority view holds that the Rome I Regulation does not apply in arbitration.[390] Proponents of this view underline that specialised conflict rules already exist for the law applicable on the merits in arbitration laws and that the

[385]Plender and Wilderspin (2009), para. 12-046.

[386]Cf. Recital 37 Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

[387]Plender and Wilderspin (2009), para. 12-003.

[388]Art. 3 (4) had been proposed by the Max Planck Institute for Foreign Private and Private International Law based upon the assertion that although'(. . .) the European Union is not a state, the level of legal integration that the Member States have achieved today justifies this extension of a conflicts approach that was originally developed for purely domestic cases.', Max Planck Institute for Foreign Private and Private International Law (2004), pp. 1, 17.

[389]Goldplating implementations can be disregarded, cf. Martiny in: Säcker et al. (Eds.) (2015), Art. 3 VO (EG) 593/2008, para. 102.

[390]Pfeiffer (2009), p. 181; Wegen (2009), p. 933; Marella (2008), p. 107; cf. regarding the identical Art. 1 (2) (d) Rome Convention on the law applicable in contractual obligations of 1980, i.e. the

Regulation never mentions arbitral tribunals or awards—unlike its references to courts (e.g. Recital 37, Art. 12 (1) (c)) and judgments (e.g. Recital 6). The opposing view points out that the Rome I Regulation takes priority over any specialised conflict rules through the primacy of EU law also regarding the law applicable to the merits of a dispute in arbitration.[391]

The question whether the Rome I Regulation poses a constraint for arbitrators is, however, decided on a different plane. Determining whether the Regulation demands to be applied does not answer the question whether the practical realities of arbitral tribunals effectively constrain them do so. Also those in support of the view that arbitrators are required to apply the Rome I Regulation recognise that the ultimate reason arbitrators would do so is an indirect one. Specifically in view of substantive mandatory EU law it is accepted that only the consequences of judicial review would facilitate the application of the Rome I Regulation.[392] In view of the aforementioned extramural status of arbitration, it stands to reason that arbitrators will not apply the Rome I Regulation by directly submitting themselves to EU law's supremacy. The motivation for arbitrators to treat substantive mandatory EU law as envisaged in the Rome I Regulation depends on the arbitrators' benefit from acknowledging the Rome I Regulation—which in turn depends on the role played by conflict of laws rules in post-award review.[393] The same holds true for any other conflict of laws rule which addresses the treatment of overriding mandatory provisions.

In all Member States, the review of an arbitral award with regard to substantive mandatory law is a review of the results reached by the arbitral tribunal and not a review of the route taken by the arbitral tribunal to arrive at these results.[394] When facing the question whether to override the choice of a non-Member State's law in favour of provisions providing for termination fees in accordance with the Commercial Agents Directive arbitrators could have recourse to the rules in the Rome I Regulation and in particular rules relating to mandatory rules. However, ignoring or misapplying conflict of laws rules does not in and of itself pose a ground for the annulment or non-enforcement of an arbitral award.[395] Conflict of laws rules merely pertain to the route taken by the tribunal to arrive at a certain result, i.e. not to the result itself.

It must not be overlooked that ignoring mandatory laws can of course be sanctioned through annulment or non-enforcement where it results in a violation

predecessor of the Rome I Regulation: von Schlabrendorff (1997), p. 254; Junker (2000), p. 454; Zobel (2005), p. 107; Beulker (2005), pp. 194–195.

[391]Mankowski (2011a); Mankowski (2011b), pp. 1022–1025, 1028; Fawcett and Carruthers (2008), pp. 684–685.

[392]Mankowski (2011a), p. 43: 'Denn die Nichtberücksichtigung von Eingriffsrecht eines späteren Vollstreckungsstaates würde die dortige Vollstreckbarerklärung massiv gefährden.'

[393]Cf. Silberman and Ferrari (2011), p. 309.

[394]Cf. Art. V (2) (b) New York Convention, which does not require the award itself to be contrary to public policy but 'the recognition or enforcement of the award', cf. supra 44.

[395]Grimm (2012), p. 196; Otto and Elwan in: Kronke et al. (Eds.) (2010), Art. V (2), 365.

of grounds set out in the applicable measures of review.[396] As was demonstrated above, the ECJ uses the principle of equivalence to connect substantive mandatory EU law and Member States' notions of public policy. National courts use these notions in their judicial review of arbitration, for example pursuant to Art. V (2) (b) New York Convention. The potential sanction in this respect is, however, not a sanction for the non-application of Art. 9, Art. 3 (3) or Art. 3 (4) Rome I Regulation or any other conflict of laws rule pertaining to mandatory provisions. Instead it is a sanction for the violation of a notion of public policy reflected in primary EU law, a Regulation, or a Directive or its transposition.[397] Much like public policy, all other measures of pre- and post-award review have self-sufficient systems to determine the applicable law which do not leave room for the application of the Rome I Regulation. Therefore, the Rome I Regulation does not pose a direct constraint to a Member State reviewing arbitration agreements or arbitral awards and—by extension—neither does it pose a direct constraint to arbitral tribunals confronted with the overriding application of substantive mandatory EU law.

Obviously, arbitrators can voluntarily adhere to the rules of the Rome I Regulation or any other conflict of laws rules they deem applicable. They may do so in order to make their decision more comprehensible to the parties and a reviewing court. If they do so, this does not mean that they were constrained to do so.[398] For example, an award which revolved around the transferability of tax benefits made under Turkish law expressly draws upon the Swiss conflict of laws rule for the applicability of foreign overriding mandatory provisions.[399] The relevant contract was governed by Swiss law. The tribunal relied on the Swiss conflict of laws system and ultimately followed the approach under Turkish law on the transferability of tax benefits. However, the arbitral tribunal did not simply consider itself bound by the Swiss conflict of laws system. Instead, it underlined that it would not strictly apply but merely take the Turkish law 'into account', referring to a number of decisions rendered in review proceedings which showed that its approach would not endanger enforcement and closed its considerations by stating that 'the Arbitral Tribunal shall make every effort to make sure that the award is enforceable at law'.[400] This shows that the driving force in fact for the decision to apply was not the Swiss conflict of laws system itself but the system of review.

[396]The same can be said about an arbitral tribunal ignoring an express choice of law by the parties, cf. Silberman and Ferrari (2011), p. 312.

[397]Accordingly, in *Nordsee* the ECJ did not mention the application of the Rome Convention or other conflict rules by arbitral tribunals in order to safeguard the application of EU law. Instead the ECJ stressed that 'if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them', Case 102/81 *Nordsee v Reederei Mond* [1982] ECR 1095, para. 14.

[398]Cf. generally ICC Award 6379/1990, YB Comm. Arb. XVII (1992), 212, 218, Beulker (2005), p. 265; Ungeheuer (1996), p. 167.

[399]ICC Award 8528/1996, YB Comm. Arb. XXV (2000), 341.

[400]ibid.

2.3 Summary

1. The systems of review have been harmonised within the four surveyed Member States to an extent which means that arbitration agreements will be recognised in principle and arbitral awards will be enforced within certain limits. There remains, however, enough leeway for individual jurisdictions to carry out review in idiosyncratic ways in spite of international conventions and comparable national arbitration laws.
2. The exact shape of the limits within which arbitration agreements and arbitral awards will not be recognised is difficult to make out. An assessment of the systems of review in Germany, France, Belgium and England has shown that in particular the content of public policy and the level of scrutiny with which courts carry out their review are difficult to describe in general terms.
3. EU law helps to salvage those uncertainties in individual cases while it aggravates it in others. It salvages them in so far as the ECJ has equated certain provisions with the Member States' relevant measures of review. Nevertheless Member State courts appear to remain in a position to effectively weigh their appreciation of arbitration higher than the compliance with a certain part of EU law. Equally, they can attach particular importance to certain provisions of EU law and disregard parties' freedom to agree to dispute resolution through arbitration without provoking a conflict with EU law.
4. Also in so far as the level of scrutiny is concerned, the Member States maintain far-reaching procedural autonomy. This has the effect that the application of substantive mandatory EU law occurs under conditions which only selectively differ from those governing application of mandatory law in general.
5. The Rome I Regulation cannot constrain arbitrators to adhere to its conflict of laws rules and in particular not its rules on the application of substantive mandatory law. Just like the conflict of laws rules addressing arbitrators included in international conventions, national arbitration laws and arbitration rules, the conflict of laws rules of the Rome I Regulation do not directly translate into a measure of review.

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Chapter 3
Assessment of Arts 17 to 19 Commercial Agents Directive and Their Impact on Cross-Border Commercial Agency

In so far as parties can foresee the applicability of certain parts of substantive mandatory EU law, their reaction depends on the specific scope and effect of that piece of EU law. If all parties to a contract prefer a solution which differs from substantive mandatory EU law, they will attempt to use party autonomy to evade the respective provisions, e.g. by opting for the applicability of a non-Member State's law which they deem preferable. Whether an arbitral tribunal will allow parties to make credible commitments in this respect depends on the consequences which upholding the parties' choice will have for the arbitrators. Those consequences in turn depend on the results which can be reached in the review proceedings. Hence, determining in a generalised manner whether substantive mandatory EU law is over-enforced or under-enforced in international commercial arbitration is not possible. The question can be handled best by narrowing down the analysis on one particular example. For the purpose of this inquiry, the appropriate example is the Commercial Agents Directive's regime for indemnity or compensation to the commercial agent upon termination.[1]

As will be outlined in a first step, the Directive's regime for indemnity and compensation is an example in point of the EU resorting to mandatory substantive law (Sect. 3.1). In a second step, the Directive's purposes as well as the effects which it has for the parties will be outlined and analysed from an economic perspective (Sect. 3.2). A third step will further specify the economic analysis for international commercial agency contracts taking into account the ECJ's position in this respect (Sect. 3.3).

[1] See supra 11f.

J. Engelmann, *International Commercial Arbitration and the Commercial Agency Directive*, International Law and Economics, DOI 10.1007/978-3-319-47449-6_3

3.1 Mandatory Regime for Indemnity and Compensation in the Commercial Agents Directive

The Commercial Agents Directive created a harmonised regime for the law of self-employed commercial agents within the EU.[2] The Commercial Agents Directive defines a commercial agent as a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of the principal or authority to negotiate and conclude such transactions on behalf of and in the name of the principal.[3] It is not relevant how the parties have labelled the relationship themselves—e.g. a 'sales representative may or may not be a self-employed commercial agent'.[4] The differences which persisted prior to the Directive in relation to the rights and obligations of the parties, the remuneration as well as the conclusion and termination of the contract were addressed by a number of provisions. A subgroup of those provisions are mandatory in the sense that parties cannot opt out of them by mere contractual agreement.[5]

The Directive sets up a mandatory regime which requires principals to indemnify or compensate commercial agents upon termination in Arts 17, 18 and 19. According to Art. 19, any derogation from this regime to the detriment of the commercial agent before the agency contract expires is inadmissible. Arts 17 and 18 set up the conditions for the duty to pay indemnity or compensation. In this respect, Art. 17 provides for two different regimes: the Directive leaves Member States a choice between an indemnity (Art. 17 (2)) and a compensation system (Art. 17 (3)). In doing so, the Directive strikes a compromise between the diverging views on this topic throughout the EU.[6] Both regimes share the characteristic that they put a price on the principal's right to terminate the commercial agency. Therefore, when referring to both compensation and indemnity in the sense of Art. 17 (2) and (3) the term 'termination fees' will be used in the rest of the inquiry.[7]

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[2]For the individual transpositions in Germany, France, Belgium and England cf. infra 166f, 173, 180f and 187f.

[3]Art. 1 (2) and (3). Thus a number of agents are left outside of the Directive's scope, e.g. agents engaged as intermediaries for contracts for services or agents who act on the principal's behalf but in their own name, Case C-85/03 *Mavrona* [2004] ECR I-1573.

[4]Goyder (2011), p. 215.

[5]Pursuant to Art. 5 parties may not derogate from Art. 3 and Art. 4. Accordingly, the commercial agent has a mandatory obligation to look after the principal's interests and act in good faith, while the principal is obliged to act dutifully and in good faith in his relations with the commercial agent. The same status as a mandatory provision is granted by Art. 10 (4) to certain time limits for the payment of the commission stipulated in Art. 10 (2) and (3). Other examples include Art. 11 (3) and Art. 12 (3) stipulating the mandatory nature of Art. 11 (1) and Art. 12 (1) as well as (2), respectively. This means that the parties can neither agree to alter the reasons for which the commercial agent's right to commission can be extinguished to the disadvantage of the commercial agent (Art. 11 (1)) nor to reduce the principal's duty to supply the commercial agent with a statement of the commission.

[6]Goyder (2011), p. 28.

[7]See Zhou (2014), p. 361.

3.1.1 Indemnity Under Art. 17 (2) Commercial Agents Directive

Indemnity under Art. 17 (2) Commercial Agents Directive centres on remunerating the agent for increasing the principal's customer base or volume of business. The regime for indemnity was inspired by § 89b of the German Handelsgesetzbuch.[8] Art. 17 (2) sets up two conditions for the duty to pay indemnity. First, commercial agents are only entitled to indemnity if and to the extent that their services continue to create a benefit the principal can reap after termination.[9] Second, if certain circumstances make the payment of indemnity inequitable, it can be limited or excluded.[10] Indemnity may also not exceed the agent's average annual remuneration over the preceding 5 years.[11]

3.1.2 Compensation Under Art. 17 (3) Commercial Agents Directive

Conversely, compensation under Art. 17 (3) emphasises compensating the agent for damage suffered as a result of termination.[12] The regime for compensation follows the French concept that was originally developed in Art. 3 (2) Décret no 58-1345, du 23 décembre 1958.[13] Two distinct considerations have to be made in order to

[8] *Commission,* Report on the Application of Article 17 of Council Directive on the Co-ordination of the Laws of the Member States relating to Self-employed Commercial Agents (86/653/EEC), COM (1996) 364 final, 1–6. *Gómez Pomar* notes that it may be closer to the truth that Art. 17 (2) was simply copied from § 89b Handelsgesetzbuch, cf. Gómez Pomar (2006) p. 1, n. 14.

[9] The wording of Art. 17 (2) (a) in this respect is: 'The commercial agent shall be entitled to an indemnity if and to the extent that: he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers.'

[10] The wording of Art. 17 (2) (a) in this respect is: 'The commercial agent shall be entitled to an indemnity if and to the extent that: (...) the payment of indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.' In this context, circumstances that decrease the business risk of commercial agents, e.g. minimum remuneration independent of the volume of transactions and pension entitlements paid by the principal.

[11] Or the entire duration of the contract if it goes back less than 5 years, cf. Art. 17 (3): 'The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question.'

[12] For a general overview of the routes of implementation taken in this regard see Bogaert and Lohmann (2000), 69ff; cf. also infra 166f, 173, 180f and 187f.

[13] *Commission,* Report on the Application of Article 17 of Council Directive on the Co-ordination of the Laws of the Member States relating to Self-employed Commercial Agents (86/653/EEC), COM (1996) 364 final, 1–6.

determine whether damage has occurred which can be compensated by virtue of Art. 17 (3). First, damage can be compensated if the termination deprives the commercial agent of commission that proper performance of the agency contract would have procured him while providing the principal with substantial benefits linked to the commercial agent's activities. Second, compensation is also due for damage suffered in circumstances which have not enabled the commercial agent to amortise the costs and expenses that he has incurred for the performance of the agency contract on the principal's advice. Typically, the commercial agent can receive a higher payment under the compensation regime. On the one hand, the practice under the compensation system is to customarily award two years' gross commission calculated over the preceding three years as a lump sum payment.[14] On the other hand there is no maximum amount unlike under the indemnity system. However, the commercial agent technically has to prove actual loss.

3.1.3 Further Conditions for the Payment of Indemnity or Compensation

Pursuant to Art. 17 (4), the entitlement to termination fees also arises in the case of termination as a result of the commercial agent's death. However, Art. 18 stipulates certain exceptions to the duty to pay termination fees. If the principal has terminated the contract, he does not owe any termination fees if the commercial agent's default would have justified immediate termination under national law.[15] In the less typical case that the commercial agent terminates the contract, no entitlement arises unless the termination was justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities.

Nothing in the Directive defines its application in situations that involve a conflict of law. As evidenced in its third recital the Directive aims at an approximation of the substantive rules in the Member States and not of their respective conflict rules. This sets the Commercial Agents Directive apart from other Directives which stipulate themselves how they are affected by a choice of law.[16]

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[14] *Commission,* Report on the Application of Article 17 of Council Directive on the Co-ordination of the Laws of the Member States relating to Self-employed Commercial Agents (86/653/EEC), COM (1996) 364 final, 16.

[15] This includes situations in which forcing the principal to continue to work with the commercial agent would be unreasonable, e.g. if the agent also worked for a competing principal in violation of a contractual prohibition from doing so, Bundesgerichtshof (Germany), 26 May 1999, VIII ZR 123/98, NJW-RR 1999, 1481, 1483.

[16] As is typically the case in consumer protection cf. Art. 12 Directive 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L33/10; Art. 12 (2) Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19;

Accordingly, the Directive does not include any unambiguous indications as to whether its mandatory provisions in fact constitute overriding mandatory provisions.

3.2 Purposes and Effects of the Mandatory Regime for Termination Fees

The treatment of Arts 17 to 19 Commercial Agents Directive requires an analysis of their purposes and effects. This requirement already follows from the fact that the ECJ has stressed that the Directive must be interpreted in light of its purposes and aims put forward in the Directive's preamble.[17] But more importantly, the question of over- or under-enforcement of a specific piece of legislation is not so much a question of black-letter adherence to the respective provisions but instead a question for the effective realisation of the underlying purpose—particularly in an international context. On the one hand, this calls for a descriptive analysis of the regime for termination fees and its mandatory nature. On the other hand, an analysis in this sense also allows an assessment of the regime's effects and of whether it is actually apt to fulfil its self-proclaimed purposes. If that is not the case, the consequential question whether its effects make under-enforcement truly undesirable arises.

The analysis will be carried out with recourse to a number of economic concepts and tools of analysis. This allows a more comprehensive understanding of the Directive and the parties which are subject to it. This pertains to the study of the Directive's purposes, which themselves are economic in nature, but also the analysis of the effects of Arts 17 to 19 Directive can benefit from economic insight in so far as the relational nature of commercial agency contracts and resultant problems are concerned. The same holds true with regard to the impact of the mandatory regime for termination fees on the market for commercial agency and its potential for salvaging any market failure.

3.2.1 Termination Fees and the Purposes Underlying the Commercial Agents Directive

The Directive's legislator viewed the differences between the Member States' laws on commercial agency relationships which existed before the Directive was

Art. 7 (2) Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12; Art. 6 (2) Unfair Terms Directive 93/13/EC.

[17]Case C-104/95 *Georgios Kontogeorgas v Kartonpak AE* [1996] ECR I-6643, para. 25.

adopted as detrimental. It diagnosed this detrimental effect with regard to the conditions of competition within the Community, the carrying on of commercial representation, the security of commercial transactions and the protection of commercial agents vis-à-vis their principals.[18] This detrimental effect was the starting point for the harmonising effort, which should approximate the conditions for the trade of goods to those of a single market.[19] This harmonising effort was, however, not the Directive's primary purpose. In view of the detected differences, the Directive did not codify the smallest common denominator. Instead it aimed at improving the economic and social conditions for commercial agencies.[20] It aimed at alleviating the detrimental effects and at fostering the conclusion and operation of commercial representation contracts within the Internal Market, including where principal and commercial agents are established in two Member States.[21]

The purpose of improving the economic and social conditions for commercial agencies is reflected in particular in Arts 17 to 19 Commercial Agents Directive. Accordingly, the regime for termination fees can be analysed along two main aspects[22]: first, approximating the conditions of competition for commercial agency in the Common (now Internal) Market (Sect. 3.2.1.1) and second, protecting commercial agents vis-a-vis their principal (Sect. 3.2.1.2).

3.2.1.1 Approximation of the Conditions of Competition

The Directive is based on the assumption that the harmonisation of Member States' laws on commercial agency will approximate the conditions of competition.[23] Differences in the Member States' law of commercial agency existing prior to the Directive's transposition were considered to substantially inhibit the conclusion and operation of commercial agency relations, especially where principal and commercial agent were established in different Member States.[24] Being aimed at the operation of undistorted competition and the freedom of establishment, the Directive thus found its basis in Art. 100 EEC Treaty (now Art. 117 TFEU).[25] This raises the question whether the conditions of competition truly were distorted prior to the Directive's implementation and whether they were approximated subsequently.

[18]Recital 2 of the Commercial Agents Directive.

[19]Recital 3 of the Commercial Agents Directive.

[20]Recitals 2 and 5 of the Commercial Agents Directive; cf. Basedow (1981), p. 203.

[21]Recital 2 of the Commercial Agents Directive.

[22]Cf. also Thoma (2007), pp. 235–241; Hagemeister (2004), p. 14; *Ingmar GB Ltd v Eaton Leonard Inc* [2001] EWHC 3 (QB) para. 23. For the crucial role of these two purposes for the regime's international application, cf. Case C-381/98 *Ingmar* [2001] ECR I-9305, Opinion of AG Léger, para. 52.

[23]Recital 2 of the Commercial Agents Directive.

[24]Recital 2 of the Commercial Agents Directive.

[25]As reflected in the Commercial Agents Directive's preamble; cf. the thorough analysis by Fock (2002), p. 26.

On a substantive level, an impact on competition could have existed in so far as different laws on commercial agency created differences in costs.[26] Prior to harmonisation, idiosyncratic conditions prevailed for termination fees. German *Handelsvertreter* received indemnity according to § 89b Handelsgesetzbuch. French *agents commerciaux* were compensated for the loss incurred as a consequence of the termination pursuant to Art. 3 (2) Décret no 58-1345 du 23 décembre 1958. Both regimes were internally mandatory but not internationally mandatory.[27] On the contrary, self-employed commercial agents working in Belgium[28] or the United Kingdom[29] did not receive any termination fees. Yet, despite these differences between national laws, the conditions for each principal and commercial agent acting within one domestic market obviously were the same. Differences could only be detected when comparing parties acting within different markets. However, a principal who entered into a commercial agency agreement e.g. for distribution in Germany, cannot be considered to have been competing against a principal who had the same goods distributed in the United Kingdom. Their activity is directed at a different group of customers.[30] The same applies for commercial agents engaged in different markets.

An impact on competition could be construed indirectly by focusing on parties that are active in more than one market. In that case, potential savings made by a principal under a law which does not provide for indemnity (e.g. United Kingdom) could indirectly contribute to his financial capability to undercut other principals on a market that requires indemnifying or compensating the commercial agent after termination (e.g. Germany or France).[31] Yet it is questionable whether the absence of mandatory termination fees truly made the principal better off financially. Most likely he had to pay commercial agents a higher commission under such a regime.[32] Pinpointing a distortion of competition between principals in this indirect manner is further complicated by the fact that other areas of law can equally influence the relevant costs. Differences in labour law, environmental law and tax law come to mind.[33] Hence, this indirect approach is unsuitable for

[26]Basedow (1981), p. 201.

[27]Bundesgerichtshof (Germany), 30 January 1961, VII ZR 180/60, NJW 1961, 1061, 1062; cf. Cour de cassation (France), 28 November 2000, *Allium v Alfin et Groupe Inter Parfums*, Clunet 2001, 511–523.

[28]In Belgium *agents commerciaux* originally had no general claim for termination fees. Belgian courts granted indemnity to self-employed *agents commerciaux* only in cases where the termination was held to be abusive, cf. Stumpf et al. (1986), p. 61; Haumann (1976), p. 51. The situation was, however, wholly different if the contract of a *concessionnaire* was unilaterally terminated and if its sales concession was exclusive and had unlimited duration, cf. infra 180f.

[29]Saintier (2002), p. 80; cf. infra 187f.

[30]Fock (2002), p. 32; for the relevant market in this respect cf. Schwarz (2002), pp. 45, 63.

[31]Fock (2002), p. 33.

[32]Basedow (1995), p. 32; Quinke (2007), p. 249; cf. infra 107ff for a further analysis of the impact of this behaviour by principals.

[33]Fock (2002), p. 33.

concluding that competition was distorted prior to the implementation of the Commercial Agents Directive.[34]

However, prior to harmonisation, the differences between the Member States' law on commercial agency in fact distorted competition in the case referred to in the preamble of the Commercial Agents Directive, i.e. 'where principal and commercial agent are established in different Member States'.[35] Parties to an international commercial agency agreement were able to evade termination fees through a choice of law. This was possible in so far as the law at the principal's place of establishment did not provide for termination fees or if the contract was otherwise connected to a country that did not.[36] This enabled them to evade the application of internally mandatory provisions, such as the ones providing for termination fees in Germany and France. This opportunity did not, however, exist for strictly domestic contracts. Accordingly, an English principal that was distributing its goods in Germany was able to contract out of § 89b Handelsgesetzbuch, while a German principal competing with an English principal on the German market did not have this opportunity.

This means, however, that the distortion caused by differences in the Member States' law on commercial agency can best be understood as a conflict of laws question. This area was ultimately excluded from the Directive's scope. The Commission originally considered including provisions to this effect but abandoned its plans in the end.[37] The Directive's third recital explicitly states that rules concerning conflict of laws do not remove the inconsistencies of the Member States' laws on commercial agency and they were not addressed accordingly.

It can be concluded that the distortion caused by differences in the Member States' differences in their law on commercial agency can be addressed fully only as a conflict of laws question. This area was, however, ultimately excluded from the Directive's scope. Admittedly, the significance of this result is reduced by the fact that through harmonisation the laws of all Member States eventually provide for termination fees. Nevertheless, parties can still gain a competitive edge over their competitors on the domestic market by choosing the law of a non-Member State. Equally, they can exploit differences in the level of protection between the different transpositions of the Directive. The Directive itself does not include the tools to prevent them from doing so.

[34]See ibid for further references regarding this line of reasoning.

[35]Recital 2 of the Commercial Agents Directive.

[36]Art. 3 (3) and Art. 3 (4) Rome I Regulation. Regarding these provisions' predecessor in Art. 3 (3) Rome Convention, *Basedow* gave the example of a principal that belongs to a group of companies whose head office and legal department is domiciled in a state of the USA. This would enable choosing the law of said state, which typically will not provide for termination fee; Basedow (1996a), p. 1925.

[37]Lando (1980), p. 15.

3.2.1.2 Protection of Commercial Agents vis-à-vis Their Principals

The Directive aims at the protection of commercial agents vis-à-vis their principals.[38] This purpose rests upon the perception that commercial agents are inherently in a weaker position than the principal.[39] In the cardinal case, a commercial agent is considered to be dealing with a principal with superior bargaining power.[40] Its fifth recital even puts the Directive within the realm of Art. 117 EEC Treaty (now Art. 151 TFEU), i.e. the improvement of living and working conditions. This conveys that the Council considered the Directive to form part of social policy. Accordingly, the status of commercial agents' protection echoes the protection substantive EU law grants to consumers and employees[41]—despite the fact that commercial agents typically are self-employed merchants.

In the realm of termination fees, the Commercial Agents Directive's invariable perception of commercial agents as the structurally weaker party can be traced back to the possibility of opportunistic termination by the principal.[42] Termination fees can contribute to the protection of commercial agents against unwarranted termination. They create a financial obstacle for termination through a principal who wants to rid himself of the commercial agent although immediate termination is not justified under the applicable law.[43] Art. 17 Commercial Agents Directive is targeted at countervailing the ability of the principal to opportunistically chisel the commercial agent out of profiting from his prior investments into the commercial agency without repercussions.

The inner workings of this argument can be illustrated using contract theory. A contract for commercial agency is a relational contract. Relational contracts do not merely establish a discrete transaction but instead form the basis for an ongoing relationship between the parties.[44] They are characterised by long-term commitments in the course of which numerous interactions occur. When entering into a

[38]Recital 2 of the Commercial Agents Directive.

[39]Provisions that reflect this perception include Art. 8, Arts 10–12, Arts 17–19 and Art. 20.

[40]Hesselink et al. (2006), p. 94. The perception of commercial agents as the structurally weaker party vis-à-vis their principal is a perception frequently found in civil law countries, cf. Saintier (2013), p. 290.

[41]Thoma (2007), p. 236; Grundmann (2005), p. 190.

[42]Joustra (1991), pp. 95ff, 102; Saenger (1997), pp. 17–19; Fock (2002), p. 139; cf. Saintier (2002), p. 112.

[43]Cf. Art. 18 (a) Commercial Agents Directive. In particular, this is understood to be the purpose of Art. 3 (2) Décret no 58-1345, i.e. the French provisions on which the regime for compensation in Art. 17 (3) Commercial Agents Directive was modelled Fock (2002), p. 181. Along those lines, a commercial agent is only entitled to compensation in case of an unwarranted termination Outside of an unwarranted termination by the principal, an entitlement to compensation can also arise in the case of termination due to illness, age or death of the commercial agent. This is, however, not the case where compensation would become due in the sense of Art. 17 (3) Commercial Agents Directive because 'proper performance of the agency contract' is not possible in this case because of the commercial agent's condition.

[44]Macneil (1974), p. 691; Schwartz (1992), p. 271.

relational contract, the parties typically lack verifiable information concerning many factors which might give rise to costly contingencies during the course of the contractual relationship.[45] This lack of information makes relational contracts to a large extent incomplete.[46]

The incompleteness of contracts in turn invites opportunistic behaviour by both parties. In order to generate sales and to thereby meet the object of the relational contract, the commercial agent must make investments. He has to build and maintain a customer base, make them familiar with the principal's product, convince them to purchase it etc. The investments that are necessary in this sense are relationship specific to a large extent, i.e. it is difficult for the commercial agent to profit from them outside of the particular commercial agency relationship in connection with which they were made.[47] This effect is intensified if the contract includes a non-compete clause for the time after termination which completely cuts the commercial agent off from benefitting from his prior investments. Already during the course of the commercial agency, investments only pay out over time through commission which the commercial agent receives for transactions made by customers which can be attributed to him. In this context, the commercial agent runs the risk of losing the return on his investments where the principal decides to terminate the contract at any given point in time. Especially once a reliable customer base has been established, it can make economic sense for the principal to 'expropriate' the commercial agent's investments through termination and instead use the established customer base to deal directly with them. This problem arises in particular when a new principal or a new product is entering a market.[48] Another possibility for opportunistic behaviour is when the principal terminates the commercial agency with one agent and then awards the commercial agency to another distributor but makes that distributor pay an entry fee for this opportunity.

Termination fees address this type of opportunistic behaviour by putting a price tag on terminating the contract. If the Directive's 'loss-based' compensation system is applicable, the price for termination is based on what the commercial agent would lose through termination. The method of calculating compensation under Art. 17 (3) Commercial Agents Directive expressly mentions the commercial agent's investments and aims at allowing him to effectively 'amortize the costs and expenses that he had incurred for the performance of the agency contract'. The connection with the investments made by the commercial agent is straightforward. The amount owed in compensation shall correspond to the damage which the commercial agent suffers from termination, i.e. the loss of future rents from his investments.[49]

[45]Gómez Pomar (2006), p. 17.

[46]Cf. generally Schwartz (1992).

[47]Fock (2002), p. 147; Gómez Pomar (2006), p. 24.

[48]Fock (2002), p. 139; Joustra (1991), p. 102; Saenger (1997), p. 10; Emde in: Canaris et al. (Eds.) (2008), § 89b HGB, para. 6.

[49]Fock (2002), p. 160.

Indemnity according to Art. 17 (2) Commercial Agents Directive is a 'gains-based' remedy as it is not directed at the harm caused to the commercial agent but at the gains which the principal derives.[50] It focuses on the effectiveness of the commercial agent in bringing in new customers or increasing the volume of business. In this sense it hints at the disgorgement of benefits acquired by the principal.[51] In practice, however, prior remuneration is used as the starting point for calculating indemnity just as is done for compensation. Under the German system of indemnity, it is a recognised rule of thumb that the gains to the principal through termination are equal to the loss of commission to the commercial agent.[52] Therefore, the conceptual differences between compensation and indemnity become blurred in practice.[53]

In this sense, both alternatives of the regime provided for in Art. 17 Commercial Agents Directive can serve as an incentive for the principal to refrain from opportunistic termination. Where the principal goes ahead and terminates nonetheless, the transfer of property caused by an opportunistic termination is reversed to a certain extent.[54] This proprietary perspective on the future rents of the commercial agent's investments is also reflected in Art. 18 (c) Commercial Agents Directive. It stipulates that the principal does not have to pay termination fees if the commercial agent assigns the commercial agency to another commercial agent, i.e. if the commercial agent transfers his future rents to another commercial agent. In that case the commercial agent can be assumed to have been reimbursed by the new commercial agent for his investments, rendering the payment of an additional termination fee superfluous.

3.2.2 Impact of Termination Fees on the Market for Commercial Agency

Whether the Commercial Agents Directive does in fact succeed in protecting commercial agents against opportunistic behaviour by principals depends on how the market reacts to termination fees. Whether principals choose to

[50]Gómez Pomar (2006), p. 30.

[51]Wittman (1985), p. 174ff.

[52]Bundesgerichtshof (Germany), NJW 1990, 2889, 2891; Emde in: Canaris et al. (Eds.) (2008), § 89b HGB, para. 129.

[53]From a theoretical perspective 'loss-based' compensation is the superior type of termination fee. First, it is more efficient for the party who decides over the termination to face the other party's cost curve. Otherwise it would be able exploit his superior information. For the termination of commercial agency contracts this means that the principal should face the commercial agent's cost curve upon termination, cf. Wittman (1985), p. 174ff. Second, it has been demonstrated that 'loss-based' compensation is much less prone to mistakes by adjudicators, cf. Polinsky and Shavell (1994), p. 427; Gómez Pomar (2006), p. 31.

[54]Fock (2002), p. 142.

opportunistically terminate a commercial agency depends on the costs and benefits of doing so. Those costs and benefits are determined by the interaction of the parties on the market for commercial agency.

Forcing termination fees upon parties impacts the attractiveness of concluding a commercial agency contract. *A priori* termination fees increase the price of commercial agency by putting a non-negotiable price tag on termination. In this sense, their function can be compared to that of a tax on the service which is sold on the market. As the amount owed in termination fees correlates (at least to a certain extent) with the value of the transactions handled by a commercial agent prior to termination the corresponding tax would be an *ad valorem* tax.[55] Like an *ad valorem* tax, the termination fees theoretically decrease the total value of transactions for which commercial agents serve as intermediaries.[56] It was in fact observed in practice that the introduction was followed by a reduction in the number of commercial agencies in those countries that did not have a comparable regime before.[57] This preliminary reaction can be made apparent from Fig. 3.1.

The x-axis depicts the total value of the transactions for which commercial agents serve as an intermediary, the y-axis depicts the respective price.

Both parties can react to the preliminarily reduced volume of transactions. Principals can increase their willingness to pay. By paying higher prices they can recapture the transactions lost due to the change in the price structure. At the same time, commercial agents in turn can react by lowering their willingness to accept, i.e. by offering their services for less. The question how the market reacts to termination fees depends on further characteristics of the market and will be discussed below—focusing on the demand by principals in a first step (Sect. 3.2.2.1) before turning towards the supply provided by commercial agents (Sect. 3.2.2.2).

[55]Indemnity upon termination depends on bringing in new customers, which shows in the value of transactions concluded before termination, cf. Art. 17 (2) (a). Compensation depends on the value of the commercial agency at the time of termination. A particularly valuable commercial agency is assumed to have produced particularly high commissions prior to termination in typical cases.

[56]For this effect of *ad valorem* taxes levied on a product cf. Sloman et al. (2012), p. 78.

[57]Commission of the European Communities, Report on the application of Article 17 of Council Directive on the Laws of the Member States relating to Self-Employed Commercial Agents (86/653/EEC), 23 July 1996, COM (1996) 364 final, 7–8. These results are also in line with the experience of the introduction of legal restrictions on termination of franchising agreements. Empirical research in this areas shows that termination restriction laws on franchising agreements lead to less franchising. These termination restriction laws typically require the franchisor to show good cause for termination. *Brickley*, *Dark* and *Weisbach* found that this type of law decreases the total number of franchising agreements in industries where individual units are prone to serving transient customers, cf. Brickley et al. (1991), p. 101. *Klick*, *Kobayashi* and *Ribstein* have detected the same effect. They also analysed whether this effect is offset by a concomitant increase in franchisor-operated establishments. However, their analysis of the development of employment rates in franchising in the fast-food sector in 13 states of the USA revealed no such effect: Klick et al. (2006).

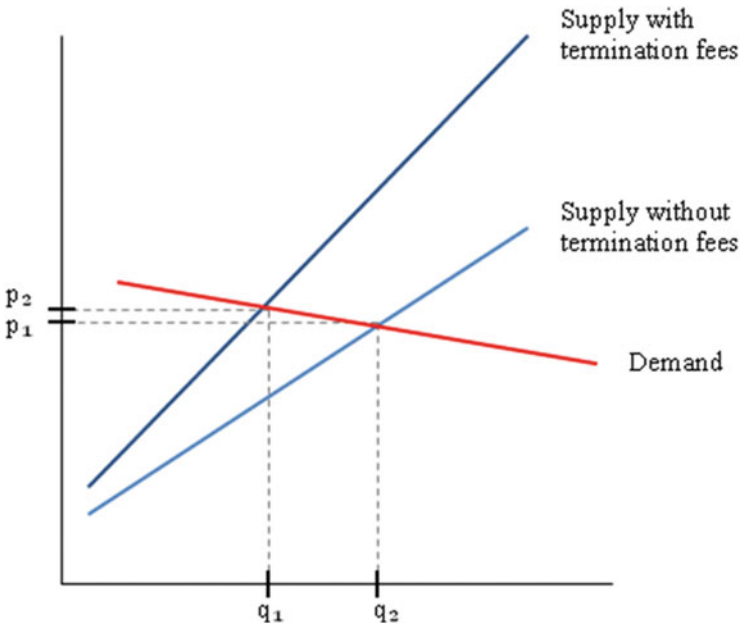

Fig. 3.1 Preliminary effect of the introduction of termination fees on supply and demand on the market for commercial agency

3.2.2.1 Effect on the Demand for Commercial Agency

Principals represent the demanding side in the market for commercial agency services. The preliminary decrease of the total value of transactions handled by commercial agents could possibly lead principals to adapt their demand by paying commercial agents a higher total remuneration in order to regain the lost transactions. Upon further analysis it is, however, unlikely that principals absorb the major share of the effect of termination fees.

On the one hand, this is due to the high substitutability of commercial agents.[58] Services comparable to those of a commercial agent can also be acquired through other arrangements, e.g. distributorship agreements or employment contracts for distributing services. After the introduction of Art. 17 Commercial Agents Directive, parties actually moved away from commercial agency and instead entered into other contractual arrangements such as distributorship and employment contracts.[59] On the other hand, it must be noted that there are typically only a limited number of principals who sit at the top of an extensive network of numerous agents—while the

[58]Cf. Mankiw and Taylor (2006), p. 80; Schwarz (2002), p. 64.

[59]Commission of the European Communities, Report on the application of Article 17 of Council Directive on the Laws of the Member States relating to Self-Employed Commercial Agents (86/653/EEC), 23 July 1996, COM (1996) 364 final, 7–8.

agents are often small or medium-sized companies or self-employed individuals.[60] In this sense, principals constitute an oligopsony in the market for commercial agency, i.e. a small number of buyers in a market with a large number of sellers.[61] As an oligopsony, principals can play commercial agents off against one another and can thus lower the total remuneration offered. Their willingness to pay for a commercial agent's services is therefore relatively independent of the amount of services available at a certain price. This makes their decisions independent of the volume of transactions which they can receive for a given total remuneration. Both the high substitutability as well as the oligopsonic structure of the market reflects on the demand curve of principals. Their strong bargaining position implies high elasticity of demand.[62] Therefore, the position of principals in the market for commercial agency militates against the willingness of principals to adapt their demand to a regime that provides for termination fees.

3.2.2.2 Effect on the Supply of Commercial Agency

The reaction of commercial agents to termination fees depends on whether the decreased volume of transactions is captured with an adequate increase of price which allows them to recapture an equal amount of profits. The high elasticity of demand makes this result highly unlikely. Instead, as will be outlined below, it allows the principal to pass on the costs of termination fees to the commercial agents.

Without termination fees, the total remuneration of commercial agents is a product of the quota set for commission and the total value of transactions for which commercial agents serves as intermediaries. Under Art. 17 Commercial Agents Directive, indemnity or compensation is added. If the commercial agent wishes to remain in the market, there are different strategies which the commercial agent can adapt. One option is for them to leave the market entirely, e.g. after being taken up as an employer by their former principal. The other option is for them to adapt their supply to the new situation. The most obvious way to do this is a reduction of commission which accounts for the addition of termination fees.[63] If commission is lowered to capture enough of the costs which Art. 17 Commercial Agents Directive levies upon principals, the same results as in a market that does not require a termination fee can be reached in principle.[64] This technique of

[60] Hesselink et al. (2006), p. 94; cf. Singleton (2010), pp. 7–9.

[61] Sloman et al. (2012), p. 257.

[62] Cf. Mankiw and Taylor (2006), p. 88; Hubbard and O'Brien (2006), p. 431.

[63] Cf. supra 101.

[64] In the example used by *Zhou*, the principal is able to pass on the entire costs of termination fees, cf. Zhou (2014), p. 362. *Zhou* obviously assumes perfect elasticity of demand, i.e. the graph depicting demand is horizontal.

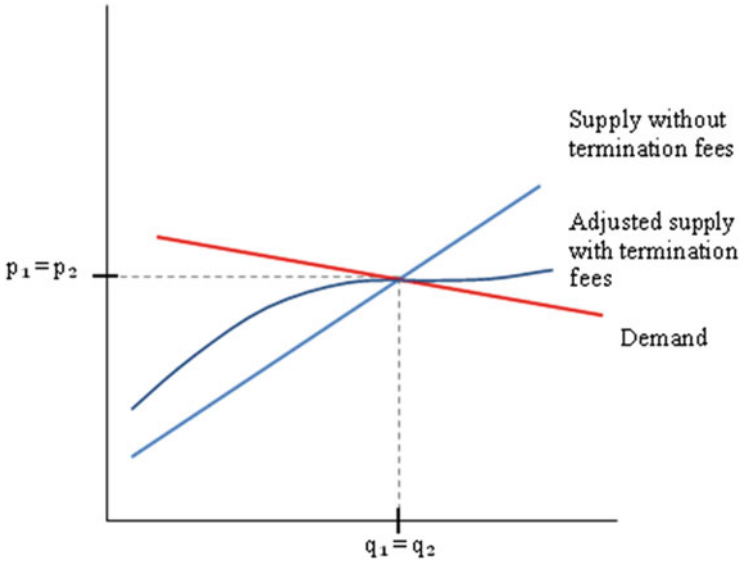

Fig. 3.2 Impact of termination fees on supply and demand on the market for commercial agency including adaptation by commercial agents

passing on the costs of regulation can frequently be encountered where costs are created for the party with superior bargaining power (Fig. 3.2).[65]

It is doubtful whether the original goals of the Directive are met in a market in which demand is adjusted in this sense, in particular with regards to the protection of the commercial agent.[66] In terms of total remuneration received, it appears as if the commercial agent is just as well off as before. Yet it is problematic that this approach requires an *ex ante* estimation of the total value of the transactions handled through the commercial agent and the duration of the commercial agency. This can be a difficult task at the beginning of a contractual relationship. The superior bargaining power of principals makes it likely that any risk of making a wrong estimation will be passed on to the commercial agent. Therefore, the commercial agent will most likely be worse off in terms of total remuneration.[67]

Indemnity and compensation can both be understood as a type of insurance which commercial agents are forced to take out and for which they have to pay with a loss in commission.[68] Accordingly, it suggests itself to differentiate commercial agents by their risk attitude, i.e. risk-seeking and risk-averse commercial agents. Lowering commission in exchange for receiving termination fees is not preferred by risk-seeking commercial agents. From their perspective, the risk of termination

[65]Craswell (1991), p. 361.

[66]Recital 2 of the Commercial Agents Directive.

[67]Zhou (2014), p. 363.

[68]ibid; Gómez Pomar (2006), p. 31.

and opportunistic behaviour is more than compensated for by the possibility of a higher total remuneration. Thus, risk-seeking commercial agents would prefer a regime without termination fees or to be able to contract around them. In contrast, risk-averse commercial agents can be better off by lowering their commission in order to be able to sell their services. They value the security provided by the indemnity or compensation more highly than a reduction of commission and potentially even the loss caused by the principal's advantage has in making an *ex ante* estimation of the total value of transactions handled by the commercial agent prior to the eventual termination.[69] It is only this group which is interested in respect to which the market for commercial agency allows the Directive's purpose to be fulfilled. Achieving protection of commercial agents is difficult in a market in which termination fees affect different commercial agents in different ways.[70] The reaction of the demand curve depends on the ratio of the two types of commercial agents.[71]

3.2.3 Impact of Attaining Protection on the Interests of Principals

It is not only opportunistic behaviour by the principal which may cause a contract for commercial agency to be terminated—relational contracts invite opportunistic behaviour by all parties involved. Another reason for a termination of the contract may be that the principal had to react to the commercial agent's moral hazard. In order to analyse this aspect, the moral hazard in commercial agency relationships will first be outlined in general terms (Sect. 3.2.3.1). Then the impact of termination fees on the possibilities for combating moral hazard will be analysed (Sect. 3.2.3.2).

3.2.3.1 Moral Hazard in Commercial Agency Relationships

The goal of a commercial agency relationship is for the commercial agent to negotiate and possibly conclude the sale or purchase of goods on behalf of the principal.[72] Yet a closer look reveals that the goals of the commercial agent and the principal do not necessarily coincide. While the principal hopes for a high volume of transactions contrived by the commercial agent, the commercial agent can be assumed to be interested in maximising his remuneration while minimising his

[69]Zhou (2014), p. 363.

[70]See Craswell (1991), p. 377 for the comparative difficulties of achieving a pro-consumer position through mandatory warranties in a market in which consumers have different risk attitudes.

[71]Cf. infra 107ff.

[72]Cf. Art. 1 (2) Commercial Agents Directive.

required effort. In this instance, it becomes problematic that the commercial agent enjoys a great deal of discretion as to how to perform his task.[73] Furthermore, it is an innate part of commercial agency relationships that the principal cannot fully monitor whether the commercial agent is acting in the best interest of the principal or rather in his own best interests. An agent controls his own effort level and to a certain extent also the information which the principal receives in this regard.

The structure of a commercial agency relationship described above shows that it is a text book example of what economists refer to as the principal–agent problem.[74] Closely related to the principal–agent problem is the problem of moral hazard. Moral hazard occurs when an agent does not fully bear the consequences of his actions and therefore tends to shirk, i.e. to undertake less effort than the principal considers desirable.[75] It implies that the conduct of the agent may increase the risk of the principal.[76] Moral hazard can also be observed for commercial agency. The lack of monitoring of his activities by the principal incentivises the commercial agent to shirk. The principal then runs the risk of losing the prior investment he made himself in developing the market, the lost opportunity of dominating the market and the expected profit brought from the new market.[77] Relational contracts generally pose the difficulty for the supplying side of making credible promises regarding their efforts. At the same time, the demanding side cannot easily verify whether the desired efforts were made to fulfil the contract's purpose.[78] Within the realm of the Commercial Agents Directive this means that it is difficult for a principal to verify e.g. whether the efforts made by a commercial agent in the negotiations with customers are 'proper' in the sense of Art. 3 (2) (a) Commercial Agents Directive. It can be particularly challenging to verify whether his marketing efforts have been satisfactory and whether his advice to prospective customers has been adequate.[79] In light of these challenges, the costs of detecting this type of behaviour can become prohibitively high for the principal.

[73]Zhou (2014), p. 364.

[74]In the principal–agent problem one party (the commercial agent) performs a service on behalf of another party (the principal) which involves delegating some decision-making authority. The particular challenges in this respect arise due to the fact that a principal cannot perfectly monitor the commercial agent's activities. As long as both parties are utility maximisers there is good reason to believe that the commercial agent will not always act in the best interests of the principal. This triggers two main problems: moral hazard and adverse selection, cf. Jensen and Meckling (1976), p. 308.

[75]Mankiw and Taylor (2006), p. 467.

[76]If, for example, an insurer agrees to compensate the insured for full losses resulting from burglary, the insured may take fewer precautions against burglary in terms of not installing an alarm or not checking doors and windows when leaving the house. Therefore, moral hazard causes an insurance covering all losses to raise the probability of burglary in spite of neither party wishing burglary to occur. Moral hazard can also be observed in the realm of commercial agency, Zhou (2014), p. 364.

[77]ibid 364f.

[78]Gómez Pomar (2006), p. 10.

[79]See ibid 19.

The agent in turn does not fully bear the consequences of his actions and therefore tends to shirk, i.e. to undertake less effort than the principal considers desirable.[80]

3.2.3.2 Combating Moral Hazard and Termination Fees

Moral hazard is a mundane problem in the modern business world. Principals will want to contain this problem and draft contracts accordingly. Agents will want to signal that they will not shirk and accept the respective conditions. More specifically, if termination fees aggravate moral hazard, parties will increasingly want to introduce language into the contract which allows them to evade the duty to pay termination fees.

Moral hazard can be addressed in a number of ways. Effectively monitoring the commercial agent's interactions with customers in their entirety is next to impossible. Yet there are a number of ways in which the principal can combat moral hazard. Three distinct approaches will be analysed below focusing on the impact of termination fees on their effectiveness: the threat of termination (Sect. 3.2.3.2.1), remuneration design (Sect. 3.2.3.2.2) and posting a bond (Sect. 3.2.3.2.3).

3.2.3.2.1 Threat of Termination

First, terminating a relational contract as a response to shirking can prevent the commercial agent from doing so in the first place.[81] Even independent of the principal's actual ability to detect shirking, the mere abstract threat can deter commercial agents from shirking. The introduction of termination fees makes this threat more costly. Therefore, disciplining the commercial agent by termination becomes less credible through Art. 17 Commercial Agents Directive because the commercial agent knows that the commercial agent cannot simply dismiss him without consequential costs.[82] This argument is the flipside of the argument outlined above, which explained termination fees as a tool against unwarranted termination. Termination as a tool against moral hazard is tantamount to unwarranted termination as long as shirking cannot be verified up to a level that would warrant termination. In that case, the introduction of termination fees makes the threat of termination a less effective tool against moral hazard. This effect is, however, influenced by the principal's ability to detect shirking and use termination as a disciplining tool against the commercial agent. The difficulties of detecting shirking through monitoring can be high as already outlined above. The information

[80] Mankiw and Taylor (2006), p. 467.

[81] Shapiro and Stiglitz (1984), p. 433.

[82] Provided that the threshold of Art. 18 (c) Commercial Agents Directive is not met. In that case the costs for termination at will are not influenced by the introduction of termination fees.

available to a principal during the course of the commercial agency mainly consists of the volume of transactions.[83]

3.2.3.2.2 Remuneration Design

Second, a commercial agent can be incentivised not to shirk through the way in which his remuneration is designed. To this end, it is essential to connect the commercial agent's level of remuneration to the quality of his performance as much as possible. Remuneration is commonly based on a commission system, i.e. the commercial agent benefits proportionally from each transaction he arranges.[84] Apart from the quality of the commercial agent's performance, the volume of transactions is also exposed to outside influences—for example efforts by the principal in terms of marketing and product development or trends among the customer base. Nevertheless, the prevalence of commission as the means of remuneration bears witness to its effectiveness in combating moral hazard. Also the Directive envisages commission as the main method of remuneration and provides for it in Arts 6 to 12. Remuneration through commission directly connects the commercial agent's incentive to increase his remuneration with the principal's goal of increasing the volume of his transactions. If shirking leads to a decrease in transactions, a commercial agent accordingly suffers the consequences of this behaviour himself.

The introduction of termination fees alters the remuneration scheme. The commercial agent cannot only receive commission, but can also benefit from termination fees. The principal can make an *ex ante* estimation of the likely costs he will face in terms of termination fees and will be able to pass at least part of these costs on to the commercial agent.[85] This means that a commercial agent that has a claim to termination fees under Art. 17 Commercial Agents Directive is likely to receive a lower commission than a commercial agent that does not receive termination fees.[86]

It has been argued that this change in the remuneration scheme negatively affects the ability to combat moral hazard.[87] The argument is based on the assumption that

[83]Cf. Shapiro and Stiglitz (1984), p. 433.

[84]Other ways to achieve this goal are piece rates, share options, discretionary bonuses, promotions, profit sharing, efficiency wages and deferred compensation, cf. Prendergast (1999), p. 7.

[85]Generally on passing on the costs of regulation cf. Craswell (1991); Basedow (1996b), p. 354.

[86]*Zhou* uses the following examples to illustrate this technique: A principal anticipates that a commercial agent will serve as an intermediary in a total of 10 sales before the contract is terminated. If Art. 17 does not apply, the principal is willing to pay a commission of 10 % for each product sold for the price GBP 100 and the commercial agent will receive a total remuneration of GBP 100. If, however, the commercial agent is entitled to an indemnity anticipated to be GBP 30, the principal will lower the commission to 7 %. Accordingly, the commercial agent will receive GBP 70 in commission and an indemnity of GBP 30 allowing the conclusion that Art. 17 does not increase the commercial agent's total remuneration. Where the commercial agent is entitled to compensation, cf. Zhou (2014), p. 362.

[87]ibid 363.

termination fees are less dependent on the commercial agent's efforts than commission.[88] Yet, upon further review, this proves not to be the case. For indemnity, the argument rests on the premise that the requirements for causality between the commercial agent's actions and bringing in new customers in accordance with Art. 17 (2) (a) are too weak.[89] It can be argued against this premise that the calculation of commission is equally dependent on causally connecting transactions to a commercial agent. Art. 7 (1) Commercial Agents Directive gives the commercial agent an entitlement to commission where a transaction has been concluded 'as a result of the commercial agent's actions'. The requirements for causation in this sense are the same as for bringing in new customers in the sense of Art. 17 (2) (a) Commercial Agents Directive.[90] Quite to the contrary, commission can be connected even less directly to the commercial agent's efforts than indemnity where the parties agreed on indirect commission according to Art. 7 (2) Commercial Agents Directive. Where a commercial agent receives commission in this sense for transactions concluded with customers from a certain geographical area, he is entitled to commission on transactions concluded with customers belonging to that area 'even if they were concluded without any action on his part'.[91] Without any action on his part, however, the commercial agent will have difficulty in bringing in new customers which can be attributed to him in calculating indemnity.[92] The problems identified by *Zhou* merely reflect the imperfections of connecting any type of remuneration to the commercial agent's efforts to address moral hazard. There are always outside influences on the volume of transactions.

[88]ibid 365.

[89]To underline this point *Zhou* puts forward the case *Duncan Moore v Piretta* [1999] 1 All ER 174 (QB). In that case the commercial agent met new customers at fairs which the customers attended in response to an advertisement issued by the principal. The judge held that in spite of the principal's contribution, the commercial agent was still instrumental in bringing the new customers. *Zhou* concludes that as a result the commercial agent may work less and rely more on the principals than under a regime without termination fees, cf. Zhou (2014), p. 364.

[90]Fock (2002), p. 224. The German system on which the indemnity regime in Art. 17 (2) was modelled uses the standard of concurrent causation ('Mitursächlichkeit') for connecting the commercial agent's activities to the conclusion of transactions when calculating commission as well as for connecting the commercial agent's activities for bringing in new customers when calculating damages; cf. Emde in: Canaris et al. (Eds.) (2008), § 89b HGB, para. 64: 'Mitursächlichkeit genügt, wie bei § 84, 86 dargestellt, freilich auch hier.'

[91]Case C-104/95 *Georgios Kontogeorgas v Kartonpak AE* [1996] ECR I-6643, para. 19.

[92]Zhou extends this argument to compensation according to Art. 17 (3) Commercial Agents Directive. He argues that an amount of compensation which focuses on the damage the termination causes to the commercial agent fails to capture outside influences on the value of the commercial agency. Taking the example of a rise in the market demand for the principal's product, he argues that compensation exacerbates moral hazard. Yet a commercial agent will benefit equally in terms of commission and in terms of compensation from a rise in the market demand for the principal's product. This result is independent of whether the commercial agent is shirking or not.

Art. 17 Commercial Agents Directive does nothing to amplify the effect of these influences on the principal's ability to combat moral hazard.[93]

3.2.3.2.3 Posting a Bond

Third, moral hazard can be addressed by requiring the commercial agent to post a bond. The commercial agent can then retrieve the bond if he does not shirk.[94] Unlike performance-based pay, this measure is not self-enforcing but requires the principal to monitor the commercial agent somehow and the principal encounters the same monitoring problem as before.

As far as Arts 17 and 18 Commercial Agents Directive are concerned, it is noteworthy that in practice a bond is frequently created which incorporates the principal's duty to pay termination fees. When taking over an existing commercial agency and the acquired customers, commercial agents are often made to pay a price to attain the commercial agency in the first place. If this price of the commercial agency is more or less equal to the amount which will be owed in termination fees, the parties' price for the commercial agency has an effect which can be compared to a bond. This type of bond can only be retrieved to the extent to which the commercial agent is ultimately entitled to indemnity or compensation under Art. 17 Commercial Agents Directive. Retrieving this type of bond upon termination depends on the conditions of Art. 18 Commercial Agents Directive not being fulfilled, in particular in circumstances that would justify immediate termination under national law as provided for in Art. 18 (a). Yet, the legality of this type of arrangement can run counter to Art. 19 Commercial Agents Directive, i.e. the mandatory nature of termination fees. Termination fees are envisaged as unilaterally benefitting the commercial agent and are not supposed to be 'hijacked' by the parties to create a bond that serves to discipline the commercial agent.[95] Therefore, stipulating a price for attaining the commercial agency which is unreasonably high has been deemed not permissible.[96] This is the case if the price not only accounts

[93] *Zhou* extends his arguments on the superiority of pure commission to the problem of adverse selection; cf. Zhou (2014), p. 365. In doing so, he again relies on the assumption that both commission and indemnity depend less on the commercial agent's performance as an intermediary than commission. As outlined above, this premise is incorrect. Therefore, *Zhou's* result that Art. 17 Commercial Agents Directive worsens the problem of adverse selection fails to convince.

[94] Shapiro and Stiglitz (1984), p. 442.

[95] German courts make an exception to this rule if the commercial agent received unusually high commission or if the contract's duration was particularly long. Another exception is made if a contractual stipulation allows the commercial agent to claim all the old customers originally acquired with the commercial agency as new customers in the calculation of indemnity after termination ('Neukundenregelung'), cf. Oberlandesgericht München (Germany), 4 December 1996, 7 U 395/96, NJW-RR 1997, 986; Oberlandesgericht Düsseldorf (Germany), 24 January 2003, I-16 U 66/01, OLGR 2003, 183; cf. Hagemeister (2004), p. 274 for a comparable view on the English transposition.

[96] Cf. Bundesgerichtshof (Germany), NJW 1983, 1727, 1728.

for the actual value of the commercial agency but makes the commercial agent pay more in order to combat shirking.

3.2.4 Justification of the Regime's Mandatory Nature

It is not easy to justify the mandatory nature of Arts 17 and 18 Commercial Agents Directive in view of its limitations and drawbacks. Ultimately, the regime strikes a balance which corresponds only with the interests of a certain subgroup of commercial agents but leaves other commercial agents and principals longing for a different solution. Against this background, it is questionable why it is not a default rule but a mandatory rule according to Art. 19 Commercial Agents Directive. In an economic sense, the mandatory nature could be justified by its effect on the parties' transaction costs (Sect. 3.2.4.1). A justification for the regime's mandatory nature might also be that it constitutes a response to a failure of the market for commercial agency (Sect. 3.2.4.2).

3.2.4.1 Mandatory Rules as a Means to Reduce Transaction Costs

It has been argued that the mandatory nature of Arts 17 and 18 Commercial Agents Directive can be justified because the regime reduces transaction costs.[97] This effect on transaction costs can be explained in light of the uncertainties which the relational nature of a commercial agency contract creates and which provide potential for conflict between the parties.[98] The fear of opportunistic behaviour by the other side can keep both principals and commercial agents from entering into a contract in the first place. Arts 17 to 19 Commercial Agents Directive provide the parties with a measuring stick which allows them to estimate the consequences of opportunistic behaviour in advance: a shirking commercial agent can lose his entitlement to compensation or indemnity pursuant to Art. 18 (a) Commercial Agents Directive; a principal who terminates the contract in order to obtain the benefit from the relationship-specific investments will have to pay termination fees he can estimate in advance pursuant to Art. 17 Commercial Agents Directive. The mandatory nature of the Directive's regime has the consequence that parties do not have to negotiate in this respect.[99] Thus, they save transactions costs which these negotiations would generate. This effect is strengthened by the ECJ's position according to which parties cannot increase the certainty with which a certain amount of termination fees are paid in exchange for a decrease in the total amount paid out.[100]

[97]Fock (2002), p. 148 argues that this is the sole justification.

[98]ibid 147.

[99]Cf. ibid 149; Jickeli (1996), pp. 204–205.

[100]Case C-465/04 *Honyvem Informazioni Commerciali Srl v Mariella De Zotti* [2006] ECR I-2879.

Yet a reduction of transaction costs cannot serve as a justification for mandatory rules but only as one for default rules. Default rules are superior in this respect because they can equally decrease transaction costs without effectively limiting the parties' contractual freedom.[101] If default rules conform with the parties' hypothetical agreement over the relevant risk in a 'no transaction costs world', the bar for entering into an inevitably incomplete relational contact can be lowered.[102] There is little reason to believe that the European legislator has come up with a model that is always superior to individually negotiated arrangements. Parties whose increase in payoff by agreeing to a different solution exceeds the transaction cost lost in negotiation should then be allowed to adopt their preferred solution. In contrast, forcefully reducing transaction costs through Art. 19 Commercial Agents Directive robs parties of that opportunity. Thus, it can even cause parties with a strong preference for a different solution to address opportunistic behaviour to not conclude an otherwise mutually beneficial contract at all.

3.2.4.2 Mandatory Rules as a Response to Market Failure

Mandatory rules regulate the content of contracts. They intervene in the market in which contracts are negotiated and require certain results to be achieved. Contracts can require intervention through mandatory rules if the market on which they are concluded does not produce a result which is desired. Determining whether the market fails in this sense and whether the consequences are grave enough to necessitate mandatory rules is ultimately the task of the legislator.[103] It should be noted that the analysis mandatory rules as a response to market failure is subject to certain value judgements and assumptions. Taking up an economic approach to legal problems does not rid one of normative assumptions.[104] Yet economic concepts can serve as analytical tools to trace the reasonableness of a legislative decision, in particular as regards its effect. The following analysis aspires to use the concept of market failure as a starting point to offer a new and structured perspective on the necessity of framing the regime for termination fees in mandatory provisions. Three forms of market failure could become relevant in this respect: market failure due to market power, information asymmetries and external effects.[105]

3.2.4.2.1 Market Failure Due to Market Power

First, it might be argued that termination fees are mandatory because they address the effects of principals' market power. A justification in this sense is connected

[101] Cooter and Ulen (2014), p. 286ff.
[102] Charny (1991), p. 1815; Whincop and Keyes (1998), p. 437.
[103] Grundmann (2001), p. 514.
[104] Rühl (2011), p. 13.
[105] Pindyck and Rubinfeld (2009), p. 612ff; cf. also Grundmann (2001), p. 518.

with the Directive's purpose of protecting commercial agents vis-à-vis principals.[106] Commercial agents might in fact be confronted with principals who have superior market power. The high substitutability of commercial agency services with other means of distribution and the oligopsonic structure of the market for commercial agency attest to that conclusion.

However, there are a number of counter-arguments which call into question whether the mandatory nature of the regime can be justified along those lines. As outlined above, the principal can and rationally will pass on the costs created by termination fees as well as the newly created risk of miscalculating the impact of termination fees to the commercial agent.[107] To this extent, mandatory termination fees fundamentally fail to effectively protect against the effects of the principal's market power; instead they merely shift any impact of those effects.

But also upon further analysis, it can be seen that the basic assumption that the principal has higher market power is severely flawed. On the one hand, it can be observed that manufacturers with considerable market power are more likely to opt for distribution strategies which—unlike commercial agency—tie up capital such as by integrating distribution through direct sales networks or key account management.[108] Instead, commercial agency is an apt strategy for small and medium-size companies which lack the required capital.[109] Hence, the disparity in market power between commercial agents cannot be considered to be systematically present in cases covered by the Directive and its regime for termination fees. If an unusual degree of disparity remains in individual cases, there is nothing that speaks against addressing the problem with the tools of competition law.[110] Hence, a justification of Art. 19 Commercial Agents Directive as a necessary step against a principal's market power fails to fully convince.

On the other hand, the protection afforded to commercial agents is independent of the actual ratio of market power between the parties. The Directive's draft version had in fact enabled parties to derogate from certain provisions if the commercial agent was a company or a legal person whose most recent annual accounts showed that it had paid-up capital exceeding the equivalent of 100,000 European units of account or an annual turnover exceeding 500,000 European units of accounts.[111] Among those provisions was one which provided for termination

[106]Recital 2 of the Commercial Agents Directive.

[107]Cf. supra 107ff.

[108]Cf. Jones (1972), p. 107.

[109]Fock (2002), p. 70 with reference to Lampe (1962).

[110]Cf. in this respect *Commission,* Notice on exclusive dealing contracts with commercial agents, published in French, Dutch, German and English in [1962] OJ 139, 2921, unofficial English version available at http://ec.europa.eu/competition/antitrust/legislation/edc_en.html accessed 26 November 2016.

[111]Art. 33 (1) Amendment to the proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents [1979] OJ C56/6. The European unit of account was a basket of European currencies. Its value exactly corresponded to the value of the IMF Special Drawing Right on 28 June 1974, i.e. roughly 1.20 USD at the time;

fees.[112] The version that was finally adopted did away with the exclusion of larger commercial agents and applies without restrictions. A further indication that a commercial agent does not have to be presumed to be in a weaker position is that the Directive does not hinder agents from serving more than one principal. Furthermore, agents are free to take on the *del credere* risk for a principal. This means that under the final version of the Directive, a commercial agent with market power equal or superior to that of the principal also benefits from the termination fees.

3.2.4.2.2 Market Failure Due to Information Asymmetries

Second, information asymmetries can justify mandatory provisions. This is the case if one, more or all parties to a contract lack relevant information about it.[113] If a party is uncertain about the likelihood of opportunistic behaviour by the other party, a mandatory rule preventing that party from that behaviour can be justified.[114] Remedying information asymmetries protects the uninformed party but can also contribute to efficient resource allocation.[115] An information asymmetry for the commercial agent consists in him not knowing whether the principal will terminate the contract at a given point in time in order to opportunistically reap the commercial agent's relationship-specific investments. The regime for termination fees could be understood to aim at alleviating these problems by discouraging the principal from an unwarranted termination. However, principals' ability to pass on the expected costs of termination fees decreases the value of this deterrent effect. By allowing the principal to save costs in commissions beforehand, terminating the contract can then effectively carry the same average costs as where no termination fees were owed.

Nevertheless, mandatory termination fees might give the commercial agent information about whether it is profitable for the principal to terminate the contract at a certain point in time. During the first stages of a commercial agency, the savings which the principal has made by paying a lower commission will typically not have made it profitable to terminate the commercial agency already. After a certain period of time has passed, however, those total savings can become higher than what termination fees would call for. Then, the likelihood of termination can be considered to increase. At the same time, however, termination might also be more profitable during the first years of the commercial agency, when the commercial agent has to invest the most in building up a customer base.[116] Hence, it ultimately

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cf. Commission Decision No. 3289/75/ECSC, 15 December 1975 [1975] OJ L327, 19 December 1975.

[112]Other provisions included those pertaining to the point in time when commission is due, the conditions of *del credere* agreements and the period of notice in case of termination.

[113]Cooter and Ulen (2014), p. 297; cf. Akerlof (1970), p. 488.

[114]Jickeli (1996), p. 114.

[115]Grundmann (2001), p. 521.

[116]Fock (2002), pp. 146, 148.

remains unclear whether Arts 17 and 18 Commercial Agents Directive contribute to offsetting the lack of information for the commercial agent.[117] If it has an effect in this respect, it can be assumed to be rather small.

3.2.4.2.3 Market Failure Due to External Effects

Third, if a certain type of contract creates negative external effects for third parties not involved in that type of contract, mandatory provisions can be required to protect those third parties. The Commercial Agents Directive is aimed at protecting commercial agents vis-à-vis their principals, i.e. only at the protection of parties involved in commercial agency contracts. Yet there are two consideration connected with external effects which could become relevant nonetheless.

On the one hand, Art. 19 Commercial Agents Directive could be understood to protect risk-averse commercial agents against the effects of contracts between principals and risk-seeking commercial agents.[118] If Arts 17 and 18 Commercial Agents Directive were default provisions, risk-seeking commercial agents would be more likely than their risk-averse counterparts to evade termination fees in their commercial agency contracts. As a consequence, they would be able to gain a larger market share as they would be better able to accommodate the interests of principals who prefer no termination fees. Risk-averse commercial agents would lose influence on such a market. This could be understood as a negative external effect, which requires framing the regime in mandatory rules. In this context it should be noted that there are a number of reasons to assume that a significant proportion of commercial agents is in fact risk averse.[119] Individuals are generally assumed to be risk averse. Furthermore, it has been shown that risk aversion increases when scaling up the potential loss.[120] Termination fees can make up a substantial amount, i.e. up to an equivalent of the sum of two years' commission. This gives some indication that at least a significant proportion of commercial agents are risk averse. This alone does not permit the conclusion that a policy favouring one subgroup of commercial agents is reasonable and a justification for the regime's mandatory

[117] The incentive for the principal to opportunistically terminate the commercial agency is highest when the amount of relationship-specific investments is highest. The commercial agent will invest most heavily at the beginning of the commercial agency.

[118] This protective effect even exceeds the Directive's original purpose of strengthening commercial agents' protection, which is limited to their position towards principals, cf. Recital 2 of the Commercial Agents Directive. Yet, it is a viable understanding that the purpose of approximating the conditions of competition can be interpreted to cover the approximation of the conditions for risk-averse and risk-seeking commercial agents.

[119] Regrettably, there exist neither studies on the ratio of risk-seeking to risk-averse commercial agents in the market nor studies on the magnitude of the positive effect termination fees have on risk-averse commercial agents and their negative effect on risk-seeking commercial agents respectively.

[120] Holt and Laury (2002), p. 1644; Holt and Laury (2005), p. 902.

nature. It would have to be ascertained that the losses to the risk-averse commercial agents outweigh the gains of risk-seeking commercial agents and principals. Obviously, the weighing of interests in this sense ultimately falls within the legislator's prerogative of evaluation. It should, however, also be pointed out that mandatory rules are generally inefficient where the preferences for terms are likely to vary and where parties are likely to know their own preferences better than lawmakers.[121]

On the other hand, relevant externalities could exist for society as a whole. If commercial agents were not entitled to termination fees, society would run an increased risk of having to support commercial agents through the public welfare system when commercial agency contracts end. In this respect, account must be taken of the fact that, unlike entitlements in the public welfare system, termination fees are directly tied to the recipient's performance during the duration of the contract.[122] Yet, both termination fees and entitlements in the public welfare system such as unemployment or retirement benefits are triggered when the commercial agent loses a source of revenue and both compensate this loss to a certain extent. This functional connection between termination fees and payments out of the public welfare system is also reflected in the fact that termination fees have to be reduced if the commercial agent benefits from a pension plan financed by the principal.[123] The analysis above permits the conclusion that the intervention at least does not occur in respect of completely negligible external effects.

3.3 Conclusion

The analysis above has shown that there are a number of indications for a market failure in the absence of mandatory termination fees. Yet again, those indications are mostly weak and can be met with substantial counter-arguments. Ultimately, the justification of the mandatory nature hinges on how the legislator weighs the interests involved. The treatment of the interests of risk-averse commercial agent merits particular attention in this respect. As far as these commercial agents are concerned, the arguments in favour of a market failure are stronger. An overall assessment of the arguments for the entire market for commercial agents suggests a weak case of market failure. Thus, the mandatory nature of the regime for termination fees can be justified, granting the legislator a broad prerogative of evaluation in this context.

[121] Whincop and Keyes (1998), p. 437.

[122] Cf. Schwarz (2002), p. 57.

[123] Commission of the European Communities, Report on the application of Article 17 of Council Directive on the Laws of the Member States relating to Self-Employed Commercial Agents (86/653/EEC), 23 July 1996, COM (1996) 364 final, 3.

3.4 Arts 17 to 19 Commercial Agents Directive and Choice of Law

Art. 19 Commercial Agents Directive impedes principals and risk-seeking commercial agents from acting on their goal to contract around the regime for termination fees. One way to achieve this goal in cross-border commercial agency could be by agreeing to apply the law of a country which does not provide for termination fees. A regime such as Arts 17 and 18 Commercial Agents Directive requires safeguarding against choice of law in order to be effective for cross-border commercial agencies. This inference can be substantiated in light of an empirical study which compared the effect of termination restrictions in the United States on another type of relational contract, namely franchising contracts.[124] Newly introduced regulation in both the District of Columbia as well as Iowa aimed at combating opportunistic terminations by the principal and required the franchisor to show good cause for his termination. The two regimes differed, however in that the law of Iowa also voided any choice of law which caused the law of Iowa to become inapplicable to a franchising contract operating in Iowa.[125] In contrast, the law of the District of Columbia did not include a comparable constraint. While there was no clear impact of the new termination restrictions on the occurrence of opportunistic termination in the District of Columbia, franchising activities in Iowa dropped significantly in response to the introduction of restrictions on termination. The panel data analysis thus showed that work-arounds such as choice of law clauses need to be prevented in order to make the regulation of relational contracts effective.

It is therefore not surprising that the omission of harmonised rules on conflict of laws in the Commercial Agents Directive has to be considered its Achilles heel.[126] International commercial agency contracts can reach across borders within the EU as well as the EU's external borders. This type of contract raises the question whether the mandatory nature of Arts 17 and 18 Commercial Agents Directive extends to situations which involve conflict of laws questions or a jurisdictional conflict. The missing rules of conflict in the Directive do not mean that parties can in fact easily opt out of the regime for termination fees or that the application of termination fees in these agreements occurs in a legal vacuum.

In order to clarify parties' potential motivation for evading the Directive's regime for termination fees, it should be reiterated that a considerable proportion of countries outside of EU do not provide for termination and instead allow the free interplay of market forces. In particular, almost all states of the United States and provinces in Canada require the payment of termination fees in the sense of the

[124] Klick et al. (2012), p. 38.

[125] Iowa Code § 523H.3 and § 523H.14; cf. *Holiday Inns Franchising Inc v Branstad*, 537 NW 2d 724, 730 (Iowa 1995); *American Express Financial Advisors Inc v Yantis*, 358 F Supp 2d 818 (ND Iowa 2005).

[126] Basedow (1996a), p. 1925; cf. Recital 3 of the Commercial Agents Directive.

Directive.[127] Incidentally, the EU and the United States are each other's primary trade partners.[128] The important status of Canada among the EU's trade partners allows a corresponding presumption.[129] It stands to reason that trade between the United States, Canada and the EU would increase with a ratification of the respective trade agreements TTIP and CETA.[130] Other major exporting countries into the EU countries which do not provide for any termination fees for commercial agents include Australia,[131] China,[132] India,[133] Indonesia,[134] Japan,[135] Mexico[136] and Thailand.[137] A choice of law then becomes the obvious work-around for commercial agency contracts involving parties—and in particular principals—from those countries.

3.4.1 ECJ Decision in Ingmar

A choice of law with the potential to exploit the global regulatory divide regarding termination fees in commercial agency contracts was subject to a decision rendered by the ECJ in *Ingmar* in the year 2000.[138] The dispute concerned the role of Arts

[127]Kraus (2013), p. 392; Harris (2012), p. US11; Katz (1997), p. 6; Bremermann (2013), p. 186. This has been evidenced by recent court decisions regarding the law of a number of states in the USA as well as the Canadian province of Ontario, see Oberlandesgericht München, 17 May 2006, 7 U 1781/06, IPrax 2007, 322 (regarding California); Cour de cassation (France), 28 November 2000, *Allium v Alfin et Groupe Inter Parfums*, Clunet 2001, 511 (regarding New York); *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB) (regarding Ontario); Oberlandesgericht Stuttgart, 29 December 2011, 5 U 126/11, IHR 2012, 163 (regarding Virginia); *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (Ch), [2015] 1 Lloyd's Rep 1 (regarding Texas).

[128]Together the EU and the United States account for one third of total world trade. In 2014, trade with the United States accounted for 15.2 % of the EU's total trade, cf. DG Trade, European Union—Trade in goods with USA (2014), 2.

[129]In 2014, trade with Canada accounted for 1.7 % of the EU's total trade, making Canada the 12th-ranked trade partner of the EU, cf. DG Trade, European Union—Trade in goods with Canada (2014), 2.

[130]*Commission,* 14 June 2013, Member States endorse EU-US trade and investment negotiations, Memo 13/564; *Commission,* 17 June 2013, A Free Trade Agreement between the EU and Canada, Memo 13/573; excerpts of the prospective trade agreements are available at ec.europa.eu/trade/policy/in-focus/ttip accessed 26 November 2016 and at ec.europa.eu/trade/policy/in-focus/ceta accessed 26 November 2016.

[131]Feinauer and Weingarten (2013), p. 33.

[132]Maaz (2013), p. 75.

[133]Bahrdwaj (2013), p. 137.

[134]Schlüter (2013), p. 142.

[135]Kaiser (2013), p. 170.

[136]de Pay (2013), p. 255.

[137]Klose (2013), p. 360.

[138]Case C-381/98 *Ingmar* [2000] ECR I-9305.

17 to 19 of the Commercial Agents Directive in international commercial agency relations. The case involved Ingmar GB Ltd, a commercial agent providing its services in the United Kingdom and Ireland, and Eaton Leonard Technologies, a principal established in California, USA. In 1989 Ingmar had become the commercial agent for the sale of all of Eaton's products, which were tube and pipe bending machines designed for the aircraft and automotive industries.[139] The respective commercial agency contract included a choice of law in favour of the laws of the state of California while no choice of court agreement was made.[140] In the common law tradition, the law of California does not provide for termination fees.[141] The contract was terminated in 1996. Ingmar ignored the choice of law clause and sought compensation under the English transposition of Art. 17 (3) Commercial Agents Directive before the High Court of Justice of England and Wales. After the High Court upheld the choice of law clause and consequently refused to grant compensation, Ingmar went on to appeal the judgment before the Court of Appeal of England and Wales (Civil Division). The Court of Appeal referred the following questions to the ECJ for preliminary reference:

> Under English law, effect will be given to the applicable law as chosen by the parties, unless there is a public policy reason, such as an overriding provision, for not so doing. In such circumstances, are the provisions of Council Directive 86/653/EEC, as implemented in the laws of the Member States, and in particular those provisions relating to the payment of compensation to agents on termination of their agreements with their principals, applicable when:
>
> (a) a principal appoints an exclusive agent in the United Kingdom and the Republic of Ireland for the sale of its products therein; and
>
> (b) in so far as sales of the products in the United Kingdom are concerned, the agent carries out its activities in the United Kingdom; and
>
> (c) the principal is a company incorporated in a non-EU State, and in particular in the State of California, USA, and situated there; and
>
> (d) the express applicable law of the contract between the parties is that of the State of California, USA?

The ECJ's reasoning paid special attention to the purpose of the Directive's regime for termination fees and its mandatory nature according to Art. 19 Commercial Agents Directive.[142] The court underlined the purpose to protect commercial agents especially after the termination of the contract.[143] Additionally, the court referred to the importance of the Directive's aim of approximating the conditions of competition within the Community.[144] Based on its analysis of the Directive's purposes, the Court held that it is essential for the Community legal order that the regime for indemnity and compensation is observed in all situations closely

[139] *Ingmar GB Ltd v Eaton Leonard Inc* [2001] EWHC 3 (QB), paras. 2, 4.

[140] Case C-381/98 *Ingmar* [2000] ECR I-9305, para. 10.

[141] Katz (1997), p. 6.

[142] Case C-381/98 *Ingmar* [2000] ECR I-9305, paras. 20–24.

[143] ibid paras. 20–21.

[144] ibid paras. 23–24.

connected with the EU.[145] Therefore, the court answered that Arts 17 and 18 of the Directive must be applied where the commercial agent carried on his activity in a Member State even if the principal is established in a non-EU Member State and a clause of the contract stipulates that the contract is to be governed by the law of that country.[146]

3.4.2 Ingmar *as a Realisation of the Directive's Purposes?*

The decision fails to convince. In contrast to the justification chosen by the court, the obligation to apply Arts 17 and 18 Commercial Agents Directive as required in *Ingmar* cannot be supported in line with the ECJ's reasoning, i.e. as a realisation of the Directive's purposes.

The ECJ did not focus on the implications of its decision in a private international law dimension. Instead it determined the application of the Directive solely on the basis of the Directive and its purposes.[147] Accordingly, it did not explicitly state that Arts 17 and 18 constitute overriding mandatory provisions.[148] Yet the interpretation of the effect of Art. 19 in international commercial agency relations in *Ingmar* effectively made those provisions immune to a choice of law. As a consequence, it effectively requires interpreting them as (or at least like) overriding mandatory provisions, although the ECJ did not make use of the term.[149] Granting Arts 17 and 18 the status of overriding mandatory provisions has to be criticised for a number of reasons.

In particular the reference to the purpose of protecting commercial agents is astonishing.[150] Both the French and the German provision after which Arts 17 to 19 Commercial Agents Directive were modelled had been viewed as merely internally mandatory provisions but not as overriding mandatory provisions prior to *Ingmar*.[151] The reason behind this was that they were aimed at the protection of a

[145] ibid para. 25.

[146] ibid para. 26.

[147] Betlem (2002), p. 91; Shelkoplyas (2003), p. 64.

[148] As it had done, for example, in 1999 regarding Belgian labour and social security law, cf. Joined Cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453.

[149] Verhagen (2002), p. 138; Staudinger (2001), p. 1976; Salah Mohamed Mahmoud (2006), p. 237; Magnus in: Magnus, Ebke, Hausmann et al. (Eds.) (2011), Art. 9 Rom I-VO, paras. 164–165.; Kindler (2011), p. 203; Staudinger in: Ferrari, Kieninger, Mankowski et al. (2012), Art. 9 Rom I-VO, para. 16; Ferrari in: Ferrari, Kieninger, Mankowski et al. (2012), Art. 3 Rom I-VO, para. 63; *Roth* opposes this view as far as Art. 9 Rome I Regulation is concerned: Roth (2010), pp. 319–320.

[150] Case C-381/98 *Ingmar* [2000] ECR I-9305, para. 21.

[151] Bundesgerichtshof (Germany), 30 January 1961, VII ZR 180/60, NJW 1961, 1061, 1062; Cour de cassation (France), 28 November 2000, *Allium v Alfin et Groupe Inter Parfums*, Clunet 2001, 511–523. Cf. also Rechtbank Arnhem, 11 July 1991, [1992] NIPR 100; Rechtbank Arnhem, 18 March 1993, [1993] NIPR 473.

party perceived as weak. It was generally understood that provisions aiming at the protection of a certain group who is structurally weaker than its contractual partners should not be enforced internationally.[152] Accordingly, a look at the Rome Convention and the Rome I Regulation confirms that commercial agents are not perceived as a group worthy of a special protective conflict rule in EU private international law.[153] This protective type of mandatory provision can be contrasted with those which aim at regulating and sustaining the operability of the economy at large. Those provisions were understood to typically form overriding mandatory provisions.

The nature of the political process which leads to the enactment of mandatory provisions protecting a specific group provides a fundamental consideration against treating them as overriding mandatory provisions. Such a political process can be considered to incorporate opposing interests from other societal or economic groups.[154] Turning mandatory provisions into overriding mandatory provisions extends the intended protection against parties whose interests were not incorporated into that political process, e.g. foreign principals who are confronted with a duty to pay termination fees.[155] This can also be asserted for the regime for termination fees in the Commercial Agents Directive, which was created with a view to contracts concluded between commercial agents from Member States with principals from Member States, but not those from non-Member States.[156] This is particularly regrettable as a large proportion of potential principals from non-Member States come from countries where termination fees are not known in the realm of commercial agency. Nevertheless, *Ingmar* exposed them to the obligations which follow from Art. 17 Commercial Agents Directive.

It is equally problematic to justify *Ingmar* in view of the Directive's purpose of approximating the conditions of competition. Harmonisation largely eliminated constellations in which a choice of law of a Member State's law allowed for a competitive edge over competitors when acting within the EU.[157] *Ingmar* addressed the remaining disparity between the law on commercial agency in Member States

[152]Treating provisions which aim at protecting structurally weaker parties as overriding mandatory provisions has raised difficulties in international private law for years; cf. Verhagen (2002), p. 144; Shelkoplyas (2003), p. 66. It also remains questionable to what extent provisions of this sort are encompassed by Art. 9 (1) Rome I Regulation, see Staudinger in: Ferrari, Kieninger, Mankowski et al. (2012), Art. 9 Rom I-VO, para. 22; Lüttringhaus (2014), p. 147.

[153]Cf. Verhagen (2002), p. 152.

[154]Basedow (1988), p. 27.

[155]See ibid 27 referring to the German provision on which the indemnity option in Art. 17 Commercial Agents Directive was modelled.

[156]Recitals 2 and 3 of the Commercial Agents Directive.

[157]For the ECJ's treatment of remaining disparities in intra-EU cases cf. infra 202ff.

and non-Member States. It could be said that by restricting the ability to make use of this disparity, the decision was necessary to approximate the conditions of competition between principals from Member States and principals from non-Member States.[158] Yet if the purpose of approximating the conditions of competition always allowed this conclusion, the mandatory rules in almost all Directives directed at the harmonisation of private law would have to be elevated to overriding mandatory provisions.[159] After all, the approximation of the conditions of competition is included in the recitals of almost all Directives directed at the harmonisation of private law.[160] It cannot be assumed that it was the court's intention to decrease the room for party autonomy in this broad sense. This is even more so in light of the recognition of the freedom to choose the law applicable to a contract as a basic tenet of private international law by the ECJ,[161] Advocate General Léger in his opinion on *Ingmar*[162] and the parties to the main proceedings in *Ingmar*.[163] In particular in so far as contractual relationships of merchants are concerned, there is little reason for giving the purpose of approximating the conditions of competition this broad effect. When trading with parties from outside the Internal Market, merchants cannot expect to be able to principally rely on EU law.[164] This holds true especially with regard to the regime for termination fees whose mandatory nature already meets substantial counter-arguments when the underlying transaction is confined to the Internal Market.[165]

Admittedly, it is a challenging task to reach an impregnable justification of why certain provisions are overriding mandatory provisions while others are not. Nevertheless, the Court's reasoning based on the Directive's purposes is open to severe criticism. The ECJ adopts a deontological approach and attempts to justify *Ingmar* based on the Directive itself. Yet, as was demonstrated above, this deontological approach fails as the Court's reasoning is ultimately inconclusive.

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[158] Cf. supra 102.

[159] For example, the Late Payment Directive also aims at approximating the conditions of competition, see Recital 5 of Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions (recast) OJ [2011] OJ L48/1. Following the logic of *Ingmar*, this would mean that its mandatory provisions become overriding mandatory provisions. Parties from non-Member States would then, always be bound by, for example, the level of interest as defined in Art. 2 (5) to (7) Directive 2011/7/EU in spite of having agreed to the application of their own law, cf. Freitag and Leible (2001), p. 293.

[160] Schwarz (2002), p. 61; Freitag and Leible (2001), p. 292; Michaels and Kamann (2001), p. 305.

[161] Case C-339/89 *Alsthom Atlantique v Sulzer* [1991] ECR I-107, para. 15.

[162] Case C-381/98 *Ingmar* [2000] ECR I-9305, Opinion of AG Léger, para. 57.

[163] Case C-381/98 *Ingmar* [2000] ECR I-9305, para. 15.

[164] Basedow (1995), p. 32.

[165] Cf. supra 120.

3.4.3 Ingmar *as a Response to a Failure of the Market for Cross-Border Commercial Agency?*

In contrast to the apparent lack of conclusiveness of the decision as a realisation of the Directive's purposes, a consideration of the effects of the decision on the market has the potential of explaining why Arts 17 and 18 Commercial Agents Directive were effectively turned into overriding mandatory provisions. In this respect, it can be argued that overriding mandatory provisions can be justified using the same analytical tool as for internally mandatory provisions, i.e. they can be justified if they function as a response to market failure.[166] In this respect, the analysis corresponds with the one regarding merely internally mandatory provisions. However, it should be taken into account that a legislator's mandate to intervene in a market dwindles when the number of ties which that market has to another country increases.[167] Restraint can also be called for in order to leave breathing space for regulatory competition between the involved states.[168] Accordingly, a particularly severe case of market failure has to be required for making a certain rule an overriding mandatory rule.

The court's reasoning with regard to the Directive's purposes and an analysis along the lines of market failure overlap to a certain extent. For instance, the protection of the commercial agent vis-à-vis the principal occurs under the assumption that principals have superior market power and superior information about the likelihood of termination. The added value of an analysis from the perspective of market failure is that it allows a structured way of looking at different possible tensions, which can necessitate restricting the party autonomy of commercial agents and principals. The same caveat applies as for the analysis of Arts 17 and 18 Commercial Agents Directive as merely internally mandatory provisions: an economic analysis is not devoid of normative assumptions. It should be treated as providing an additional and structured perspective on a legal problem and not as its indisputable solution.[169]

3.4.3.1 Market Failure Due to Market Power

Unquestionably, overriding mandatory provisions can be justified as a response to a market failure due to market power—as is the case, for example, with EU competition law.[170] Yet it is hard to conceive that a strategic choice of law would allow

[166] Grundmann (2001), p. 514; Whincop and Keyes (1997), p. 527.

[167] As reflect in the opinion Supreme Court of the United States delivered by Stewart J. in *Scherk v Alberto Culver Co* 417 US 506, 519 (1974): 'We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.'

[168] Muir Watt and Radicati di Brozolo (2004), p. 94.

[169] Rühl (2011), p. 13.

[170] Grundmann (2001), p. 518.

principals to distort the market in such a severe a way as to require turning Arts 17 and 18 Commercial Agents Directive into overriding mandatory provisions. As pointed out earlier, courts applying the Directive or a transposition lack the tools to make its application dependent on the presence of an actual disparity in market power.[171] Yet there are additional arguments which show that an intervention is even less appropriate in international commercial agency contracts than in domestic contracts as far as it is aimed to address such a disparity.

The comparison with EU competition law allows an inference which speaks against a severe market failure due to market power.[172] The extraterritorial application of EU competition law can be made dependent on the respective restriction of competition having an appreciable effect.[173] Transferring this notion to *Ingmar*, the portion of commercial agency contracts which evade termination fees through a choice of a law could be required to have an appreciable effect on the overall market for commercial agency.[174] The Commission has pointed out that it considers an agreement between non-competing parties whose market shares do not exceed 15 % of any of the relevant markets to not appreciably affect competition within the meaning of Art. 101 (1) TFEU.[175] In particular, an appreciable effect cannot be determined through broad assumptions but requires an analysis of some kind. Neither the Court's ruling nor the Advocate General's opinion provide an indication of whether commercial agency agreements which include a choice of law reach that threshold. Yet, it appears an unrealistic assumption bearing in mind the structure of the market for commercial agency.[176]

Furthermore, in particular in the realm of international commercial agency, the disparity of market power can be considered to be rather small and non-systematic. When commercial agency contracts reach across borders, the commercial agent frequently is a multinational corporation with superior market power to a principal

[171] Cf. supra 102f, 118f.

[172] Advocate General Léger also drew a parallel between the field of EU competition law and the distortion of competition as referenced in the Directive's second recital in his opinion, see Case C-381/98 *Ingmar* [2000] ECR I-9305, Opinion of AG Léger, paras. 27ff. This overlooks the fact that EU law differentiates between a distortion and a restriction of competition, cf. Schwarz (2002), p. 60.

[173] The Court of First Instance held that under public international law the application of EU Competition Law is justified when the restriction of competition has a foreseeable, immediate and substantial effect in the EU, cf. *Gencor v Commission*, T-102/96, ECR II-753, paras. 90, 92. For an analysis of the prospective development of this criterion in conflicts of law after Art. 6 Rome II Regulation came into force cf. Massing (2010), p. 189.

[174] The impact on the market for the products distributed through commercial agency is not relevant. Consumers are oblivious to the distribution channel which a product took before reaching them; cf. Schwarz (2002), p. 63; Michaels and Kamann (2001), p. 305.

[175] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) OJ 2001, C-368/13.

[176] Schwarz (2002), p. 64.

who in turn may be a private individual relying on a large commercial agent to distribute its products in a foreign market.[177] The improvements in information and communication technology in recent years have contributed to a further increase in small firms attempting to distribute their goods and services in foreign markets. In particular when attempting to distribute their goods in the EU, a large commercial agent who is able to be active in a number of Member States can be the appropriate contractual partner for this type of principal. An assessment of an appreciable effect in the aforementioned sense would also have to take into account that principals from non-Member States are already at a disadvantage. The ECJ has held on another occasion that no violation is to be deduced if advantages gained through anti-competitive behaviour are eroded through other disadvantages.[178] As outlined above, the absence of termination fees is typically eroded through a duty to pay higher commission. Additionally, principals from non-Member States are not protected by the fundamental freedoms, are potentially confronted with custom duties as well as transport costs and have to overcome disparities in labour law, environmental law, tax law etc.[179] When bearing in mind those disadvantages, the assumption of an appreciable effect becomes even more unrealistic. In view of the above, a market failure due to a disparity of market power which would require to restrict the choice of law as determined in *Ingmar* can hardly be detected.

3.4.3.2 Market Failure Due to Information Asymmetry

It is conceivable that provisions which remedy information asymmetries have to be turned into overriding mandatory provisions to prevent a market failure. Provisions which prevail over a choice of law, being designed to remedy the negative effects of information asymmetries, can be found, for example, in EU consumer protection law.[180] In this respect, EU instruments in private international law tend to include specific regulations for the relevant cases.[181]

While the impact of Arts 17 and 18 Commercial Agents Directive on offsetting information asymmetries in favour of the commercial agent is already small in internal cases, it can additionally be argued that the relevant information asymmetries are particularly small in commercial agency contracts reaching across borders. Exporters go through a succession of different distributional strategies when entering a foreign market. At a first stage, commercial agencies are set up to

[177] Verhagen (2002), p. 153; Freitag and Leible (2001), p. 291.

[178] Case C-306/96 *Javico v YSLP* [1998] ECR I-1997, para. 24.

[179] Michaels and Kamann (2001), p. 305; Schwarz (2002), p. 65; Fock (2002), p. 33. The impact of customs duties and transport costs has already been taken into account by the ECJ in this respect in Case C-306/96 *Javico v YSLP* [1998] ECR I-1997, para. 24; cf. Schwarz (2002), p. 65.

[180] Grundmann (2001), p. 520; Rühl (2011), pp. 412–413, 558; Rühl (2012), p. 193; cf. generally on the Unfair Terms Directive and information asymmetries Schäfer and Leyens (2010), p. 103.

[181] Cf. Arts 5, 6, 7, 8 Rome I Regulation, Art. 14 Rome II Regulation.

gain a foothold in a foreign market.[182] The psychic distance between the exporter and the foreign market necessitates an intermediary.[183] In this respect, commercial agents have the advantage of delivering valuable information about the market to the principal—such as information about demand and competitors but in particular so-called internationalisation knowledge.[184] By gaining more information about the market, it becomes increasingly profitable for the principal to internalise the costs of distribution. This means that the principal can eventually distribute the goods directly through a sales subsidiary.[185] Inevitably this implies the termination of the commercial agency and potentially the loss of the goodwill built up by the agent. A commercial agent who enters into an international commercial agency can be considered to know that his role is that of an intermediate step in the exporter's strategy of entering a foreign market.[186] Unlike in domestic markets, a commercial agency reaching across borders rarely develops into a permanent condition. It either fails and the exporter moves on to another market or the commercial agent is successful and the commercial agent is replaced by, or turned into, a sales subsidiary. Commercial agents who engage in contracts with principals from other countries can be assumed to be aware of the conditions which prevail in international distribution strategies—in particular that they are trading in security and longevity of contracts for a chance of higher profits.[187] Conversely, a commercial agent engaged in the principal's home market knows that the latter neither needs to decrease the psychic distance to the market nor to increase his internationalisation knowledge. The factors leading up to a termination are less recognisable for commercial agents who remain within the principal's domestic market. Therefore, it can be argued that commercial agents dealing with foreign principals possess more information regarding the likelihood of opportunistic behaviour by their principal. They can be considered to be able to better accommodate themselves for the termination of the contract, e.g. by factoring in the eventual costs of termination when concluding a contract. Hence, a justification of *Ingmar* based

[182]The typical 'establishment chain' is (1) exporting to a country via an agent, (2) establishing a sales subsidiary and (3) eventually beginning production in the host country: Johanson and Vahlne (1977), p. 24. For a similar typology cf. Ohmae (2002), p. 139.

[183]Factors disrupting the flow of information between a principal and the market, such as differences in language, culture, political systems, education level or industrial development, are referred to as psychic distance, cf. Johanson and Wiedersheim-Paul (1975), p. 305.

[184]Internationalisation knowledge refers to particular resources and capabilities for engaging in international business; cf. Johanson and Vahlne (2009), p. 1417; Clark et al. (1997), p. 617.

[185]Johanson and Vahlne (1977), p. 24. For further empirical evidence of this succession of stages cf. Martin et al. (1998), p. 566. It is also possible that a principal is able to leapfrog the stage of setting up a sales subsidiary by FDI, cf. Clark et al. (1997), p. 616; Johanson and Vahlne (2009), pp. 1420, 1422. Nevertheless, this involves terminating the commercial agency.

[186]Note that almost all sales subsidiaries in the export organisation in the Swedish special steel as well as the pulp and paper industry had been established through acquisition of the former agent or have been organised around some person employed by the agent, cf. Johanson and Vahlne (1977), p. 24.

[187]Cf. Basedow (1995), p. 32.

on a market failure due to information asymmetries fails to convince. This holds true in particular when bearing in mind that a particularly severe case of market failure can be required for the decision to turn a provision into an overriding mandatory provision.

3.4.3.3 Market Failure Due to External Effects

Overriding mandatory provisions can become necessary to remedy external effects.[188] Cases in which a justification can be achieved in this sense include competition law[189] and rules regarding the safety of products.[190] Yet in line with the preceding analysis it is difficult to characterise the Directive's regime for termination fees as one of those cases.

As far as external effects on risk-averse commercial agents are concerned, the question is whether those agents would in fact lose a share of the international market if Arts 17 and 18 Commercial Agents Directive were merely internally mandatory provisions. *Ingmar* can only remedy any respective external effects if it can cause principals from non-Member States to seek out risk-averse commercial agents. Yet commercial agents that are willing to enter into contracts with principals from non-Member States can already be assumed to be more risk-seeking than those that limit themselves to the domestic market—irrespective of termination fees. Those agents are willing to expose themselves to uncertainties which arise due to the parties' distance from one another. While geographical distance creates difficulties when trying to enforce claims against one another, a distance in content between the two legal systems to which the parties are subject brings about difficulties in obtaining any such claims in the first place.[191] The so-called border effect bears witness to this deterrent effect.[192] Commercial agents willing to contract with principals from non-Member States can be considered to be aware of these risks.[193] Thus, the conditions of international commercial agency contracts pre-select more risk-seeking commercial agents than in the domestic context. This makes it regrettable that *Ingmar* attempts to protect risk-averse commercial agents in a context in which they do already participate to a lesser extent. There probably are certain commercial agents on the continuum between risk-seeking and risk-averse commercial agents that *Ingmar* puts into a position that allows them to

[188] Grundmann (2001), p. 518; Whincop and Keyes (1999), p. 250.

[189] Grundmann (2001), p. 518.

[190] Whincop and Keyes (1999), p. 250.

[191] Rühl (2011), p. 33; Kronman (1985), p. 5; Schmidt-Trenz and Schmidtchen (1991), p. 331; E. Posner (1999), p. 648.

[192] The border effect refers to the observation that the volume of domestic trade exceeds the volume of international trade, cf. Evans (2003), p. 1291; Rühl (2011), p. 1, with further references. This effect can be studied also within the EU, cf. Chen (2004), p. 93.

[193] Cf. Basedow (1995), p. 32.

capture a share of the market of contracts with principals from non-Member States. However, they can be considered to be a relatively small group—in particular when compared with the relative size of risk-averse commercial agents that benefit from Arts 17 and 18 Commercial Agents Directive being mandatory in the domestic market.

In view of the above, *Ingmar* can be criticised both when looked upon as an attempt to realise the Directive's purposes and when understood as an attempt to remedy market failure. A justification based on the purposes remains inconclusive; a justification based on market failure appears unreasonable. In fact, the analysis has revealed that there is an even less severe case of market failure when looking upon international commercial agency cases than when looking upon domestic cases. *Ingmar* can only be justified if the limited number of risk-averse commercial agents willing to conclude contracts with principals from non-Member States are deemed worthy of an extraordinary high level of protection. As their protection requires restricting other merchants from designing their contractual relationships in ways which they deem mutually beneficial, the ECJ is responsible for a severe intervention into party autonomy. Why this should be the case is widely inexplicable. Therefore, *Ingmar* can be characterised as a mistaken decision. Nonetheless, it cannot be assumed that the ECJ is likely to recant its classification of Arts 17 and 18 Commercial Agents Directive. It is therefore preferable to limit the impact of the decision within the boundaries of interpretation.

3.4.4 Ingmar *and Its Effect on the Conclusion of Arbitration Agreements*

Ingmar itself did not address arbitration agreements or forum selection clauses at large. The Court merely aimed at hindering parties from evading Arts 17 to 19 'by the simple expedient of a choice-of-law clause'.[194] The ECJ had no reason to address forum selection clauses, i.e. another typical manifestation of party autonomy in contractual relations across borders. The Advocate General's opinion had referred to the respective parts of the Directive as provisions that 'prevail over any expression to the contrary on the part of the contracting parties'[195] but this broad formula was not picked up by the Court.

The Commission's report on the application of Art. 17 Commercial Agents Directive published four years prior to *Ingmar* stated that there was no need to amend the Directive with regard to jurisdictional questions. The Commission assumed that the Brussels Convention (now the Brussels I Regulation) was capable of assisting in ensuring that courts of a Member State will have jurisdiction over the

[194]Case C-381/98 *Ingmar* [2000] ECR I-9305, para. 25.

[195]Case C-381/98 *Ingmar* [2000] ECR I-9305, Opinion of AG Léger, para. 75.

respective disputes.[196] Yet this assumption suffers from obvious flaws.[197] Parties can evade the jurisdiction of a Member State court using other equally 'simple expedients'—one of them being arbitration clauses which already fall outside the scope of the Brussels I Regulation pursuant to Art. 1 (2) (d).[198] Bearing in mind that arbitration is the prevailing means of dispute resolution in international commercial relations, questions relating to the international applicability of the Commercial Agents Directive can be assumed to arise especially before arbitral tribunals. The inclusion of an arbitration agreement is a particular viable reaction to *Ingmar* as the ECJ itself recognises the interest of limiting the scope of interference with arbitration.[199]

After *Ingmar*, a number of Member State courts unsurprisingly had to deal with arbitration agreements that related to relationships between EU commercial agents and principals from non-Member States which were accompanied by a choice of law in favour of the law of the non-Member State.[200] Equally, courts were confronted with parties that had collateralised the application of the chosen law by a choice of court clause in favour of a non-Member State court.[201] Typically, the underlying disputes concerned American or Canadian principals and commercial

[196]Commission of the European Communities, Report on the application of Article 17 of Council Directive on the Laws of the Member States relating to Self-Employed Commercial Agents (86/653/EEC), 23 July 1996, COM (1996) 364 final, 10.

[197]Weller (2005), p. 135.

[198]Another simple expedient would be a choice of court agreement, which is typically permitted for commercial agency relations according to Art. 23 Brussels I Regulation, cf. Roth (2002), p. 382.

[199]Cf. ECJ, 23 March 1982, 102/81 *Nordsee v Reederei Mond*, ECR 1095, para. 14; ECJ, 1 June 1999, C-126/97, *Eco Swiss v Benetton International*, ECR I-3055, para. 32.

[200]*Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB); Oberlandesgericht München, 17 May 2006, 7 U 1781/06, IPrax 2007, 322–324; Cour de cassation (Belgium), 3 November 2011, N ° C.10.0613.N, *Air Transat v Agencies Air Belgium*, available at http:/jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20111103-3 accessed 26 November 2016.

[201]BGH (Germany), 5 September 2012, VII ZR 25/12, BeckRS 2012, 20587; Oberlandesgericht München (Germany), 17 May 2006, 7 U 1781/06, IPrax 2007, 322–324; Cour de cassation (France), 28 November 2000, *Allium v Alfin et Groupe Inter Parfums*, Clunet 2001, 511–523. The fact that the same substantive result can be reached both with an arbitration agreement and a choice of court typically brings about the same response by reviewing courts. As far as the respective decisions can be used to assess the Member States' treatment of arbitration agreements and awards using this technique, they are therefore included in the present inquiry. Cf. in a case not related to EU law: Bundesgerichtshof, (Germany), 15 June 1987, II ZR 124/86, NJW 1987, 3193, 3194: 'Aus demselben Grunde wurde auch einer Gerichtsstandsvereinbarung die Wirksamkeit versagt, die bei ihrer Anwendung in Verbindung mit einer Rechtswahlklausel zur Folge hätte, daß die zur Entscheidung berufenen Gerichte den Termineinwand nicht beachten (...). Nichts anderes kann gelten, wenn die Vereinbarung eines ausländischen Schiedsgerichts in Verbindung mit einer Rechtswahl dazu führt, daß dem Börseninländer der Termineinwand versagt wird, wie dies hier unstreitig der Fall wäre. Würde die Schiedsabrede anerkannt, stünden die börsenrechtlichen Schutzvorschriften zur Disposition der Parteien, was ihrem Charakter als unabdingbaren gesetzlichen Bestimmungen widerspräche.'

agents providing their services within the EU.[202] The background to these cases is that the law of commercial agency in the United States and Canada generally does not provide for indemnity or compensation.[203] Instead the agent's commercial risk is addressed through higher compensation throughout the duration of the contract. Additionally, the North American practice gives commercial agents more freedom after the termination of the contract by not including non-compete or restraint of trade clauses.[204] In contrast, these usually form part of the respective agreements in Europe.[205] An example in point can be made by reference to a case decided by the High Court of England and Wales in 2014. The case involved Fern, a commercial agent based in Derbyshire, England, who acted as the commercial agent for the United Kingdom and other European countries for selling software products for its principal, Intergraph, a Texas-based company. The contract granted Fern an unusually high commission of 50 % of net receipts.[206] Commission above 20–30 % is uncommon for the distribution of software products in England.[207] The high commission can be explained by the fact that the parties' contract included a choice of law clause in favour of the laws of Texas, which do not provide for termination fees. The parties had also agreed on the exclusive jurisdiction of the courts of the state of Texas.

It can be assumed that North American principals aim at maintaining the same standard in all of their commercial agency contracts and finding a way to introduce it into the individual contracts across the globe. Equally, it is advantageous to concentrate all disputes in one specific forum.[208] At the same time, this combination of contractual stipulations bears fundamental economic advantages for commercial agents depending on their risk attitude.[209] If a 'tandem' of a forum selection clause and a choice of law clause is effective in evading the extraterritorial effect the Commercial Agents Directive it could be viewed as tantamount to a choice of law clause serving the same aim.[210]

In light of the analysis above, the question of over- or under-enforcement of the Directive's regime for termination fees vis-à-vis arbitration agreements and arbitral

[202]For non-North American countries whose law does not provide for termination fees see infra 217.

[203]Kränzlin (1983), p. 170; Katz (1997), p. 6 (regarding California); cf. infra 216.

[204]Kleinheisterkamp (2009), p. 108, n. 50; Kränzlin (1983), p. 170.

[205]Cf. Art. 20 Commercial Agents Directive. The divide in the law of commercial agency between common law and the EU was echoed during the transposition of the Commercial Agents Directive in England, cf. infra 187.

[206]Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc [2014] EWHC 2908 (Ch), [2015] 1 Lloyd's Rep 1, para. 12.

[207]Singleton (2010), p. 64.

[208]Basedow (2014), p. 352.

[209]Cf. supra 112ff.

[210]The combination of a choice of law clause and an arbitration agreement was referred to as a 'tandem' in the infamous footnote in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614, 637, n. 19 (1985); cf. Weller (2005), p. 246 for the development of the 'tandem' criterion in the United States.

awards becomes a question which involves a weighing of the interests of different groups of commercial agents. A system which invariably bars any prospective arbitration of disputes relating to termination fees (and the enforcement of any resulting awards) between parties from different countries must be considered to over-enforce. At the same time, a system which invariably admits the arbitration of those disputes under-enforces. What appears to be preferable is a system which enables courts to account for the realities of the individual commercial agency and the position of the parties. While it may prove difficult in practice, developing a varied approach which allows courts to take into account the individual conditions appears to be preferable.

3.5 Summary

1. The Commercial Agents Directive's regime for termination fees fulfils the Directive's purposes only to a limited extent. The protection of commercial agents is achieved merely with regard to the subgroup of risk-averse commercial agents. The conditions of competition are not addressed directly because the Directive fails to include a conflict of laws provision. Neither can the regime be characterised as a necessary response to a severe case of market failure. Hence, it is difficult to justify the internally mandatory nature of its regime.
2. The properties of the market for commercial agency contracts enable principals to pass the costs generated by the Directive's mandatory regime for termination fees on to the commercial agents. With the introduction of termination fees, commission or other means of remunerating the commercial agent decrease in value. This is beneficial for risk-averse commercial agents and detrimental to risk-seeking commercial agents.
3. The introduction of termination fees limits the principal's ability to combat the commercial agent's moral hazard. His threat of termination becomes less credible and Art. 19 Commercial Agents Directive curtails his ability to make the commercial agent post a bond.
4. The difficulties of justifying Arts 17 and 18 Commercial Agents Directive's mandatory status are even more severe in view of their impact on cross-border commercial agency contracts. There is substantial evidence pointing to the conclusion that the ECJ's decision in *Ingmar* failed to realise the Directive's purposes and was not warranted as a response to a failure of the market for cross-border commercial agency. It is therefore preferable to mitigate the decision's effect in the field of international commercial arbitration within the insurmountable constraints set by EU law.
5. *Ingmar* is likely to increase the incentive to include a combination of a choice of law in favour of a law which does not provide for mandatory termination fees and an arbitration clause in cross-border commercial agency contracts. Courts which interpret *Ingmar* as a call to invariably prevent arbitration of all disputes relating to the Arts 17 and 18 Commercial Agents Directive over-enforce the regime.

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Chapter 4
Arbitral Tribunals and the Application of Arts 17 to 19 Commercial Agents Directive After *Ingmar*

After *Ingmar*, parties cannot evade the mandatory regime of Arts 17 to 19 Commercial Agents Directive before a Member State court by virtue of a choice of law clause alone. Therefore, parties can and in fact were expected to further collateralise their choice of law clause with a choice of forum clause in favour of a forum which they expect to uphold their choice of law as an obvious response to *Ingmar*.[1] This type of 'tandem' of a choice of law and an arbitration clause will enable parties to evade the mandatory regime of Arts 17 to 19 Commercial Agents Directive only to the extent to which arbitrators can mitigate the effects of *Ingmar* and decide the dispute in line with the parties' original agreement. Whether, and, if so, how, arbitrators must respect overriding mandatory provisions is an equally classic and contentious question in the study of international commercial arbitration.[2]

The arbitral practice regarding the question whether parties can use a combination of a choice of law and an arbitration clause to evade the consequences of *Ingmar* is an obvious point of departure for the analysis of the respective behaviour of arbitrators. In the following, it will therefore be analysed first (Sect. 4.1) However, it can already be advanced that only one award has surfaced after *Ingmar* which speaks directly to those issues. Therefore, the arbitrator's decision-making process will then be analysed in a game theoretical model (Sect. 4.2). In light of the practical implications which can be drawn from this model, the review proceedings in four Member States will then by examined in a last step (Sect. 4.3).

[1] Roth (2002), p. 382.

[2] Cf. Greenawalt (2007); Beulker (2005); Schnyder (1995).

J. Engelmann, *International Commercial Arbitration and the Commercial Agency Directive*, International Law and Economics, DOI 10.1007/978-3-319-47449-6_4

4.1 Arbitral Practice Regarding Arts 17 to 19 Commercial Agents Directive

The only (partially) published award which directly addressed the impact of *Ingmar* on a choice of law designating the law of a non-Member State was rendered by an arbitral tribunal in 2008.[3] The facts of the case were as follows. Accentuate, an English company, had acted as a commercial agent for Asigra, a Canadian company.[4] Their contract included a choice of law clause in favour of the laws of Ontario and an agreement to arbitrate all disputes in Toronto.[5] After the principal Asigra contract had been terminated, a dispute arose as to the compensation of the distributor under the English transposition of the Commercial Agents Directive in the so-called Commercial Agents (Council Directive) Regulations 1993.[6] The commercial agent initiated arbitration and claimed for compensation under the English transposition of the Directive in spite of choice of law pointing towards the laws of Ontario. The arbitral tribunal took cognisance of the ECJ's decision in *Ingmar* and noted that the question of whether they should apply the Directive in spite of the parties' choice of law is something for which there 'may be interesting academic and intriguing domestic and international policy reasons'.[7] Ultimately, however, the arbitral tribunal felt bound by the parties' choice of law and decided in an 'Award on Preliminary Issue of Law':

> It is the Arbitral Tribunal's decision therefore that the English Regulations do not apply in determining the rights and liabilities of the parties to this arbitration. Those rights and liabilities will be determined in accordance with the 'Governing Law' selected by the parties in Clause 18.3 of the MRA [master reseller agreement].[8]

The arbitral tribunal decided in its final award on 3 February 2010 that Accentuate was only entitled to compensation in the amount of 14,112.32 USD plus interest under the laws of Ontario—instead of the 1,750,000.00 GBP of compensation which Accentuate had counterclaimed for under the assumption that the English transposition applied.[9]

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[3] Cf. the reference throughout *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB).

[4] One of the disputed questions between the parties was whether the English party satisfied the requirements to be a commercial agent under the English transposition of the Commercial Agents Directive. The High Court held that the party could plausibly be seen as a commercial agent, cf. *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB), paras. 58–61. The qualification of commercial agent is particularly daunting in the United Kingdom. Unlike, for example, in Germany, there does not exist a social group identifiable as such, cf. Randolph et al. (2000), p. 671.

[5] Like its Quebecoise and Californian counterparts, the law of Ontario does not grant indemnity or compensation after the termination of commercial agency contracts.

[6] SI 1993 No. 3053 as amended by SI 1993 No. 3137 and SI 1998/2868.

[7] *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB), para. 73.

[8] *Accentuate Ltd v Asigra Inc*, 24 June 2010, 2010 ONSC 3364, para. 18.

[9] ibid paras. 5, 16, 17.

This decision reflects the strict adherence to the law chosen by the parties which can be described as the overarching guiding principle in international commercial arbitration.[10] It can also be detected in two awards rendered prior to *Ingmar* in which commercial agents were not able to obtain termination fees under the law of the place where they had provided their services because a choice of law pointed the arbitral tribunal towards another law.[11] The high regard for parties' choice of law is also reflected in a noteworthy award rendered by an arbitral tribunal acting under the auspices of the ICC in 2003.[12] The parties' choice of law designated the Commercial Agents Directive itself as the applicable law. This unusual direct choice of a Directive was an apparent attempt to evade the stricter goldplating Belgian transposition and the effects of *Ingmar*.[13] Nevertheless, the arbitral tribunal relied on the choice of law to deny compensation under Belgian law and instead applied the Directive. The fact that arbitrators refused to grant termination fees in the cases referred to above does not indicate any type of particular aversion towards termination fees. Already prior to *Ingmar*, arbitrators repeatedly granted termination fees to commercial agents if those were claimed for under the law chosen by the parties.[14] Instead of an aversion towards termination fees, these awards indicate that arbitrators' primary allegiance lies with the parties' original will. However, it should not and cannot be generalised that every arbitral tribunal deciding whether to override a choice of law in order to give effect to *Ingmar* would always uphold the choice of law. This is mainly for three reasons.

The first reason is that while the allegiance to the parties' will is certainly the starting point for the analysis of arbitrators, it does not imperatively dictate the result of their analysis. For one, it might not always be easily discernible what the parties' will is with regard to the applicable law. Choice of law clauses can be drafted in ambiguous and contradictory terms, or they may have simply been forgotten. Then it becomes the task of the arbitral tribunal to determine the applicable law. A wide array of provisions in the different conventions, arbitration laws and arbitration rules lay claim to guiding the arbitrators' decisions in this respect.[15] Recently, the question has arisen whether the Rome I Regulation merits

[10]Renner (2011), p. 111.

[11]ICC Award 6379/1990, YB Comm. Arb. XVII (1992), 212–220; ICC Award 6752/1991, YB Comm. Arb. XVIII (1993), 54–57 (in both awards the choice of Italian law impeded the application of Belgian provisions on indemnity payments).

[12]ICC Award 12045/2003, Clunet 2006, 1434, cf. also ICC Award 9032/1998, 12 ICC Bull. (2001), 123, 125: 'Cependent, les parties privées restent libre de choisir une directive communautaire en tant que loi, ou en tant que loi "intégrative" de leur relation contractuelle.'

[13]Cf. infra 180f for details on the Belgian transposition.

[14]ICC Award 8161/1995, ICC Bull. 2002, 86; ICC Award 8177/1995, ICC Bull. 2002, 89; cf. Beulker (2005), p. 78. In a recent analysis *Renner* has shown that in 31 ICC Awards which discussed the application of mandatory provisions of the *lex causae*, the mandatory provisions were ultimately applied in 26 cases, Renner (2011), p. 112.

[15]Cf. for example ICC Award 8817/1997, YB Comm. Arb. XXV (2000), 355, 366, para. 47. As the parties had not chosen an applicable law the arbitral tribunal applied the Commercial Agents

attention or even requires application in this respect. The question may also be raised whether the rules pertaining to the application of overriding mandatory provision included in the different conflict of laws rules require to be applied by arbitrators.[16] Lastly, this question can also be posed if the parties have chosen a certain law to be applicable to their contract.

It can be concluded that there exist a number of indications that arbitral practice is not *per se* opposed to the application of provisions which can be compared with those establishing the regime for termination fees. Nevertheless, it has also become noticeable that there is a lack of uniformity to arbitral practice regarding the application of overriding mandatory provisions.

The second reason relates to the reliability of published awards as indications of arbitrators' general behaviour. A ubiquitous problem in the research on international commercial arbitration is that awards are difficult to access for analysis as they are rarely made available to the public. Parties only rarely agree to publication of an award in international commercial arbitration. Equally, review proceedings occur too seldom to allow the published decisions to give enough insight into arbitral decision-making. The accessible awards provide merely anecdotal evidence, making it difficult to evaluate whether they refer to an event which is typical or atypical, frequent or infrequent, ordinary or extreme.[17]

The third reason is that the assumption that arbitrators simply ignore the interests behind mandatory laws not encompassed by the parties' choice of law would be to belittle their far-sightedness. The enforceability of an award can depend on whether they take those provisions into account. Arbitration occurs in the shadow of judicial review.[18] The properties of that review have an indirect effect on arbitrators and shape their decision-making. This applies also with regard to substantive mandatory EU law. Arbitrators have expressly referred to their respective concerns, for example in light of EU competition law.[19] In more general terms, arbitral tribunals

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Directive itself as it considered its provisions to be common to the countries where the two parties were established, i.e. Denmark and Spain.

[16]Cf. ICC Award 4132/1983, YB Comm. Arb. XXV (2000), 341–354 (accepting the applicability of Art. 85 EEC Treaty in spite of determining Korean law as the law applicable on the substance of the contract).

[17]Cf. Drahozal (2003), p. 23; Paulsson (1998), p. 22.

[18]See Park (2005), p. 905: 'Arbitration proceeds in the shadow of judicial power'; Greenawalt (2007), p. 105: '(...) and because arbitration always takes place in the shadow of the judicial review that a party may seek in a national court'. Regarding the *Eco Swiss* judgment see Blanke (2005), p. 175: '(...) the ECJ did not explicitly impose a duty on the arbitrator to raise *ex officio* the potential infringement of EC competition law, the net effect of the judgment was nonetheless that an arbitrator's award could turn out to be unenforceable if he failed to give due consideration to the potential competition issues (...) In other words, given the arbitrator's traditional duty to render an enforceable award, he would run the insurmountable risk of the unenforceability of his award if he ignores relevant competition law issues in the making of the award.'

[19]ICC 4131/1982, YB Comm. Arb. IX (1984), 134 pointing out that the tribunal 'will assure itself that the solution is compatible with international public policy, in particular, in France' i.e. the expected place of enforcement; cf. also ICC Award 8626/1996, Clunet 1999, 1073; ICC Award

have at times recognised that the priority of the parties' will 'must be construed to be subordinate' to the application of mandatory law if the state that enacted the law has 'a strong legitimate interest to justify the application of such law in international arbitration'.[20]

What can be concluded is that the willingness of arbitrators to adhere to Arts 17 to 19 Commercial Agents Directive and the respective transpositions in a law different from the one agreed upon by the parties remains problematic.[21] In spite of occasional indications to the contrary, the accessible portion of awards reflects that arbitrators in principle favour the will of the parties in this context.

4.2 Game Theoretical Analysis of the Application of Art. 17 Commercial Agents Directive by Arbitral Tribunals Within the System of Review

As outlined above, the scarcity of published awards makes it difficult to systematically assess the attitude of arbitrators when faced with a choice of law in favour of a law which does not grant termination fees. What can be assessed with less difficulty is the behaviour of arbitrators in a model which traces that decision using the insights of game theory. This allows reframing the attitude adopted by arbitrators as a strategy in response to the actions taken by the other relevant actors in a model. These other actors are a principal, a commercial agent and a court of a Member State. This open approach can reduce the impact of any philosophical perspectives on how arbitrators should behave.[22]

If it is possible to detect the conditions which influence a certain decision maker, game theory allows systematic prediction of the action which a rational decision maker will choose. Game theory proves apt to analyse situations where the actors take interdependent decisions based in part on how others are likely to act. It has allowed deepening of the understanding of interactions in sequential stages such as the appeals process.[23] The decision by an arbitrator on whether to apply or disregard a potential entitlement arising under a transposition of the Commercial

8528/1996, YB Comm. Arb. XXV (2000), 341, para. 35; ICC Award 14046/2010, YB Comm. Arb. XXXV (2010), 241, para. 3.

[20]ICC Award 6320/1992, YB Comm. Arb. XX (1995), 62, para. 153.

[21]Renner (2011), p. 117.

[22]Cf. supra 6ff. The model cannot do without assumptions which in turn can be argued to be influenced by philosophical perspectives. The most critical of those relate to the utilitarian view that arbitrators will always decide in favour of the action which benefits themselves the most. See *R. Posner's* laconic answer to the question of what appellate judges in the United States maximise: 'The same thing as everybody else does.': R. Posner (1993), p. 1.

[23]Cf. e.g. generally Cooter and Ulen (2014), p. 392; regarding the appeals process Shavell (1995); Shavell (2007).

Agents Directive is an example in point for such an interdependent decision. An arbitrator is concerned to render an enforceable award as well as to meet the parties' will. While enforceability is connected with the court's understanding of *Ingmar* and its role in pre- and post-award review, meeting the parties' will is connected with the parties' incentives to use arbitration in the first place. To these ends, the application of the Commercial Agents Directive in international commercial arbitration can be modelled as a sequential game.[24] The model can trace the connections between the way in which review is carried out and the way in which arbitrators render decisions on termination fees. It can thereby bring light to the black box of arbitral decision-making and the delicate interdependencies of the multi-layered problems detected in the legal analysis.

This model necessarily simplifies the complex system at work but shows the key forces at work within this system. It is based on a model by *E. Posner*.[25] His model uses the Supreme Court of the United States' decision in *Mitsubishi* as a starting point and analyses the conditions for the application of mandatory provisions by international arbitrators. He uses antitrust law as a starting point and limits the model to mandatory rules that are designed to protect third parties against externalities.[26] In contrast, the Commercial Agents Directive also addresses the protection of the commercial agent, i.e. the unilateral protection of one of the contracting parties. Nevertheless, it provides a very helpful blueprint for the analysis and its application to rules unilaterally protecting parties is feasible.[27] The model limits its attention to the constellation with the most practical importance, i.e. a contract between a commercial agent carrying on his services in a Member State and a principal from a non-Member State.[28]

4.2.1 Short Description of the Model

The model traces the interactions of four parties: a principal from a non-Member State, a commercial agent carrying on its activity in a Member State, a court in that Member State and an arbitrator seated outside of the EU. In broad terms, their interaction can be described as follows: when entering into the contract the principal and the commercial agent know that both can terminate the contract at any time. They are aware that termination can trigger the commercial agent's consequential claim to termination fees under the Member State's transposition of the

[24]For illustration cf. E. Posner (1999), p. 670, who provides an extensive game form for the comparable situation in the United States. Note that *E. Posner* does not address setting aside and enforcement proceedings separately.

[25]ibid; cf. also E. Posner and Voser (2000).

[26]E. Posner (1999), p. 668.

[27]As expected by *E. Posner*, cf. ibid.

[28]Cf. supra 122f, 134f.

Commercial Agents Directive even if the parties chose the law of a non-Member State to apply. Parties can address this outlook by also adding an arbitration agreement to their contract. If the parties conclude this type of contract, the commercial agent will raise a claim for termination fees in front of the Member State court upon termination. The principal in turn relies on the arbitration agreement, requests the court to refer the dispute to arbitration and consequentially initiates a review of the arbitration agreement. The court can then either refer the parties to arbitration or rescind the arbitration agreement and decide the commercial agent's claim itself. If the parties are referred to arbitration, the arbitrator has to decide whether to either uphold the choice of law and refuse to award any termination fees or to override the choice of law, apply the Member State's law instead and require payment of a termination fee consequentially. The arbitrator can only award termination fees if he views the conditions set out in the transposition for granting a termination fee as both overriding and fulfilled. In all other cases the commercial agent loses the arbitration. If the commercial agent loses, he turns to the Member State's courts and attempts to have termination fees awarded there. The principal can rely on the award and its *res judicata* effect as a defence against this claim. Consequentially, the court decides whether to either respect the award as having *res judicata* effect or to refuse to do so. In the latter case it will decide the termination fees *de novo*.

To some extent, this poses a dilemma for the courts. If they grant *res judicata* effect to awards, then arbitrators will uphold the choice of law, so courts will in turn be tempted to decide the matter *de novo*. If courts do so, then arbitrators will override the choice of law as demanded in *Ingmar*, but then courts will be tempted to grant *res judicata* effect to awards.[29] However, there are also situations in which the court cannot do better by changing its strategy, as long as the arbitrator does not change his, i.e. Nash equilibria. Those depend on the relevance attached to the transposition of Arts 17 and 18 Commercial Agents Directive and the costs of interfering with the process of arbitration. Generally, if courts care about commercial agents receiving termination fees, they will always review awards, arbitrators will always override the choice of law and parties will eventually refrain from using arbitration agreements. If courts do not care enough about termination fees, then they will always give the awards *res judicata* effect and parties will be able to evade termination fees by agreeing to arbitrate. Lastly, the model also analyses the consequences of a court granting *res judicata* effect to some awards and trying some cases *de novo*.

[29]Cf. E. Posner (1999), p. 653.

4.2.2 Payoffs

4.2.2.1 Principal

The payoff for the principal is higher if the commercial agent agrees to the combined arbitration and choice of law clause. In addition to the general advantages of international commercial arbitration mentioned above, it improves his ability to combat moral hazard. As the principal is wary of moral hazard and the restrictions imposed on him through the mandatory regime of the Commercial Agents Directive, his payoffs are higher where arbitration allows him to effectively evade termination fees. Although this entails costs for the principal as they lead to higher remuneration for the commercial agent, the principal prefers paying higher remuneration and no termination fees over paying lower remuneration and termination fees. For the principal the worst possible scenario would be to pay higher remuneration and termination fees.[30]

4.2.2.2 Commercial Agent

The ratio of the different possible payoffs for a commercial agent depends on his risk aversion. For a risk-averse commercial agent, not being able to receive termination fees under the chosen law is not offset by the ability to receive higher remuneration during the course of the commercial agency. In contrast, a risk-seeking commercial agent prefers the opportunity to receive a higher total remuneration over an entitlement to receive termination fees pursuant to the Member State's law.[31] However, for both types of commercial agents the best payoff can be achieved if they are granted termination fees in addition to higher remuneration during the course of the contract.[32] It is assumed that the commercial agent's risk aversion cannot be detected by the principal, arbitrator or court.

Choosing not to agree to an arbitration clause carries the risk that the principal will not contract with the commercial agent in question at all. As the buyer in an oligopsonic market, the principal is able to find another commercial agent who is willing to agree to an arbitration agreement.[33] He can also opt to substitute

[30]Let P_r with remuneration r ϵ {high, low} and f for termination fees. It is assumed that the probability that the conditions under the transposition of Arts 17 and 18 Commercial Agents Directive are fulfilled is 0.5. Then $P_l > P_h > P_l - f2 > P_h - f2 > 0$. Yet, P_l without a duty to pay termination fees is a result that the market does not allow for, cf. supra 107ff.

[31]Cf. supra 109f.

[32]Let C_r with remuneration r ϵ {high, low}. The risk averse commercial agent would prefer receiving termination fees over the opportunity to receive a higher total remuneration through a higher commission. It is assumed that the probability that the conditions for being granted termination fees is 0.5. For risk-averse commercial agents $C_h + f/2 > C_l + f/2 > C_h > C_l > 0$. For risk-seeking commercial agents $C_h + f/2 > C_h > C_l + f/2 > C_l > 0$.

[33]Cf. supra 107f.

commercial agency for another type of distributional arrangement. Hence, an individual commercial agent refusing to agree to an arbitration agreement involves the possibility of losing the chance to contract with the principal.[34]

4.2.2.3 Court

The payoff for the Member State court engaged in pre- and post-award review is dependent on the benefit of having the Directive's standard of protection effectively realised. This benefit is offset by the costs of achieving that goal. The benefit has been influenced by the ECJ through *Ingmar*, which elevated the status of Art. 17 Commercial Agents Directive. Enforcing the respective provisions through review also implies favouring the interests of risk-averse commercial agents. Hence, the more a court is values the interests of that group, the higher the benefits of a review are. The costs of such a review depend on the conditions under the applicable procedural law and the general attitude adopted towards arbitration. The more deferential the attitude towards arbitration is, for example, the higher are the costs of interfering with arbitration. State courts increasingly understand that allowing the circumvention of mandatory rules through arbitration can serve to foster the opportunities for its citizens in international business dealings.[35] This attitude makes it costly to interfere with an arbitration going forward or with the enforcement of an award. Especially because the path dependency created by the attitude to arbitration is reflected in both procedural rules and precedents, rendering a decision that goes against this attitude is particularly costly. Another factor which influences the court's opportunity costs is the congestion of the court. It can also be assumed that the benefit of having Art. 17 Commercial Agents Directive applied is higher than the costs of review—otherwise review would never occur. The court maximises its payoffs if the Commercial Agents Directive is applied by arbitrators without the need to decide the case by itself; the second best result is achieved if this result is created through pre- or post-award review; and the worst result is achieved if the Commercial Agents Directive remains unapplied by the arbitrator without being detected by the court.[36]

[34]The commercial agent's payoff in case of not agreeing to the arbitration agreement is therefore multiplied by α, with $0 < \alpha < 1$.

[35]Muir Watt and Radicati di Brozolo (2004), p. 93.

[36]Let m represent the benefit of the court for having the transposition of Art. 17 Commercial Agents Directive effectively applied and let t represent the cost of judicial review. If the transposition remains unapplied without being detected the payoff is 0. Then: $m > m - t > 0$.

4.2.2.4 Arbitrator

The arbitrator's payoff depends on the impact that the ultimate outcome of the dispute has on his reputation. The activity of the arbitrator is driven by reputation. Nomination in future cases depends on his reputation, which in turn ultimately depends on his ability to enforce the parties' will. Hence, it can be assumed that the arbitrator's reputation depends on his ability to honour the parties' will of having a non-Member State law applied in order to evade the effect of *Ingmar* in his award while ensuring that the award is ultimately enforced.[37] Where parties have chosen a law which does not provide for mandatory termination fees, the arbitrator has to balance the interest of upholding the choice of law and allowing mandatory rules such as the Commercial Agents Directive to override the choice of law with his interest of rendering an enforceable award. The arbitrator's interest of having the award enforced without review can be considered to be stronger than the interest of being able to ignore the Commercial Agents Directive.[38] This allows the envisaging of four potential situations which influence the arbitrator's reputation differently. The best result for the arbitrator is that he can uphold the choice of law and the award is given *res judicata* nonetheless. The worst result occurs when his upholding of the choice of law is detected and the award is refused *res judicata* effect. The second best result is if he ignores the choice of law and his award is given *res judicata* effect. Finally, the result in which the arbitrator allows the choice of law to be overridden and the award is reviewed nonetheless ranks third among the possible outcomes.[39] If the parties do not conclude an arbitration agreement, the arbitrator's payoff is 0.

[37] Muir Watt and Radicati di Brozolo (2004), p. 93: 'Waning of the influence of mandatory rules is certainly one of the selling points of arbitration.' *Radicati di Brozolo* has stated in a his witness statement before the Federal Court of Australia that there are two reasons for arbitrators to consider to override a choice of law and apply the mandatory rules of the third country. One reason is their concern for enforceability. He stated as the second reason that '(...) as a matter of policy it is recognised that arbitration should not be perceived as a means to avoid or circumvent the application of such mandatory rules.' cf. *Casaceli v Natuzzi SpA* [2012] FCA 691 (29 June 2012). This concern for arbitration as an institution can be underweighted in this analysis. The impact of a single, confidential decision on the perception of arbitration at large has to be rated as too small to decisively impact a rational decision maker, cf. Rasmusen (2007), p. 10.

[38] As was observed by *E. Posner*, an arbitrator whose awards are always vacated by courts has little value for the parties, whereas an arbitrator who respects the mandatory rules but is never reversed at least confers the benefit of neutrality and cost savings: E. Posner (1999), p. 654.

[39] Let R_{ac} with a $a \in$ {uphold, override} and $c \in$ {*res judicata*, no *res judicata*}. Then: $R_{uj} > R_{oj} > R_{on} > R_{un} = 0$.

4.2.3 The Order of Play

4.2.3.1 Round 1: Arbitration Agreement and Choice of Law

In the first round the parties decide whether to conclude a contract. The respective contract is for an indefinite period of time and includes an arbitration agreement and a choice of law clause in favour of a law which does not provide for termination fees. The parties can be assumed to accept such a 'tandem' of contractual stipulations if it is more beneficial to both of them than the alternative. The alternative in this scenario constitutes a contract that depends on the Member States' courts for enforcement with a consequence of a lower remuneration for the commercial agent in exchange for his secure entitlement to termination fees. Additionally, it entails the possibility that the parties cannot agree to contract with one another at all.[40] The opportunity for gaining termination fees before state courts will be valued more highly by risk-averse commercial agents than by risk-seeking commercial agents. The game ends if the parties decide against an arbitration agreement.[41]

4.2.3.2 Round 2: Termination of the Contract

The parties' contractual relationship is entered into for an indefinite duration but is assumed to end through termination eventually as also the death of the commercial agent creates an entitlement to termination fees according to Art. 17 (4) Commercial Agents Directive. When the contract is terminated, the claim to compensation or indemnity does not arise automatically, but only if the specific conditions of the Member State's transposition are met. In this model, it is assumed that these specific conditions are fulfilled with a probability of 0.5. Both parties observe that termination occurs but neither party observes whether the conditions for the commercial agent's entitlement to termination fees are met.

4.2.3.3 Round 3: Pre-award Review

The commercial agent opportunistically brings his claims before the courts of the Member State where he carries on his activity.[42] In the absence of an arbitration

[40]Let δ with $0 > \delta > 1$ represent the discount which the payoff for not agreeing to the arbitration clause suffers in view of the possibility that the principal will turn to another commercial agent with $0 > \delta > 1$.

[41]Payoffs are $(P_l - f/2,\ \delta C_l + f/2,\ m - t,\ O)$. It is assumed that the conditions for being granted termination fees in the transposition of Arts 17 and 18 Commercial Agents Directive are fulfilled with a probability of 0.5.

[42]If the commercial agent is interested in dealing with the principal in another context, this assumption would have to be relaxed. He could also decide not to bring his claims but to settle with the principal, especially if pre-award review is costly and if the subsequent moves by the

agreement, the court would normally have jurisdiction. However, the court will be confronted with a motion by the principal according to Art. II (3) New York Convention or a respective provision in national arbitration law requesting the court to refer the parties to arbitration. In that situation the court can do one of two things. It can either refer the parties to arbitration or rescind the arbitration agreement and apply the applicable transposition of the Commercial Agents Directive itself. In the latter case the game ends.[43]

4.2.3.4 Round 4: Arbitration Proceedings

In the former case the parties meet again in arbitration. The arbitrator is confronted with the commercial agent's claim for termination fees, which is not consistent with the parties' choice of law. He must decide whether to uphold the choice of law or to allow it to be overridden. In doing so, he can engage in an analysis of the level of protection afforded to the commercial agent through the chosen law or the contractual stipulation that reflects the absence of termination fees (e.g. higher commission). The consequences of his decision depend on whether the specific conditions for claims for termination fees under the otherwise applicable transposition of the Directive are fulfilled, e.g. whether the termination is attributable to a default by the commercial agent in the sense of Art. 18 (a) Commercial Agents Directive or not. If the specific conditions are fulfilled, upholding the choice of law requires the arbitrator to hold in favour of the principal. Allowing the choice of law to be overridden requires him to find in favour of the commercial agent. If the specific conditions are not fulfilled, both upholding and overriding will yield the same substantive result, i.e. that the commercial agent is not awarded termination fees. As neither party can say with certainty whether the conditions are fulfilled, the payoff for the arbitrator is as if he had overridden their choice of law.

If an arbitrator allows the choice of law to be overridden and grants termination fees to the commercial agent, the commercial agent has no incentive to attack the award in post-award review. Then the game ends.[44] The principal might attempt to have the award annulled at the seat of arbitration for not adhering to the law chosen by the parties, but this possibility is put aside in the model.[45] If the arbitrator finds in favour of the principal, the commercial agent will ignore the arbitral award and sue before the Member State courts in the hope of a second bite at the cherry.

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court and arbitrator could be predicted. The results of this settlement, however, would reflect the equilibrium payoffs determined in the model, cf. E. Posner (1999), p. 662.

[43]If the conditions in the transposition are fulfilled, the payoffs are $(P_h - f,\ C_h + f,\ m - t,\ 0)$. If they are not fulfilled, payoffs are $(P_h,\ C_h,\ m - t,\ 0)$.

[44]In that case payoffs are $\left(P_h - f,\ C_h + f,\ m - t,\ R_{o,j}\right)$.

[45]The result of the analysis of the annulment proceedings would be the same as the result for the enforcement proceedings in Round 5, cf. E. Posner (1999), p. 665.

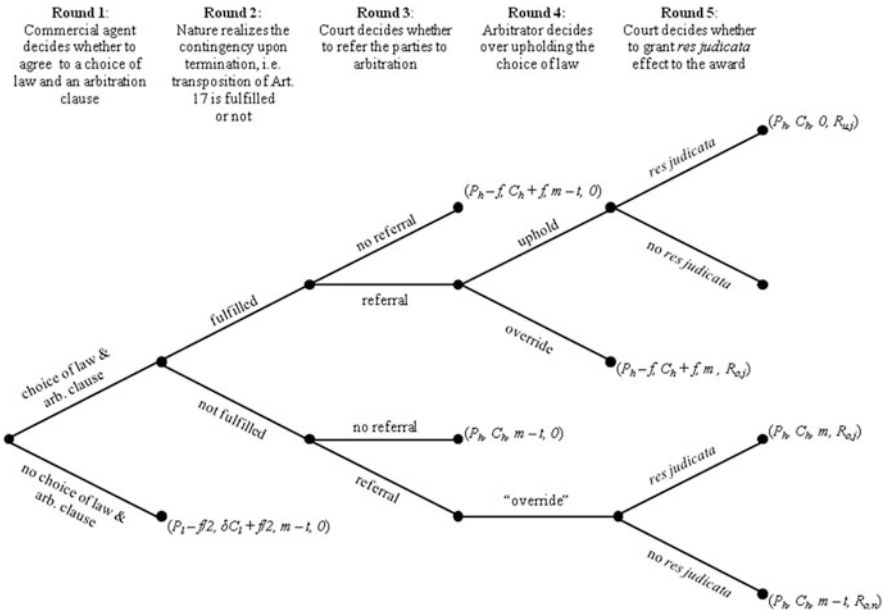

Fig. 4.1 Extensive game form

4.2.3.5 Round 5: Post-award Review

As a response to the commercial agent requesting termination fees before the Member State court, the principal raises the arbitral award as a defence.[46] The court must decide whether the arbitral award bars it from deciding the claim to termination fees *de novo*. If the award cannot be challenged under the respective grounds for refusal of enforcement, it is considered to establish *res judicata* between the parties and bars the court from deciding over the claim. In these circumstances, the court has to consider that the award can have been rendered in one of two situations, i.e. in a situation in which the specific conditions of the Member State's transposition of the Directive are fulfilled and one in which they are not fulfilled. The game ends after the court takes its decision (Fig. 4.1).[47]

[46]Again, the commercial agent could not initiate review. If the court never reviews awards he should never initiate review. If the court always gives *res judicata* effect to awards, he should always initiate review unless litigation costs are higher than the potential benefits, cf. ibid 662.

[47]If the conditions of the transposition of Art. 17 Commercial Agents Directive are fulfilled, granting *res judicata* will yield the following payoffs: $(P_h, C_h, 0, R_{u,j})$. If in that situation the court refuses to grant *res judicata* effect payoffs are $(P_h - f,\ C_h + f,\ m - t,\ R_{u,n})$. If the conditions for termination fees are not fulfilled payoffs are $(P_h, C_h, m, R_{o,j})$ for granting *res judicata* effect and $(P_h,\ C_h,\ m - t,\ R_{o,n})$ for refusing to do so.

4.2.4 Equilibria

An equilibrium in a game is as an assignment to each player of a strategy that is optimal from when the others use the strategies assigned to them.[48] Equilibria can be detected using backward induction, i.e. reasoning backwards in time to determine a sequence of actions that trigger an equilibrium.[49] Accordingly, the analysis of the conditions for equilibria to arise needs to begin with the court's decision in round 5. The court has two actions available to it in that situation: granting *res judicata* effect to the award and not granting *res judicata* effect to the award. The court can either always choose one of the two actions or alternate between the two. In game theoretic terms this means that the court can employ either a pure or a mixed strategy. The model will trace equilibria for courts which apply a pure strategy (Sect. 4.2.4.1) and a mixed strategy (Sect. 4.2.4.2) before evaluating the equilibria (Sect. 4.2.4.3).

4.2.4.1 Pure Strategy Equilibria

If the commercial agent claims for termination fees in round 5, the court does not know whether the arbitrator refused to grant termination fees because the conditions of the transposition were not fulfilled or because the choice of law was upheld. The court has to make a decision in which the prohibition of a *révision au fond* holds it back from replacing the arbitrator's evaluation with its own, while its mandate to ensure that commercial agents receive termination fees in accordance with *Ingmar* points it towards not granting *res judicata* effect. In that situation, the court develops a probabilistic approach to develop an assumption for whether the arbitrator has overridden the choice of law in accordance with *Ingmar*. The probability depends on the ratio of the payoffs available to the court in round 5, i.e. on the ratio between the benefits of having the transposition of Arts 17 and 18 Commercial Agents Directive applied and the costs of trying the case *de novo*.[50] If the benefits fall relative to those costs, the court becomes more willing to grant *res judicata* effect. If the benefits rise relative to the costs, the court becomes more willing to decide the case itself.[51] When rendering his decision in round 4, the arbitrator possesses information about the system of post-award review which his award will encounter and about the probability which the court will attach to his having overridden the choice of law.[52] If the arbitrator knows that the court will

[48] Aumann (1988), p. xi.

[49] Cf. Rasmusen (2007), p. 110.

[50] If p represents the probability which the court attaches to the arbitrator having overridden a choice of law in accordance with *Ingmar*, the probability which makes the court indifferent between the two actions is $p^* = (m - 2t)/(m - t)$. This means that the court will grant *res judicata* effect if $p > p^*$. The court will not grant *res judicata* effect if $p < p^*$ and $m > 2t$. If $m < 2t$ the court will grant *res judicata* effect despite $p < p^*$; cf. E. Posner (1999), p. 659.

[51] cf. ibid.

[52] Cf. supra 144.

assume he overrode the choice of law and will grant *res judicata* effect to the award, the arbitrator will always uphold the choice of law.[53] If the arbitrator knows that the court will assume that he upheld the choice of law and will not grant *res judicata* effect, the arbitrator will always override the choice of law.[54] The court and the arbitrator are caught in this dilemma in most constellations and the conditions for equilibria in the subgame in rounds 4 and 5 are restricted accordingly.[55]

An equilibrium can arise if the probability which the court attaches to the arbitrator having overridden the choice of law in round 3 is higher than the one making him indifferent.[56] If the court's benefit for ensuring that the transposition of Arts 17 and 18 Commercial Agents Directive is applied is also not more than twice the costs of achieving that goal, the court would then use a pure strategy of always refusing to grant *res judicata* effect in round 5. Consequentially, it will already refuse to refer the parties to arbitration in round 3. The payoff for doing so is at least as high as any payoff it could obtain by a referral.[57] If the court always refuses to refer the parties to arbitration, principals never agree to an arbitration clause in their contract.[58] International commercial agency contracts between a principal from a non-Member State and a commercial agent from a Member State will thus never include arbitration clauses. The result is the NO ABITRATION equilibrium.[59]

In contrast, the PURE ARBITRATION equilibrium arises if the costs for enforcing a transposition of Arts 17 and 18 Commercial Agents Directive are more than twice as high as the benefits of achieving that goal. The court will then use the pure strategy of always granting *res judicata* effect to awards in round 5—although it knows that the arbitrator upheld the choice of law. In this case, reducing costs outweighs foregoing the benefits of ensuring that commercial agents ultimately receive termination fees. The arbitrator will always uphold the choice of law in round 4 and the court will always refer the parties to arbitration in round 3.[60] As nature does not act strategically in round 2, it is then up to the parties to choose whether to include an arbitration clause in their contract in light of the expected course of events. Principals will always prefer to arbitrate.[61] They will always be able to conclude an arbitration agreement if they are facing a risk-seeking

[53] As $R_{uj} > R_{oj}$.

[54] As $R_{o,n} > R_{u,n}$.

[55] There is no pure strategy subgame equilibrium for rounds 4 and 5 if $p < p^*$ and $m \geq 2t$ or if $p < p^*$, cf. E. Posner (1999), p. 660.

[56] $p > p^*$.

[57] $m \geq 2t$ implies that $m - t \geq (m - t)/2 + (m - t)/2$. All other payoffs in rounds 4 and 5 are not available to the court because if $m \geq 2t$ the arbitrator would uphold the choice of law and the court would not grant *res judictata* effect in round 5.

[58] As $P_l - f/2 > P_h - f/2$, principals will not agree to arbitrate.

[59] Cf. E. Posner (1999), p. 660.

[60] $m < 2t$ implies that $m - t < m/2$, i.e. the payoff for refusing the referral is lower than the expected payoff of the referral, cf. ibid.

[61] $P_l - f/2 < P_h/2 + P_h/2$.

commercial agent.[62] Those parties will always conclude an arbitration agreement, the court will always refer the parties to arbitration, the arbitrator will always uphold the choice of law and the court will always grant *res judicata* effect to the award.[63] Thus, the PURE ARBITRATION equilibrium occurs between principals and risk-seeking commercial agents. Risk-averse commercial agents prefer in principle not to include an arbitration clause.[64] The prospect of otherwise not being able to contract with the principal at all can, however, persuade commercial agents to agree to an arbitration agreement. The more the market resembles an oligopsony, the more risk-averse commercial agents are persuaded to agree to an arbitration clause in this manner.[65] The PURE ARBITRATION equilibrium therefore also arises between principals and this group of commercial agents. Yet for highly risk-averse commercial agents, not agreeing to the arbitration clause remains the preferred action.[66]

4.2.4.2 Mixed Strategy Equilibria

An equilibrium can also arise if the court does not adhere to one of the two pure strategies but instead applies a mixed strategy. This means that the court neither categorically grants nor categorically refuses to grant *res judicata* effect but instead probabilistically chooses one of the two actions.[67] The arbitrator is aware of the value which this probability takes when making his decision in round 4. Accordingly, the court picks a probability which equates the arbitrator's expected payoff for upholding the choice of law to the payoff for overriding the choice of law. Therefore, the probability depends on the arbitrators' payoffs, i.e. the reputational effects of the individual outcomes for him.[68] What turns out to be decisive is the ratio between the arbitrator's payoff for an award upholding the choice of law which is ultimately granted *res judicata* effect and the payoff for an award overriding the choice of law which is also granted *res judicata* effect. If these two outcomes yield about the same payoff for arbitrators, a high probability of the court granting *res judicata* effect is required. The probability must be low if upholding the choice of law yields a much higher payoff than an award overriding the choice of law.[69]

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[62]For risk seeking commercial agents $C_l + f/2 < C_h/2 + C_h/2$.

[63]Cf. E. Posner (1999), p. 660.

[64]For risk-averse commercial agents $C_l + f/2 > C_h/2 + C_h/2$.

[65]Although $C_l + f/2 > C_h/2 + C_h/2$, if δ is small enough $\delta C_l + f/2 < C_h/2 + C_h/2$.

[66]High risk aversion implies that $(C_l + f/2) - C_h)$ is too high to allow δ to compensate the difference.

[67]Cf. Rasmusen (2007), p. 66.

[68]Let q represent the probability that the court grants *res judicata* effect to the award. The model allows the conclusion that the probability that achieves indifference is $q^* = (R_{oj} - R_{un})/(R_{uj} - R_{un})$. Letting $R_{un} = 0.$, $q^* = R_{oj}/R_{uj}$, cf. E. Posner (1999), p. 660.

[69]The court will then review awards with a probability of p^* in round 5 and the arbitrator will override the choice of law with a probability of q^* in round 4.

For an equilibrium to occur, the court must refer the parties to arbitration in round 3 and the parties must include an arbitration clause in round 1. The court will always refer the parties if the benefit of ensuring adherence to Art. 17 Commercial Agents Directive is more than twice as high as the costs of achieving that goal by not referring the parties and instead seizing jurisdiction over the dispute.[70] Otherwise the NO ARBITRATION equilibrium arises. In round 1, the parties' expected payoffs for including an arbitration clause must exceed the payoff for not doing so. Principals and risk-seeking commercial agents will always prefer including an arbitration clause.[71] Risk-averse commercial agents can also be willing to include an arbitration clause.[72] This is in particular the case if the costs of review incurred by the court are low and if the relevance assigned to the transposition of Art. 17 Commercial Agents Directive is high.[73] Additionally, the more easily commercial agents are substitutable as contractual partners, the more risk-averse commercial agents will prefer including an arbitration clause. However, the possibility remains that highly risk-averse commercial agents will not agree to arbitration clauses.[74] Again the NO ARBITRATION equilibrium will arise between those parties.

4.2.4.3 Evaluating the Equilibria

The model reveals that the conditions for successfully using an arbitration agreement to evade the restrictions of party autonomy emanating from *Ingmar* are highly interdependent. Ultimately, however, the way in which review is carried out determines whether commercial agents are able to rely on Arts 17 to 19 Commercial Agents Directive in international commercial arbitration proceedings. This poses the general question as to which type of review and consequentially which equilibrium is preferable. It should be borne in mind that the mandatory status of

[70]The expected payoff of a referral is $1/2\left[\left(p^{*}m+\left(1-p^{*}\right)(0)\right]+1/2(m)=(2m^{2}-3mt)/2(m-t)\right.$. The payoff for refusing the referral is $m-t$. Thus, the court will refer the parties to arbitration if $m>2t$., cf. E. Posner (1999), p. 661.

[71]For principals $P_{l}-f/2<1/2\left[p^{*}(P_{h}-f)+\left(1-p^{*}\right)q^{*}P_{h}+\left(1-p^{*}\right)\left(1-q^{*}\right)(P_{h}-f)\right]+1/2$ $\left[q^{*}P_{h}+\left(1-q^{*}\right)P_{h}\right]$ or $P_{l}-\left(q^{*}-p^{*}q^{*}\right)f/2<P_{h}$. This is because $P_{l}-f/2<P_{h}$ and $q^{*}-p^{*}q^{*}\leq 1$. For risk-seeking commercial agents $\delta C_{l}+f/2<1/2\left[p^{*}(C_{h}+f)+\left(1-p^{*}\right)q^{*}C_{h}\right.$ $\left.+\left(1-p^{*}\right)\left(1-q^{*}\right)(C_{h}+f)\right]+1/2\left[q^{*}C_{h}+\left(1-q^{*}\right)C_{h}\right]$ or $\delta C_{l}+\left(q^{*}-p^{*}q^{*}\right)f/2<C_{h}$. This is because for them $C_{l}+f/2<C_{h}$ while $q^{*}-p^{*}q^{*}\leq 1$ (and $0>\delta>1$).

[72]For risk averse commercial agents $C_{l}+f/2>C_{h}$ but $C_{l}<C_{h}$. Hence, a low value of $\left(q^{*}-p^{*}q^{*}\right)$ can satisfy $\delta C_{l}+\left(q^{*}-p^{*}q^{*}\right)f/2<C_{h}$.

[73]$\left(q^{*}-p^{*}q^{*}\right)$ decreases with an increase of p^{*}. p^{*} increases with a decrease of t and an increase of m.

[74]Cf. supra 148, n. 32.

termination fees can hardly be justified in commercial agency relationships reaching across borders.[75] The preferable type of review would therefore aim at restricting the application of the Commercial Agents Directive's regime for termination fees and its transpositions in arbitration as far as possible. At the same time, it is necessary to realise that the review cannot violate the constraints set by EU law on the review with regard to its substantive mandatory provisions in general and Arts 17 to 19 Commercial Agents Directive in particular.

4.2.4.3.1 PURE ARBITRATION Equilibrium

Arbitration agreements can have the effect of a waiver of termination fees in the PURE ARBITRATION equilibrium. All commercial agents and principals subjecting their disputes to arbitration could ultimately evade the application of Arts 17 and 18 Commercial Agents Directive. This result can be acclaimed when focusing on the interests of risk-seeking commercial agents, principals and arbitrators. Yet, the feasibility of any review triggering the PURE ARBITATION equilibrium hinges on the principle of effectiveness. The respective conditions of review mean that receiving termination fees becomes impossible in the presence of an arbitration agreement. A court might abstractly prefer this solution if it has extreme congestion costs or equally if it assesses termination fees as envisaged in the Directive to be of rather insignificant importance in cross-border cases. However, a practice triggering the PURE ARBITRATION equilibrium is in violation of the principle of effectiveness and could presumably be overturned by the ECJ. Therefore, review triggering this equilibrium cannot be considered as preferable.

4.2.4.3.2 NO ARBITRATION Equilibrium

In contrast, the NO ARBITRATION equilibrium ensures that commercial agents receive termination fees. Accordingly, it does not clash with principles of EU law. Nevertheless, it completely robs parties of the opportunity to avail themselves of the advantages of arbitration in international commercial agency contracts, i.e. neutrality and savings in costs. It also decreases the likelihood that commercial agents will contract with principals from non-Member States.[76] Furthermore, any type of review triggering the NO ARBITRATION equilibrium can only be justified with severe difficulties when bearing in mind the critical assessment of Arts 17 to 19 Commercial Agents Directive and *Ingmar* above. Only the limited number of risk-averse commercial agents willing to conclude contracts with principals from

[75] Cf. supra 125ff, 128ff.

[76] Commercial agents will still have to face δ while principals as buyers in an oligopsony market will be able to easily substitute the commercial agent with another or with a completely different distributional arrangement.

non-Member States and who are principally willing to conclude an arbitration agreement welcome this outcome. Also, risk-seeking commercial agents must relinquish any opportunity to gain profit from their willingness to take risks. Principals have to accept restrictions on their ability to combat moral hazard. As the model goes to show, protecting risk-averse commercial agents by always reviewing awards also effectively costs all parties the advantages of international commercial arbitration in terms of cost savings under the NO ARBITRATION equilibrium.

Yet if the only other choice for a reviewing court was generating the PURE ARBITRATION equilibrium, allowing arbitration would equate to categorically allowing parties to evade the regime for termination fees. Then it could be held that preventing this result necessitates the strict type of review which leads to the NO ARBITRATION equilibrium. It would appear that as long as the court adheres to a pure strategy the choice is between a type of review which is in violation of EU law and one which perpetuates the regime for termination fees across the EU's external borders. Triggering the NO ARBITRATION equilibrium by never referring the parties to arbitration and never recognising the *res judicata* effect would then be the preferable strategy.

4.2.4.3.3 PARTIAL ARBITRATION Equilibrium

Adopting a mixed strategy in order to trigger the PARTIAL ARBITRATION equilibrium could spare courts this choice. It might be produced if courts grant *res judicata* effect to arbitral awards relating to termination fees with a probability greater than 0 or lower than 1.[77] The effect of the PARTIAL ARBITRATION equilibrium can be likened to the effect of roadblocks randomly set up by the police to catch drunk drivers.[78] Checking everyone is too expensive, checking no one leads to excessive drunk driving. Therefore, roadblocks are set up randomly. Checking only some drivers is optimal as long as the drivers do not know in advance where they will be checked. *E. Posner* shows that a comparable type of judicial review can balance encouraging the use of arbitration while at the same time ensuring that arbitration does not become tantamount to waiving the application of mandatory rules.[79] Review then does not implicate a certain result but constitutes an ambiguous threat from an arbitrator's point of view.[80] Consequently, the parties too cannot be certain about the ultimate fate of any award.[81]

[77]Cf. E. Posner (1999), p. 667.

[78]E. Posner and Voser (2000), p. 128 with reference to Becker (1986).

[79]E. Posner (1999), p. 660.

[80]Cf. ibid 667. *E. Posner* refers to n. 19 of the decision by the Supreme Court of the United States in *Mitsubishi*, cf. also Guzman (2000).

[81]In this context, the lack of uniformity in the approaches among the Member States may not be confused with a mixed strategy. Parties can predict with sufficient certainty which courts will

The PARTIAL ARBITRATION equilibrium can be considered superior to the NO ARBITRATION equilibrium if the possibility for risk-seeking commercial agents to replace the regime for termination fees under the former is valued more highly than the protection afforded to risk-averse commercial agents under the latter. As was set out above, it can be assumed that the protection of risk-averse commercial agents does not necessitate turning Arts 17 and 18 into an overriding mandatory provision.[82] The same arguments which speak for that result also allow the conclusion that the PARTIAL ARBITRATION equilibrium should be preferred in the model. It has to be pointed out, nonetheless, that the different interests connected with different risk attitudes are not accounted for by a truly randomising attitude. This is a logical consequence of the model's assumption that risk attitude of commercial agents cannot be determined by the other actors. So far as the status of a review triggering the PARTIAL ARBITRATION equilibrium is concerned, it can be held that as long as the probability of granting *res judicata* effect is not too high, the review will not conflict with the principle of effectiveness. As long as this condition is met, the PARTIAL ARBITRATION equilibrium is superior to the PURE ARBITRATION equilibrium.

However, it is questionable for a number of reasons whether a reviewing court is barred from adopting a mixed strategy as a matter of principle. At first sight, it might appear as a more sensible assumption that a court only uses pure strategies, i.e. for every situation that arises before it there is one particular action with which it will respond. The rule of law implies that courts are required to reduce any ambiguities in their decision-making as far as possible.[83] Also the goal of uniform interpretation of international conventions contributes to the need for predictability and stability of court decisions across ratifying states within the realm of the New York Convention. In this context, a mixed strategy can be likened to a rule which tells the court what dice to throw in order to choose an action.[84] It is at least doubtful whether any judge would ever share the view that the (figurative) throwing of any dice was involved in rendering his decision.

Yet there are a number of indications which allow the conclusion that post-award review can inadvertently amount to the application of a mixed strategy.[85]

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review their arbitration agreement and their arbitral award. The decisive jurisdiction is the one where the commercial agent carried on his activity for the principal. However, individually, the approach adopted by each Member State can potentially be interpreted as facilitating a PARTIAL ARBITRATION equilibrium.

[82]Cf. supra 125ff.

[83]The rule of law also forms one of the foundations of the EU according to Art. 2 TEU, cf. also Hilf and Schorkopf in: Nettesheim (Ed.) (2012), Art. 2 EUV, paras. 34, 35.

[84]Cf. Rasmusen (2007), p. 66.

[85]*E. Posner* assumes that the Supreme Court of the United States inadvertently created the conditions for an application of a mixed strategy in *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*, Inc., 473 US 614, 638 (1985). On the one hand the court held that parties should go forward and arbitrate claims which implicated the antitrust law of the United States as there was 'no reason to assume at the outset of the dispute that international arbitration will not provide an

Already the content of public policy as a measure of review remains a vague concept, reducing the predictability as to which actions courts will take.[86] Furthermore, the level of scrutiny and the evaluation of what type of violation of public policy prevents the recognition of an award are not expressed in clear-cut and predictable criteria in the surveyed Member States' law. Equally, the ECJ's concession that the 'review of the arbitration award may be more or less extensive depending on the circumstances' can be understood as an acknowledgement of reviewing courts' discretion, which in turn contributes to a certain lack of predictability.[87] The limitations on the level of scrutiny by EU law are only marginal.[88] With regard to Arts 17 and 18 Commercial Agents Directive in particular, *Ingmar* did not generate a clear-cut answer to the question on when review should occur and what result it should produce.[89]

Therefore, a mixed strategy can be considered as a viable option for reviewing courts.[90] As a result, reviewing courts could in principle trigger the PARTIAL ARBITRATION equilibrium.

4.2.4.3.4 Extension: Selectively Triggering Equilibria

It has been shown in the preceding chapter that the answer to the question how reasonable it is to subject commercial agents to the regime for termination fees depends on their risk attitude. If it could be ensured that risk-averse commercial agents would benefit from protection while at the same time risk-seeking commercial agents could relinquish mandatory protection as far as possible, that system of review could be considered superior to the PARTIAL ARBITRATION equilibrium for all commercial agents. Such a system would have to ensure that awards declining termination fees rendered against risk-averse commercial agents do not receive *res judicata* effect. At the same time, the same type of awards rendered against risk-seeking commercial agents should be granted *res judicata* effect to the

adequate mechanism', para. 38. At the same time it expressed that it 'would have little hesitation in condemning the agreement as against public policy' if 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations', n. 19. By speaking out of both sides of its mouth the court created the ambiguity which allows for the application of a mixed strategy, see E. Posner (1999), p. 667.

[86]In this respect the often quoted statement by Judge Burrough is apt: 'Public policy is a very unruly horse and once you get astride it you never know where it will carry you.' *Richardson v Mellish*, [1824-1834] All ER 258 (Common Pleas).

[87]Cf. Case 102/81 *Nordsee v Reederei Mond* [1982] ECR 1095, para. 14; Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055, para. 32.

[88]See supra 71ff.

[89]Cf. supra 133ff.

[90]In fact, the assumption of mixed strategies being applied by courts is nothing unusual when modelling judicial behaviour, cf. e.g. Miceli and Coşgel (1994), p. 45.

largest extent possible under the restrictions of the principle of effectiveness. Then it would be desirable to selectively trigger NO ARBITRATION equilibrium for risk-averse commercial agents and the PURE or PARTIAL ARBITRATION equilibrium for risk-seeking commercial agents.

A fundamental challenge for this selective approach is detecting the commercial agent's risk attitude. The model assumed that courts cannot do that. This assumption can be based on the fact that the commercial agent's *ex post* opportunism will impede attempts to detect his risk attitude after a dispute has arisen as it is beneficial to all commercial agents to claim for termination fees after the contract has been terminated.[91]

Yet general characteristics of the commercial agent might be serviceable for detecting the risk attitude in post-award review. A comparable effort in this direction was the provision in a draft version of the Directive which made the application of the regime for termination fees dependent on commercial agents' paid-up capital or their annual turnover.[92] The provision's scope was however restricted to companies and legal persons, thus excluding individuals acting as self-employed commercial agents. At first sight, the exclusion of individuals acting as self-employed commercial agents might appear as an unsuitable proxy for risk-seeking behaviour. It may seem intuitively appealing that particularly risk-seeking individuals would be also be more willing to become self-employed at the outset instead of working as an employee for a company or legal person. Denying those risk-seeking individuals the possibility to opt out off the regime for termination fees would then go against the results of the analysis above.[93] The underlying assumption has, however, been called into question. An increasing volume of research has documented that risk-seeking behaviour is not the prevailing factor in the decision to become self-employed.[94] A more suitable proxy might therefore be a minimum requirement for a commercial agent's paid-up capital. Paid-up capital mainly serves a purpose as recoverable assets for any potential creditors but also limits the company's liability to a certain level. Thus, the acting individuals within this type of company do not directly put their own well-being at risk when acting in a risk-seeking manner. Instead they might be more interested in increasing the company's

[91] Cf. supra 148, n. 32.

[92] 'Where the commercial agency is undertaken by a company or legal person whose most recent annual accounts show that it has a paid-up capital exceeding the equivalent of 100,000 European units of account, or whose annual turnover exceeds 500,000 European units of account, the parties may derogate from the provisions of Articles 15 (4), 19, 21, 26 (2) and 30.' as provided for in Art. 33 (1) of the Amendment to the proposal for a Council Directive to coordinate the laws of the Member States relating to (self-employed) commercial agents [1979] OJ C56/6.

[93] Cf. supra 109.

[94] *Rosen/Willen,* Risk, Return and Self-employment (Discussion Paper 2 July 2002) found that risk aversion is not the predominant consideration driving the decision between becoming self-employed and taking up a wage-earning job. Furthermore, they discovered a negative effect of risk aversion on choosing to become self-employed, yet did not detect enough to conclude anything concerning the causality of this relationship.

sources of profit in the short term through achieving the highest commission possible.[95] This assumption holds true in particular if the acting individuals are working for a wage. The more their remuneration becomes performance related, the less accurate becomes the assumption. Therefore, paid-up capital is not a suitable proxy for risk attitudes on its own. Finally, the criterion of the annual turnover being above a certain threshold could serve as a proxy. It could be connected with the impact which the termination of a contract can have on the economic survival of a company, thus on the necessity of protecting it through termination fees. Yet, this cannot be assumed in a generalised manner as an individual contract can be so large as to be responsible for the economic survival of a company undertaking it as its sole commercial agency.[96] Hence, the factors restricting the draft version of the Directive's scope could sometimes point in the right direction when investigating the commercial agent's risk attitude. But there are always considerable counter-arguments which impede coming to a reliable conclusion. The fact that a comparable provision was ultimately excluded from the Directive appears to reflect the fact that the drafters were aware that the scope of the Directive should be limited in some sense but failed to come up with serviceable criteria in this respect.

The commercial agent's risk attitude can also not be inferred from the contents of the particular commercial agency contract. If the commercial agent has already agreed to a choice of law in favour of a law which does not award termination fees, the risk attitude cannot be determined *ex post*. There are various indications that a commercial agent entering into this type of contract is risk seeking. But the commercial agent can also be risk averse and have fallen victim to a principal with superior bargaining power, forcing the commercial agent to enter into a contract against its own interest. Hence, an *ex post* analysis of the contract does not appear suitable to detect the risk attitude.

In view of the above it appears impossible to selectively review awards with respect to the risk attitude of the commercial agent involved. Although this approach might be superior to the PARTIAL ARBITRATION equilibrium, it is not possible to measure risk attitudes in a reliable way during post-award review.

4.2.5 *Practical Implications for the Member States' Systems of Review*

The model has shown how reviewing courts influence the behaviour of arbitrators by the way they design the system of review. Although ignoring the regime for termination fees is potentially more beneficial to arbitrators, there is no reason to consider that this is a barrier which cannot be overcome by an adequate system of

[95]For example, limited liability in tort is generally acknowledged for excessive risk-taking, Hansmann and Kraakman (1991).

[96]Cf. also the arguments put forward in Bellemare and Brown (2010).

review. If courts are able to establish a PARTIAL ARBITRATION equilibrium, arbitrators will be incentivised to ensure that commercial agents are afforded the Directive's protection. From a normative standpoint, this is preferable if the interests of risk-averse commercial agents outweigh the interests of risk-seeking commercial agents.

As far as the measure of pre-award review is concerned, the model showed that an arbitration agreement cannot be considered to be a derogation in the sense of Art. 19 Commercial Agents Directive unless post-award review invariably incentivises the arbitrator to uphold the parties' choice of law.. What follows from this is the desirability of results-oriented measures of review in pre-award review, i.e. one which anticipates the approach which will be adopted in post-award review. Only if the pure strategy of always recognising awards is applied in post-award review may the arbitration agreement be considered to be null and void. Such a strategy, however, violates the principle of effectiveness and is therefore not viable as it is. In the same vein, disputes between a commercial agent from a Member State and a principal from a non-Member State should not be considered categorically inarbitrable only because a clause in their contract stipulates that the contract is to be governed by the law of the non-Member State.

Furthermore, the model has revealed that choosing a certain strategy for review must impact both pre- and post-award review in order to create an equilibrium. If incompatible strategies are used at the different stages of review, the result ultimately achieved depends on whether the commercial agent initiates pre- and/or post-award review. Pre- and post-award review therefore need to be coordinated.

4.2.6 Review Proceedings in Member State Courts Involving Arts 17 to 19 Commercial Agents Directive

Member State courts more or less routinely review arbitration agreements and arbitral awards. In doing so, they can make use of the leeway left by international law and EU law in different ways. In practice, the typical scenario in which Arts 17 to 19 Commercial Agents Directive becomes relevant in pre-award review occurs when commercial agents fear that they will not be awarded termination fees in arbitration. This allows the assumption that the commercial agent will turn to national courts as the moving party claiming for indemnity or compensation.[97] Typically, the commercial agent will bring an action before the courts of the state where he provided his services. If the principal is domiciled in another Member State the jurisdiction of those courts follows from Art. 5 (1) (b) Brussels I Regu-

[97]Pre-award review is typically triggered in such a scenario, i.e. a party ignoring the arbitration agreement and bringing a claim on the merits in the courts, cf. Lew et al. (2003), para. 14–33.

lation.[98] If the principal is domiciled elsewhere, the assumptions still holds true as the possibility of benefitting from the implementation of Arts 17 to 19 Commercial Agents Directive incentivises commercial agents to bring their claim before the courts at the place of performance.[99] The principal can be expected to object to the jurisdiction of those courts relying on the arbitration agreement and Art. II New York Convention (or a variation thereof in national arbitration law). Pre-award review of the arbitration agreement will then occur before those courts.[100]

The Commercial Agents Directive can also create a constraint to the arbitral tribunal's decision through its role in the proceedings for the annulment or enforcement of arbitral awards. If the commercial agent considers himself to have been put at a disadvantage by the arbitral tribunal as far as the application of the Directive is concerned, he will be the moving party. In that situation, the commercial agent can attack the award for non- or misapplication of a transposition of the Directive directly in annulment proceedings at the seat of arbitration. The more likely scenario, however, is that the commercial agent will ignore the award and seek indemnity or compensation before a Member State's court, typically the place where he provided his services.[101] The principal can then use the award as a defence.[102] In this constellation, most developed arbitration laws presume international arbitral awards to be valid and give them *res judicata* effect preventing the parties from litigating the same claims.[103] However, the presumptive validity of arbitral awards finds its limits in the measures of review for annulment and enforcement. They enshrine the limited number of procedural and substantive considerations which allow ridding awards of their binding effect.[104] The review of the award will then be raised as an incidental question.

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[98]Case C-19/09 *Wood Floor v Solutions Andreas Domberger* [2010] ECR I-2121; Oberlandesgericht Koblenz (Germany) 6 U 947/07, 13 March 2008, NJW-RR 2009, 502–503; Mankowski (2006), p. 137; Hollander (2014), p. 335.

[99]Those courts will have jurisdiction under the Member State's procedural law if the arbitration agreement is deemed to have no effect, e.g. under § 21 Zivilprozessordnung (Germany); cf. Oberlandesgericht Stuttgart, 29 December 2011, 5 U 126/11, IHR 2012, 163, 165.

[100]As was the case in the following cases, which are analysed in more detail infra 167ff, 182ff: Cour de cassation, (Belgium), 3 November 2011, *Air Transat A.T. Inc. v Air Agencies Belgium S.A*, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20111103-3 accessed 26 November 2016; Cour de cassation (Belgium), 16 November 2006, *Van Hopplynus Instruments S.A. v Coherent Inc*., Rev. dr. com. belge 2007, 889; Oberlandesgericht München (Germany), 17 May 2006, 7 U 1781/06, IPrax 2007, 322–324.

[101]Cf. *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB) para. 72: 'It is the Distributor's primary case that the Ontario arbitration Award is strictly irrelevant to the compensation claim, and that that must be so in respect of any non-EU arbitration award which does not apply mandatory provisions of EU law.'

[102]Cf. ibid para. 7: 'The Licensor's interest in the Award is to use it as a means of defeating the claim that the Distributor was bringing in England for compensation under the Regulations.'

[103]Born (2014), p. 3172ff.

[104]Cf. Case C-126/97 *Eco Swiss v Benetton International* [1999] ECR I-3055, para. 35.

The way in which the different Member States' courts carry out their review within the aforementioned conditions reflects different approaches to arbitration as well as the different transpositions of the Commercial Agents Directive. They will be analysed in the next section. The analysis will include whether review effectively amounts to the application of a pure strategy or a mixed strategy. The constellation of primary interest here is the one addressed in *Ingmar*, i.e. one in which a commercial agent carries on his activity in the territory of a Member State for a principal from a non-Member State under a contract that includes a choice of law in favour of a law which does not provide for termination fees. While the PARTIAL ARBITRATION equilibrium appeared preferable in the model, its feasibility in the framework of the Member States' systems of review should be analysed in the following. It must be borne in mind that the facts of individual cases as well as the reactions by the reviewing courts and the parties are likely to be more differentiated than in the model. Courts can make their choice dependent on factors not taken into account in the model. Furthermore, while the model assumed that parties will engage in both pre- and post-award review, parties might frequently skip one of the stages in reality. The following analysis focuses on the effects of these implications on the feasibility of the findings in the model.

The situation will be analysed in detail for the four Member States surveyed in this inquiry: Germany (Sect. 4.2.7), France (Sect. 4.2.8), Belgium (Sect. 4.2.9) and the United Kingdom (Sect. 4.2.10). For each country, the way in which the individual Member State has transposed the Directive is described before looking into the review proceedings as carried out by the respective courts regarding both pre- and post-award review.

4.2.7 Germany

4.2.7.1 Transposing the Commercial Agents Directive

§ 89b Handelsgesetzbuch entitles commercial agents to indemnity after the agency agreement has been terminated. § 89b Handelsgesetzbuch was introduced into German Law as early as 1953 and served as a model for the indemnity system in Art. 17 (2) Commercial Agents Directive. § 89b Handelsgesetzbuch therefore required only marginal changes to comply with Directive 86/853/EEC.[105] § 89b (4) stipulates that parties cannot derogate from the indemnity regime prior to the termination of the contract.[106] Additionally, § 92c clarifies that the mandatory nature does not apply to commercial agents who are not obliged to act for the

[105]Commission of the European Communities, Report on the application of Article 17 of Council Directive on the Laws of the Member States relating to Self-Employed Commercial Agents (86/653/EEC), 23 July 1996, COM (1996) 364 final, 2; Küstner and von Manteuffel (1990), p. 297.

[106]Unlike Art. 19 Commercial Agents Directive this is not explicitly limited to those types of derogation that are detrimental to the commercial agent.

principal within the territory of a Member State of the EU or a contracting state of the Agreement on the European Economic Area.

Prior to European harmonisation through the Commercial Agents Directive and *Ingmar*, German courts did not consider § 89b to reflect public policy in conflict of laws analysis.[107] They neither considered it to be capable of nullifying a 'tandem' of a choice of Dutch courts and a choice of Dutch law, which (at the time) allowed the Dutch principal to evade his duty to pay indemnity under German Law.[108] However, after *Ingmar* these decisions have only limited value in guiding courts in their review.[109] In recent years German courts have shown that they understand *Ingmar* to have turned § 89b Handelsgesetzbuch into an overriding mandatory provision where the commercial agent carried on his activity in Germany.[110]

4.2.7.2 Pre-award Review by German Courts

The impact of § 89b on arbitration agreements was one of the questions presented to courts in Munich in 2005 and 2006.[111] The dispute concerned an American principal established in California, USA and a German commercial agent who had contracted for the distribution of semiconductor components. The parties had chosen the laws of California to govern their contract. Additionally, the parties had concluded both a choice of court agreement in favour of the courts of Santa Clara, California and an arbitration agreement in favour of AAA arbitration. After the principal terminated the contract, the commercial agent sought indemnity under § 89b Handelsgesetzbuch before the Landgericht München. In view of the forum selection clauses, the Landgericht declined international jurisdiction. Obviously in response to an argument put forward by the commercial agent, it pointed out that its international jurisdiction could not be made dependent on the probability with which the prorogated courts or arbitral tribunals would grant indemnity.[112]

In appeal proceedings, the Oberlandesgericht München based its analysis on the understanding that *Ingmar* required it to apply § 89b Handelsgesetzbuch as 'international zwingendes materielles Recht', i.e. an overriding mandatory provision. The court held that parties cannot rely on an arbitration agreement which creates the

[107]Landgericht Frankfurt am Main, 18 September 1980, 2/3 O 18/80, IPrax 1981, 134–136 (German principal and commercial agent for the market in the United States); cf. also Bundesarbeitsgericht (Germany), 26 February 1985, 3 AZR 1/83, NJW 1985, 2910, 2911 (Principal from Kansas, USA and sales agent for the UK market).

[108]Bundesgerichtshof (Germany), 30 January 1961, VII ZR 180/60, NJW 1961, 1061, 1062.

[109]Quinke (2007), p. 249; cf. already prior to *Ingmar*: Freitag and Leible (2001), p. 2130; Reich (1994), p. 2130.

[110]Oberlandesgericht Stuttgart, 29 December 2011, 5 U 126/11, IHR 2012, 163, 165.

[111]Oberlandesgericht München, 17 May 2006, 7 U 1781/06, IPrax 2007, 322–324.

[112]Landgerichtgericht München, 5 December 2005, 15 HKO 23703/04, available at http://www.dis-arb.de/de/47/datenbanken/rspr/lg-m&uumlnchen-i-az-15-hko-23703-04-datum-2005-12-05-id660 accessed 26 November 2016.

'nahe liegende Gefahr', i.e. the likelihood, that § 89b Handelsgesetzbuch will not be applied during arbitral proceedings.[113] The court's inquiry into the likelihood assumed that Californian courts can be inclined not to apply German law and § 89b Handelsgesetzbuch in particular. The court based this assumption on the fact that the parties chose Californian law, the fact that both parties could be qualified as merchants and the fact that the principal was domiciled in California.[114] Ultimately, the Oberlandesgericht München held that these facts made it likely that § 89b Handelsgesetzbuch would not be applied by Californian courts and simply extended this reasoning to arbitrators. The Oberlandesgericht did not examine whether the commercial agent had been compensated by other means, e.g. a higher commission.[115] As a result, the Oberlandesgericht München refused to refer the parties to arbitration.

The line of reasoning focusing on how likely it is that prorogated fora will grant indemnity has been updated by the Bundesgerichtshof in reference to a choice of court clause. The dispute had arisen between a principal seated in Virginia, USA and its commercial agent for Germany, Austria and the Czech Republic.[116] Their contract included a choice of two particular courts in Virginia as well as a choice of the law of Virginia. The law of Virginia does not provide for termination fees for the commercial agent. Additionally, the parties had explicitly excluded any such claims in a clause of their contract. The Oberlandesgericht Stuttgart refused to enforce the choice of court agreement. In light of the explicit exclusion of termination fees in the contract, the court considered it to be not only likely, but certain that the courts in Virginia would not grant any indemnity.[117] The Bundesgerichtshof upheld this assessment.[118] Additionally, the Bundesgerichtshof refused to refer the question to the ECJ whether any claim to indemnity or compensation under Art. 17 Commercial Agents Directive must be expressly mentioned in the contract or whether it suffices that the commercial agent effectively received a substitute for indemnity or compensation by means of a higher commission.[119] This conclusion was reached with reference to the view that the

[113]For implications of the translation of 'naheliegende Gefahr' cf. Rühl (2007b), p. 894, n. 6.

[114]Oberlandesgericht München, 17 May 2006, 7 U 1781/06, IPrax 2007, 322, 324.

[115]Cf. the critique by Quinke (2007), p. 249.

[116]Bundesgerichtshof (Germany), 5 September 2012, VII ZR 25/12, BeckRS 2012, 20587; Oberlandesgericht Stuttgart, 29 December 2011, 5 U 126/11, IHR 2012, 163–166.

[117]Oberlandesgericht Stuttgart, 29 December 2011, 5 U 126/11, IHR 2012, 163, 164: 'Es besteht daher nicht nur die naheliegende Gefahr, dass die Gerichte in Virginia das zwingede europäische und deutsche Recht nicht zur Anwendung bringen werden (...) dies ist vielmehr als sicher zu erwarten nachdem in Ziff. 10 des Vertrages zwischen den Parteien diese einen Ausgleichsanspruch ausdrücklich ausgeschlossen haben.'

[118]Bundesgerichtshof, (Germany), 5 September 2012, VII ZR 25/12, BeckRS 2012, 20587: '(...) wenn wie hier feststeht, dass das Gericht des Drittstaates dem Handelsvertreter keinen Ausgleichsanspruch gewähren wird.'.

[119]Bundesgerichtshof, ibid para. 6.

ECJ had not made its ruling in *Ingmar* dependent on the level of protection afforded to the commercial agent under the law chosen by the parties.

In light of these decisions it can be concluded that German courts will not refer parties to arbitration if their arbitration agreement is accompanied by a choice of a law clause which makes it likely that § 89b Handelsgesetzbuch will not be applied in arbitration. This 'likelihood' exists as soon as the chosen law does not provide for such termination fees. According to German case law relevant for pre-award review, the indemnity system cannot be replaced with a higher commission or else. German commentators disagree as to whether a lower level of pre-award scrutiny would also suffice. The discussion centres on whether it has to be certain that the goals of the regime for termination fees will be disregarded in arbitration to allow the reviewing court to refuse to refer the parties to arbitration.[120] The commentators do, however, widely agree that categorically referring principals and commercial agents to arbitration is not permissible under the principle of effectiveness.[121] For most, ensuring adherence to § 89b Handelsgesetzbuch through post-award review alone is not seen as an adequate approach in view of the toll this technique would take in terms of time and money expended by commercial agents in order to exercise their rights.[122]

Furthermore, it is unclear whether this implies a limitation of arbitrability or rather that respective arbitration agreements become null and void. In particular the Oberlandesgericht München can be criticised in this respect.[123] The *travaux pré paratoires* of the German Arbitration Law envisaged that claims pursuant to § 89b Handelsgesetzbuch would be arbitrable.[124] Therefore, it has been assumed that the Oberlandesgericht held that the arbitration agreement was null and void.[125] Furthermore, the court emphasised the synchronism between choice of court agreements and arbitration agreements. A category comparable to arbitrability does not exist in regard to choice of court agreements. Instead the prospective violation of § 89b Handelsgesetzbuch invalidates the choice of court agreement in its entirety.[126] Accordingly, German courts seem to use the 'null and void' exception as the pre-award measure of review without expressly stating so.

[120]Quinke (2007), pp. 249, 253; Dathe (2010), p. 2199 (both requiring certainty after an analysis in light of Art. V (2) (b) New York Convention); Rühl (2007b), p. 899 (requiring 'sufficient certainty' after an analysis of the conflict of laws rules likely to be applied in arbitration); Kleinheisterkamp (2009), p. 114 (letting reasonable foreseability suffice but allowing for exceptions); cf. for choice of court agreements Weller (2005), p. 184.

[121]Rühl (2007b), p. 898; Kleinheisterkamp (2009), p. 113.

[122]Kleinheisterkamp (2009), p. 112; Weller (2005), p. 184.

[123]Quinke (2007), p. 247; Kröll (2009), para. 16–60ff.

[124]BT-Drucksache 13/5274, 34; cf. also Hausmann (2011), para. 398.

[125]Kröll (2009), para. 16–62.

[126]Oberlandesgericht Stuttgart, 29 December 2011, 5 U 126/11, IHR 2012, 163, 165.

4.2.7.3 Post-award Review by German Courts

Post-award review by German courts is likely to occur where an arbitral tribunal failed to grant a commercial agent the indemnity he is entitled to under § 89b Handelsgesetzbuch. Where the commercial agent attempts to receive indemnity before German courts in spite of a domestic award rendered, he would in principle be barred from doing so by the award's *res judicata* effect according to § 1055 Zivilprozessordnung. Foreign awards equally become *res judicata* in Germany from the moment they become binding pursuant to the procedural law which applies to that award.[127] Yet, the *res judicata* effect of both types of awards depends on whether the award can be annulled or its enforcement refused.[128] The duty to treat an award as binding under the New York Convention is understood accordingly.[129]

So far the courts in Germany have not been confronted with a commercial agent who claimed for indemnity after an arbitral tribunal failed to award it to him. In view of the assumption that the respective disputes are arbitrable in Germany, only one measure of review comes to mind: public policy as provided for in § 1059 (2) No. 2 lit.b Zivilprozessordnung and Art. V (2) (b) New York Convention. German courts traditionally do not understand post-award review as a general means for ensuring the application of overriding mandatory provisions.[130] The only limited and indirect possibility for doing so is by reviewing the award to prevent violations of public policy by recognising the award.[131] In this context post-award review is understood to ensure that the recognition of the award does not violate German international public policy, i.e. the most basic principles of the German legal system. Overriding mandatory provisions can express this type of principle but do not do so automatically. This poses the question if and to what extent § 89b Handelsgesetzbuch expresses German international public policy: must the commercial agent be indemnified strictly in accordance with the provision or is meeting the provision's general aims sufficient, albeit by different means?

When answering this question, German legal practice concentrates on § 89b's protective function.[132] Correspondingly, commentators assume that ignoring § 89b

[127] von Schlabrendorff and Sessler in: Böckstiegel et al. (Eds.) (2015), § 1055 para. 30 with reference to Bundesgerichtshof, 7 January 1971, VII ZR 160/69, NJW 1971, 986, 987.

[128] Münch in: Krüger and Rauscher (Eds.) (2013), § 1055, para. 31.

[129] von Schlabrendorff and Sessler in: Böckstiegel et al. (Eds.) (2015), § 1055 para. 30.

[130] Bundesgerichtshof (Germany), 27 February 1969, KZR 3/68, NJW 1969, 978, 979; Oberlandesgericht Thüringen, 8 August 2007, 4 Sch 03/06, SchiedsVZ 2008, 44, 46.

[131] This can be said with certainty for disputes involving a party from Germany and a party from the US. Art. VI (2) of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany only allows review with regard to potential public policy violations.

[132] Owing to the decisive influence of German law on the indemnity regime of the Commercial Agents Directive, the historical understanding of §§ 89b Handelsgesetzbuch is influential for the interpretation of Art. 17 (2). In this context, the protective function of indemnity has always been

in favour of a commercial agent providing his services in Germany in principle amounts to a violation of public policy under § 1059 (2) No. 2 (b) Zivilprozessordnung and Art. V (2) (b) New York Convention—as long as the commercial agent is worthy of protection.[133] The commercial agent is considered not to be worthy of protection if he has been adequately compensated in another way, e.g. by virtue of the equivalent level of protection awarded by the chosen law, through a higher commission during the course of the commercial agency, a lower sales price or through employment in a different position without any financial losses.[134] The distinction is made on a case-by-case basis.

This is in contrast to the application of § 89b Handelsgesetzbuch as an internally mandatory provision which does in fact not depend on whether the commercial agent is worthy of protection in the concrete circumstances.[135] Yet the requirements are more relaxed in an international context. Also in legal areas outside commercial agency, the post-award review carried out by German courts reflects a line of thinking comparable to the legal commentators' view on § 89b. In cases concerning limits of liability of tortfeasors or liens as hedging instruments the Bundesgerichtshof has rejected simply equating a violation of mandatory German law with a violation of German public policy. Instead it has entertained a results-oriented analysis of the financial situation the protected party was ultimately put in and found it to be compatible with the respective notions of public policy.[136] It can therefore be assumed that German courts would grant *res judicata* effect to an award which did not grant indemnity to a commercial agent who is not worthy of protection in the aforementioned sense.

4.2.7.4 Analysis

German courts carry out pre-award review as if their only two choices were the two pure strategies, i.e. either never enforcing arbitration clauses at all or always enforcing both arbitration clauses as well as the resulting awards in later post-

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emphasised, cf. BT-Drs. I/3856, 33; BT-Drs. 7/3918, 7; Bundesverfassungsgericht (Germany), 22 August 1995, 1 BvR 1624/92, NJW 1996, 381.

[133]Schlosser in: Roth and Bork (Eds.) (2014), Anhang zu § 1061, para. 350 (and reference to domestic awards in § 1059, para. 50); Hopt (2009), § 92, para. 10; Schwarz (2002), p. 57.

[134]Schlosser in: Roth and Bork (Eds.) (2014), Anhang zu § 1061, para. 350; Freitag and Leible (2001); Michaels and Kamann (2001); Quinke (2007), p. 249; cf. Basedow (1995), p. 32.

[135]Bundesgerichtshof (Germany), 11 February 1977, I ZR 185/75, NJW 1977, 896, 897; Bundesgerichtshof (Germany), 6 February 1985, I ZR 175/82, NJW 1985, 3076, 3077; Bundesgerichtshof (Germany), 29 March 1990, I ZR 2/89, NJW 1990, 2899, 2890; Bundesgerichtshof (Germany), 10 July 1996, VIII ZR 261/95, NJW 1996, 2867, 2868.

[136]Bundesgerichtshof (Germany), 4 June 1992, IX ZR 149/91, NJW, 1992, 3096, 3101; Bundesgerichtshof (Germany), 22 June 1983, VII ZB 14/82, NJW 1984, 568, 570; Bundesgerichtshof (Germany), 20 March 1963, VIII ZR 130/61, NJW 1963, 1200, 1200–1201.

award review. Thus, their choice in favour of not enforcing arbitration clauses is comprehensible. It avoids triggering the conditions for the PURE ARBITRATION equilibrium, which would invite intervention by the ECJ. Instead, German courts engage in pre-award review in a way which bears the characteristics of one that triggers the NO ARBITRATION equilibrium. Also being able to show that the commercial agent received a higher commission in lieu of termination fees will presumably not alter this result. Consequentially, a principal from a non-Member State and a commercial agent carrying on his activities in Germany will not include an arbitration clause in their contract. This allows the conclusion that German courts over-enforce Arts 17 to 19 Commercial Agents Directive vis-à-vis arbitration agreements.

The conditions for post-award review differ from the conditions for pre-award review to a decisive degree. If an award became subject to the German system of post-award review, the ensuing analysis would be open to alternative ways of protecting the commercial agent and hold the award against the protection worthiness of the commercial agent. This approach is reminiscent of one which aims at selectively triggering equilibria dependent on the type of commercial agent involved.[137] However, German courts do not succeed in finding a suitable proxy for risk attitude either. Instead they analyse the monetary situation the commercial agent has been put in, compare it to a baseline of protection and finally determine the protection-worthiness of the commercial agent based on whether the baseline has been reached in the individual case. As an increase in commission is likely to be taken into account as providing protection, it can be argued that this type of post-award review favours risk-seeking commercial agents. At the same time, the fact that equivalent protection can also be seen in employment in a different position without any financial losses caters to the interest of risk-averse commercial agents. Overall, the German approach in post-award review appears relatively prudent which neither over- nor under-enforces the ruling in *Ingmar*, yet it is in stark contrast to the zealous approach adopted in pre-award review.

The contrast appears to be based on a discrepancy as to the assumptions made in the model, i.e. that the benefit of having the transposition enforced and the costs of carrying out review do not vary between pre- and post-award review. The practice of German courts indicates that the two factors are assessed differently at the two stages. Practically, the inconsistency between the approaches in pre- and post-award review means that there exist situations in which an award would be granted *res judicata* effect in post-award review, although the parties would not have been referred to arbitration in pre-award review before German courts. Furthermore, it appears that the Oberlandesgericht München at least partially errs when assuming that it is likely that § 89b Handelsgesetzbuch will not be respected during arbitral proceedings. Instead, arbitrators can be assumed to induce the level of protection envisaged by § 89b Handelsgesetzbuch in a broader sense—i.e. commercial agents

[137] Cf. supra 161ff.

who can be detected as protection-worthy receive termination fees—while the other commercial agents are held to the contractual terms.

4.2.8 France

4.2.8.1 Transposing the Commercial Agents Directive

The French regime for contracts between commercial agents and principals is provided for in Art. L. 134-1 to Art. 134-17 Code de Commerce, which implements the Commercial Agents Directive. Art. L. 134-12 Code de Commerce provides for compensation as opposed to indemnity. The level of the compensation is not addressed in the provisions but instead lies in the discretion of the courts. They determine the amount in light of the commercial agent's contribution to building and maintaining a customer base, the effect of the loss of commission as income to the agent and the value of the goodwill generated by the commercial agency. Courts typically award twice the average annual earnings made during the last 2 or 3 years of the contract's duration as compensation.[138] The commercial agent does not actually have to prove that he suffered damage in this amount.[139] French courts typically award amounts under Art. L. 134-12 Code de Commerce which are twice as high as what could be achieved under the German regime for indemnity.[140] The mandatory nature of the commercial agent's compensation is provided for in Art. L. 134-16 Code de Commerce. It stipulates that any agreement contrary to Art. L. 134-12 is void.

This compensation system had already existed under the transposition's predecessor in Art. 3 Décret no. 58-1345 du 23 décembre 1958. The transposition of the Directive had little impact on the French doctrine, although it was strengthened through the transposition, e.g. by extending the scope of situations in which compensation is owed.[141]

4.2.8.2 Pre-award Review by French Courts

So far there has not been a decision by French courts which has directly decided the role of the Commercial Agents Directive in pre-award review. Yet in light of the relevant provisions and decisions rendered in the broader context of this question, it

[138]Leloup (2001), paras. 1201, 1217; Kling and de Hurtut Giovanni (1997), p. 23; cf. *Commission,* Report on the Application of Article 17 of Council Directive on the Co-ordination of the Laws of the Member States relating to Self-employed Commercial Agents (86/653/EEC) COM (1996) 364 final, 16.

[139]Rühl (2007a), p. 748.

[140]ibid 752.

[141]Saintier (2002), p. 116.

seems unlikely nonetheless that French courts would interfere with an arbitration agreement in a cross-border commercial agency contract.

The status of Art. 134-12 Code de Commerce and all transpositions of Arts 17 to 19 Commercial Agents Directive as overriding mandatory provisions is uncertain in France. The only court decision on this matter was rendered by the Cour de cassation 3 weeks after *Ingmar*. Both surprisingly and unambiguously it held that Art. 134-12 Code de Commerce is not a 'loi de police applicable dans l'ordre international', i.e. not an overriding mandatory provision.[142] The Cour de cassation had to decide essentially the same set of facts and questions as the ECJ had to in *Ingmar* but came to a result with the opposite effect.[143] If French courts continue to construe Art. 134-12 Code de Commerce as only an internally mandatory provision, the provision will not have an effect on pre-award review. French courts do not measure international arbitration agreements with standards which merely form part of internal public policy.[144] Yet the lack of observance of the binding power of the ECJ's ruling made the Cour de cassation's decision easily contestable.[145] Nevertheless, it was applauded by a number of authors as the better insight into the issue.[146] Whether the Cour de cassation was unaware of the ECJ's earlier decision or chose to ignore it is not clear but it is likely that the decision had already been drafted before the ECJ published its decision.[147] This apparently necessitated a clarification by the Cour de cassation. In its annual report for the year 2000 the Cour de cassation had already pointed out that its decision had been called into question by the ECJ's finding in *Ingmar*.[148] At a later stage the Cour de cassation has been cited to have expressed the opinion that it will 'reverse its own decision and regard the termination indemnity as a public order law even at an international level (in other words as a *loi de police*)'.[149] Nevertheless, the result reached in this decision still holds currency as reflected in the fact that some French commentators rely on it to point out that Art. 134-12 Code de Commerce does not

[142]Cour de cassation (France), 28 November 2000, *Allium v Alfin et Groupe Inter Parfums*, Clunet 2001, 511–523.

[143]The Cour de cassation had to rule on a choice of law clause in a contract between a French commercial agent and an American company for the distribution of perfumes in Europe and Israel. The choice of law was in favour of the law of New York, which does not provide for indemnity or compensation payments. In the proceedings it was alleged that the commercial agent's commission was particularly high to account for the implicit waiver of compensation; cf. Cour de cassation (France), 28 November 2000, *Allium v Alfin et Groupe Inter Parfums*, Clunet 2001, 511–523.

[144]Delvolvé et al. (2009), p. 89.

[145]Salah Mohamed Mahmoud (2006), p. 236; Bollèe (2006), p. 724.

[146]Especially in the realm of international arbitration, see Erauw (2005), p. 84.

[147]*Schwarz* assumes that the Cour de cassation was not award of *Ingmar*, see Schwarz (2002), p. 52.

[148]*Cour de cassation,* Droit des Contrats et Quasi-Contrats (2000) Rapport de la Cour de cassation 367, 367.

[149]Kling and de Hurtut Giovanni (1997), p. 22.

constitute an overriding mandatory provision in the sense of Art. 9 (3) Rome I Regulation.[150]

In view of the Cour de cassation's backpedalling after its original decision, *Ingmar* has probably changed the French courts' position, albeit with delay. As an overriding mandatory provision, the impact of the Commercial Agents Directive on arbitration clauses can be put into perspective with the attitude French courts demonstrate towards the validity of choice of court agreements in view of comparable overriding mandatory provisions. In this respect, pre-award review by French courts revolves around the question whether the arbitration agreement constitutes a violation of international public policy.[151] This does not, however, answer the question how French courts approach the task of predicting the arbitral tribunal's behaviour. Indications regarding those questions can be drawn from the French courts' treatment of the potential application of Art. L 442-6 (I) (5) Code de Commerce in international commercial arbitration. This provision makes any producer, commercial person, manufacturer or person entered in the trades register personally liable for any loss caused by an abrupt termination of a well-established trade relationship. It is viewed as an overriding mandatory provision, i.e. it cannot be evaded by a choice of law.[152] The Cour de cassation has confirmed that the fact that French courts would apply Art. L 442-6 (I) (5) Code de Commerce to a given dispute does not stand in the way of referring that dispute to an arbitral tribunal or foreign courts.[153] This expansion of party autonomy in turn has influenced the perception of which types of disputes can generally be referred to arbitration.[154] This holds true in particular in view of the fact that Art. 134-12 and Art. L. 442-6 (I) (5) Code de Commerce pertain to comparable situations. In fact, commercial agents can claim for compensation under Art. L. 442-6 (I) (5) Code de Commerce as well as under Art. 134-12 Code de Commerce under certain conditions.[155] This means that even if Art. 134-12 Code de Commerce is considered as an overriding mandatory provision, it cannot be expected to affect international arbitration agreements in pre-award review.

This result is to be expected given the level of scrutiny in Art. 1448 NCPC and the well-documented influence of negative Kompetenz-Kompetenz on the decision-making of French courts. If French courts carried out any pre-award review in view of the application of Art. 134-12 Code de Commerce in international commercial

[150] *Juris-Classeur Civil Code/Jobard-Bacheller & Train*, Art. 3: fasc. 42 (30 April 2010), para. 26.

[151] See supra 34.

[152] Cour d'appel Versailles (France), 14 October 2004, *Casa Milano Internacional v Société Loris Azzaro Parfums*, JCP èd. e., 2004, 2002; Cour de cassation (France), 22 October 2008, *Monster Cable Products inc. v Audio Marketing Services*, Rev. Crit. DIP 1998 (1), 69–70; Reinmüller and Bücken (2013), p. 92.

[153] Cour de cassation (France), 22 October 2008, *Monster Cable Products inc. v Audio Marketing Services*, Rev. Crit. DIP 1998 (1), 69–70; Cour de cassation (France), 8 July 2010 *Doga v HTC Sweden*, Dalloz 2010, 1797; cf. Reinmüller and Bücken (2013), p. 92.

[154] Muir Watt (2010), p. 267.

[155] Kling and de Hurtut Giovanni (1997), p. 26.

arbitration, that review would be very restrained.[156] French courts understand arbitrators to have the power to apply any type of overriding mandatory provisions.[157] In the realm of EU competition law, for example, French courts give arbitrators the freedom to decide related disputes and even grant damages for illicit conduct.[158] The same holds true for provisions that protect structurally weaker parties such as consumers.[159] In light of this, it is safe to say that French courts would generally refer a commercial agent carrying out his business in France to arbitration in international commercial agency cases. In this respect it would not be decisive whether the arbitral tribunal is seated in France or not, as long as the arbitration can be qualified as international, i.e. if interests of international trade are at stake.[160]

4.2.8.3 Post-award Review by French Courts

After an arbitral tribunal has decided the matter, French courts would consider the commercial agent to be barred from bringing the claim either because of the arbitration agreement (which is considered valid *prima facie*) or because of the award's *res judicata* effect as stipulated in Art. 1484 NCPC.[161] Yet, successful annulment proceedings before French courts do away with the *res judicata* effect of a domestic award, which the principal could use as a defence in those proceedings.[162] Equally, foreign awards lose the *res judicata* effect if one of the grounds for refusing recognition and enforcement is fulfilled.

As the application of Art. L. 134-12 Code de Commerce apparently raises no doubts as to arbitrability or the validity of the arbitration agreement in France, the obvious measure of post-award review is public policy.[163] It has been argued that the relative openness of the French legal system to arbitrating disputes concerning the protection of commercial agents has to be compensated by a particularly

[156]Cf. Cour de cassation (France), 7 June 2006, *Maritime Jules Verne v American Bureau of Shipping (ABS)*, Rev. arb., 2006, 945; cf. for further evidence *Fouchard*, Cour de cassation (France), 5 January 1999, *Zanzi v de Coninck*, Rev arb. 1999, 262; regarding Art. 1448 NCPC in general cf. supra 33ff.

[157]Cour d'appel Paris (France), 16 February 1989, *Almira Films v Pierret ès-q*, Rev. arb. 1989, 711; Cour de cassation (France), 21 May 1997, *Renault v V 2000 (formerly Jaguar France)*, Rev. arb. 1997, 537, cf. also English translation in Born (2015), pp. 221ff.

[158]Cour d'appel Paris (France), 14 October 1993, *Société Aplix v Société Velcro*, Rev. Arb. 1994, 165.

[159]Gaillard and Savage (1999), para. 573; Delvolvé et al. (2009), para. 89.

[160]Cf. Art. 1504 NCPC.

[161]Delvolvé et al. (2009), para. 349.

[162]Cf. ibid para. 348. On the *res judicata* effect of arbitral awards in French arbitration law in general cf. Veillard (2012).

[163]As was the case in the two decisions analysed below.

thorough post-award review.[164] However, so far there have been a number of decisions regarding awards which have touched upon the Commercial Agents Directive before French courts but the courts cannot be characterised as having been particularly thorough. They exclusively involved parties from EU Member States and the application of the Commercial Agents Directive or one of its transpositions. Accordingly, the cases did not involve the typical regulatory gap between North American principals and commercial agents providing their services in the EU that was reflected in *Ingmar* and the cases in Germany. This peculiarity also shaped the courts' decisions.

One case involved a Spanish principal and a Belgian company acting as a commercial agent which distributed women's clothing in Belgium. In their contract the parties had directly referred to the Commercial Agents Directive itself as the law to be applicable in the event of a dispute.[165] During the arbitral proceedings the commercial agent attempted to rely on the Belgian Loi du 13 avril 1995, i.e. the particularly strict Belgian transposition of the Commercial Agents Directive.[166] The arbitral tribunal refused to apply the Belgian transposition and instead applied the Directive itself, adhering to the choice of the parties.[167] In annulment proceedings brought by the commercial agent, the Cour d'appel de Paris concisely refused to look into the matter. It argued that any review in this respect would require the court to scrutinise the arbitral tribunal's assessment of the parties' rights and that this fell outside its tasks in annulment proceedings.[168] The court stated that it was only capable of reviewing whether the substantive result reached was in violation of international public policy but apparently found no such violation.

Another dispute involved Monsieur X, a French commercial agent, and its Swedish principal Trioplast AB. The contract concerned the distribution of plastic films for packaging in France. After the contract had not been renewed, Monsieur X initiated arbitration in Paris under the auspices of the ICC claiming indemnity. Its claims were apparently based on the law chosen by the parties, which included the Swedish transposition of the Commercial Agents Directive in Lag (1991:351) om handelsagentur.[169] The award discussed and ultimately rejected the claims for indemnity. The commercial agent went on to challenge the award in annulment

[164]Muir Watt (2010), p. 267; cf. also Otto and Elwan in: Kronke et al. (Eds) (2010), Art. V (2), 354.

[165]ICC Award 12045/2003, Clunet 2006, 1434, 1435.

[166]Cf. infra 180f.

[167]In doing so the Cour de cassation relied *inter alia* on the European Convention, cf. supra 81.

[168]Cour d'appel Paris (France), 24 November 2005, *Société BVBA Interstyle Belgium v Société Cat et Co*, Rev. arb., 2006, 717, 717. The Cour d'appel used a standard formula to refuse to look into the merits of an award which can also be found in e.g. Cour d'appel Paris (France), 5 April 1990, *Courrèges Design v Andre Courrèges*, Rev. arb. 1992, 110; Cour d'appel Paris (France), 20 June 1996, *P.A.R.I.S. v Razel*, Rev. arb. 1996, 657; Cour d'appel Paris (France), 14 June 2001, *Compagnie commerciale André v SA Tradigrain France*, Rev. arb. 2001, 773.

[169]The choice of Swedish law is not evident from the decisions but is inferred from the fact that the commercial agent only objected to the way the Swedish law was applied but not to the mere fact that it was applied at all.

proceedings before the Cour d'appel Paris[170] and ultimately the Cour de cassation.[171] One of its complaints was that the arbitrator applied the Commercial Agents Directive as transposed in Sweden in an incorrect manner regarding its indemnity payments. The Cour d'appel concisely found in 2007 that the arbitrators had applied Swedish law and that it was not up to the reviewing court to verify whether the respective conditions for indemnity payments had been fulfilled. This was considered to be exclusively the arbitral tribunal's task. When the Cour de cassation was seized of the dispute 2 years later, it based its analysis on a potential violation of international public policy. It began its analysis by pointing out that review in annulment proceedings is restricted to verifying that the recognition of the award is compatible with international public policy entaily verifying that it does not lead to a 'flagrant, effectif et concret' violation of international public policy. The fact that the arbitrator had not entirely ignored the Directive or its transposition sufficed for the Cour de cassation to conclude that no such violation would occur. It rejected the motion to annul the award.

The decisions give two decisive indications as to how a French court will deal with an award in which no termination fees were granted to a commercial agent providing his services in a Member State. First, French courts will only review the substantive result reached by the arbitrators and not whether the Commercial Agents Directive or a transposition as such has been applied. They will not replace the arbitral tribunal's assessment of the commercial agent's right to receive termination fees with their own.[172] The level of scrutiny applied for potential violations of international public policy is that of a 'flagrant, effectif et concret' violation.[173] By requiring violations to be blatant, effective and concrete in this sense, French courts aim at excluding formal violations and focus on the question whether the solution adopted in the award is substantively incompatible with the objectives and the results aimed at by those rules that have public policy character.[174] This is only the case if the monetary and economic equilibrium pursued by those rules would otherwise not be realised.[175] This results-oriented approach is also reflected in the French understanding of the mandatory nature of Art. 134-12 Code de Commerce in domestic relations where it is emphasised that parties can contractually stipulate different types of indemnity or compensation or adopt alternative models of

[170]Cour d'appel Paris (France), 6 December 2007, *de Prémont v Trioplast AB*, Rev. arb. 2007, 934–935.

[171]Cour de cassation (France), 11 March 2009, *de Prémont v Trioplast AB*, Rev. arb. 2009, 240–241.

[172]Cour d'appel Paris (France), 24 November 2005, *Société BVBA Interstyle Belgium v Société Cat et Co*, Rev. arb., 2006, 717, 717.

[173]Cf. supra 52.

[174]Cour d'appel Versailles, 2 October 1989, *Société des Grands Moulins de Strasbourg v Société Compagnie Continentale France*, Rev. Arb. 1990, 115, 120; Derains (2001), p. 817.

[175]Cour d'appel Versailles (France), 2 October 1989, *Société des Grands Moulins de Strasbourg v Société Compagnie Continentale France*, Rev. Arb. 1990, 115, 120.

reparation provided that ultimately they are equally or more beneficial to the commercial agent.[176]

This allows the conclusion that a French court will recognise an award in which the arbitral tribunal applied a transposition of the Commercial Agents Directive or even the Directive itself if this corresponds with the parties' choice of law. An award in which the law of a non-EU Member State is applied as the law chosen by the parties will also be recognised if the parties have provided for means which realise the monetary and economic equilibrium envisaged by the Directive, e.g. through a higher commission, an entitlement to a share in post-contractual profits or a subsequent employment in a different position. An award which does not provide for this equilibrium will not be recognised if the court reaches the conclusion that this was is done in a 'flagrant' way, i.e. if it is discernible from the most superficial reading of the award. It is more than doubtful that this requirement would ever be met.[177] So far, no case has surfaced in which a French court applied this level of scrutiny and concluded that the respective award exhibited this type of violation of public policy. As a result, an award which disregards the Commercial Agents Directive can only be tackled in post-award review in France in exceptional circumstances. Possibly enforcement of an award could be refused if it both upheld a choice of a law which does not grant termination fees and also allowed the establishment of the absence of any other compensating mechanism in favour of the commercial agent.

4.2.8.4 Analysis

French courts will in principle refer parties to arbitration in the typical constellation of interest in this inquiry. They apply a particularly unobtrusive version of the 'second look' doctrine. This means that the arbitral tribunal is *a priori* trusted with handling the respective disputes and only the award is checked for compliance with the regime for termination fees. In post-award review, the liberal level of post-award scrutiny requiring a 'flagrante, effective et concrète' violation practically means that awards will always be given *res judicata* effect unless it is as plain as the nose on the face that they do not grant any reparation which is equally beneficial to the commercial agent.

Therefore, arbitrators can be expected to address the monetary and economic equilibrium which their award creates and put it into the context of Art. L. 134-12 Code de Commerce. The arbitrator's actual assessment will not be reviewed for correctness as this would imply replacing the arbitrators' opinion with the courts'. Thus, the result which would be achieved under the at best vague level of post-award scrutiny applied by French courts becomes predictable to a great extent. As

[176]Cour de cassation (France), 24 March 1998, *Société Selenium v Directeur general des Impôrts*, Bull. Civ. 1998, IV N° 115.

[177]Gaillard (2007), p. 717; Delvolvé et al. (2009), para. 349.

long as the monetary and economic equilibrium is addressed, the award will be given *res judicata* effect. Hence, the approach adopted by courts in France can be likened to a pure strategy in favour of granting *res judicata*. The PURE ARBITRATION equilibrium arises for cases in which arbitrators signal that the chosen law or the respective stipulation has put the parties on a par with the solution envisaged by the Directive or at least the French transposition. Under the analysis made in Chap. 3, arbitrators should be able to do so in the majority of cases. Hence, the French system of post-award review arguably violates the principle of effectiveness.[178] This conclusion has recently been reached also by Advocate General Wathelet whose opinion on this point has regretfully not been taken up by the Court.[179]

For the small portion of commercial agents who cannot negotiate for any monetary or economic compensation in exchange for their willingness to agree to the choice of law, the French approach appears to be never to grant *res judicata* effect. Dependent on this also being discernible from the most superficial reading of the award, this would trigger the NO ARBITRATION equilibrium for this subgroup. In view of these consequences, the French regime must be considered to under-enforce the Directive's regime for termination fees in the face of arbitration agreements in commercial agency contracts reaching across borders as well as the resulting arbitral awards.

4.2.9 Belgium

4.2.9.1 Transposing the Commercial Agents Directive

The countries in the Benelux had worked on a convention to establish common rules on the law of commercial agency since the 1960s but these efforts ultimately petered out when the project of a common European approach in this area took shape. Belgium originally implemented the Commercial Agents Directive through Loi du 13 avril 1995 relative au contrat d'agence commerciale.[180] In 2014 it

[178] Cf. supra 158.

[179] "(...) limitations on the scope of the review of international arbitral awards such as those under French law (...) namely the flagrant nature of the infringement of international public policy and the impossibility of reviewing an international arbitral award on the ground of such an infringement where the question of public policy was raised and debated before the arbitral tribunal — are contrary to the principle of effectiveness of EU law.", Case C-567/14 *Genentech Inc. v Hoechst GmbH & Sanofi-Aventis Deutschland GmbH* [2016] EU:C:2016:177, Opinion of AG Wathelet, para. 58. This was particularly astonishing since the level of scrutiny did not play an immediate role in the question referred by the Cour d'appel de Paris request. Unfortunately, the Court did not address the French level of scrutiny but merely the referred question which concerned EU Competition Law, cf. Case C-567/14 *Genentech Inc. v Hoechst GmbH & Sanofi-Aventis Deutschland GmbH* [2016] EU:C:2016:526.

[180] Loi du 13 avril 1995 relative au contrat d'agence commerciale, Moniteur belge, 2 June 1995, 15621.

transferred the provisions of the Loi du 13 avril 1995 into the tenth book of the Code de droit économique without making relevant changes to their content.[181] Today, Arts X.18 to X.21 Code de droit économique provide for a regime of indemnity payments after termination of the contract between the commercial agent and the principal. Art. X.18 Code de droit économique provides that the maximum indemnity payment amounts to one average annual remuneration calculated on the basis of the last 5 years of the contract's duration. Art. X.19 Code de droit économique enables commercial agents to claim for additional indemnity payments where remaining damages are not covered by indemnity under Art. 18. In this respect, the Belgian implementation reflects a peculiar understanding of Art. 17 (2) (c) Commercial Agents Directive. According to the European Commission, this provision is aimed at situations in which the contract was terminated in connection with a breach of contract by the principal or a failure to respect the notice period provided for under the Directive.[182] In contrast, Art. X.19 Code de droit économique does not establish this requirement and allows for additional damages also in situations where the contract was terminated lawfully. This allows commercial agents to receive indemnity payments beyond the maximum stipulated in Art. X.18 Code de droit économique, i.e. more than envisaged by the Directive.[183]

According to Art. X.21 Code de droit économique parties may not derogate from Arts X.18 and X.19 to the detriment of the commercial agent before the contract expires. The mandatory nature is extended through a peculiar provision in Art. X.25 Code de droit économique. It stipulates that if a commercial agent has its principal place of business in Belgium, the respective disputes are subject to the jurisdiction of Belgian courts, which will apply Belgian law.[184] Therefore, as far as the applicable law is concerned, the Belgium transposition essentially anticipated the effect of *Ingmar*.[185] However, the effect of Art. X.25 Code de droit économique is

[181]Loi portant insertion du livre X 'Contrats d'agence commerciale, contrats de coopération commerciale et concessions de vente' dans le Code de droit économique, et portant insertion des définitions propres au livre X, dans le livre Ier du Code de droit économique, Moniteur belge, 28 April 2014, 35053.

[182]*Commission,* Report on the Application of Article 17 of Council Directive on the Co-ordination of the Laws of the Member States relating to Self-employed Commercial Agents (86/653/EEC) COM (1996) 364 final, 5.

[183]Fock (2002), p. 253; Hoffmann (1996), para. 192.

[184]This approach was known in Belgian law under termination fees in the area of continuous and exclusive sales concessions. It was introduced with Article 4 Loi du 27 juillet 1961 (now Art. X.39 Code de droit économique): 'Le concessionnaire lésé, lors d'une résiliation d'une concession de vente produi-sant ses effets dans tout ou partie du territoire belge, peut en tout cas assigner le concédant, en Belgique, soit devant le juge de son propre domicile, soit devant le juge du domicile ou du siège du concédant. Dans le cas où le litige est porté devant un tribunal belge, celui-ci appliquera exclusivement la loi belge.' A comparable provision can be found in Art. 285 Commercial Code of Kuwait, cf. El-Ahdab and El-Adhab (2011), p. 316.

[185]The provision differs from the approach in *Ingmar* in that it focuses on the place of business and not on the area where the commercial agent provided his services. Nevertheless, there is considerable overlap between the two criteria.

expressly made subject to the international conventions to which Belgium has become a party. As far as the applicable law is concerned, especially the Rome Convention on the Law Applicable to Contractual Obligations comes into consideration, which allowed parties to freely select the applicable law. The answer to jurisdictional questions in connection with arbitration agreements can be influenced by the New York Convention and the European Convention.[186] Essentially, the question arises whether Art. X.25 Code de droit économique implies that disputes between a principal and a commercial agent distributing goods in Belgium may not be referred to arbitration.

Prior to the implementation of the Commercial Agents Directive, commercial agents were not granted indemnity by Belgian courts.[187] Instead, commercial agents were protected by extending provisions in labour law to their activities.[188] This approach was driven by an above-average intention to protect the commercial agent. The Code de droit économique still shows this approach in a number of provisions which 'goldplate' the Directive.[189]

4.2.9.2 Pre-award Review by Belgian Courts

In 2011, the Belgian Cour de cassation addressed the mandatory nature of the Directive's transposition and its effect on an arbitration agreement in its decision in *Air Transat v Agencies Air Belgium*.[190] A Belgian individual and his principal had concluded a commercial agency contract which included a choice of law clause in favour of the law of Québec as well as an arbitration clause. After termination of the contract, the commercial agent claimed for indemnity before the Belgian courts. When deciding whether the parties should be sent to arbitration, the Belgian Cour de cassation analysed the law in Québec regarding the indemnification of commer-

[186] As far as the choice of court agreements are concerned, it should be noted that the ECJ held in 2013 that Art. 4 (1) Brussels I Regulation '(...) must be interpreted as meaning that, where the defendant is domiciled in a Member State other than that in which the Court seized is situated, it precludes the application of a national rule of jurisdiction such as that provided for in Article 4 of Law of 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration (...)', Case 9/12 *Corman-Collins*, EU:C:2013:860, para. 23. The same must apply for Art. X.25 Code de droit économique. Due to its rather imprecise wording, it is questionable whether Art. X.25 Code de droit économique even grants exclusive jurisdiction to Belgian courts in the first place, cf. Erauw (2005), pp. 82–83.

[187] Fock (2002), p. 56.

[188] ibid 77.

[189] In addition to Art. X.19 and Art. X.25 outlined above, this also applies for the scope of application which Art. X.1 (2) extends to agency contracts for the supply of services.

[190] Cour de cassation (Belgium), 3 November 2011, C.10.0613.N, *Air Transat v Agencies Air Belgium*, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20111103-3 accessed 26 November 2016.

cial agents and compared its effect with those of the Belgian transposition of the Directive. Appellate judges had already concluded that the Québécois law did not confer guarantees similar to the Belgian law. This result was reached without reflecting in the judgment that the level of protection afforded by the law of Québec had actually been verified but instead simply by referring to the relevant provisions of Belgian law.[191] In so far as Art. X.25 Code de droit économique gives way to international conventions, the court was satisfied that it was able to not enforce an arbitration agreement in spite of Art. II New York Convention if the dispute can be deemed to be inarbitrable under the *lex fori*, i.e. Belgian law.[192] The Cour de cassation ultimately refused to engage in a more detailed comparison, relied on the Cour d'appel's analysis and did not refer the parties to arbitration. Equally, both courts did not analyse whether Belgian law might have become applicable by virtue of the conflict rules applicable in arbitration or whether any substitutes for indemnity agreed on by the parties had compensated the loss of indemnity payments.

As reflected in advocaat-generaal Ingelem's opinion on the case,[193] the approach which focused on comparing the levels of protection by different laws had been developed earlier by courts in relation to the Belgian Loi du 27 juillet 1961 relative à la résiliation unilatérale des concessions de vente exclusive à durée indéterminée.[194] This law grants indemnity to exclusive distributors upon termination of a contract with indefinite terms in its Art. 3. In turn, Art. 4 Loi du 27 juillet 1961 stipulates that where such an exclusive distributor provided his services at least in part in Belgium, Belgian courts will automatically have jurisdiction and will apply Belgian law.[195] Furthermore, this applies regardless of any contrary agreement by the parties entered into before the contract was terminated.[196] All provisions in Loi du 27 juillet 1961 are considered to constitute overriding mandatory provisions but not rules expressing international public policy.[197] When Belgian courts were first confronted with disputes concerning the question whether arbitral tribunals and foreign courts can be trusted to decide the indemnity paid in connection with exclusive distributorships, the question arose as to how Art. 4 Loi du 27 juillet 1961 impacts on arbitration agreements. The development of the case law in this regard culminated in the conclusion that the prospect of the said Act remaining unapplied in arbitration allows refusal of enforcement of the arbitration

[191] Matray and Vidts (2012), p. 245.

[192] The Court referred to the provision's identical predecessor in Art. 27 Loi du 13 avril 1995, which is no longer in force.

[193] Conclusions, C.10.0613.N, *Air Transat v Agencies Air Belgium*, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20111103-3 accessed 26 November 2016.

[194] Loi du 27 julliet 1961 relative à la résiliation unilatérale des concessions de vente exclusive à durée indéterminée. On the possibility of applying these rules to commercial agency contracts cf. Willemart and Willemart (2005), p. 20; Matray and Vidts (2012), pp. 235, 242–254.

[195] Franchisees enjoy a comparable protection under Art. 9 Loi du 19 decembre 2005 relative à l'information précontractuelle dans le cadre d'accords de partenariat commercial.

[196] Art. 7 Loi du 27 julliet 1961.

[197] Kröll (2009), para. 16–36; cf. Rigaux and Fallon (1993), para. 1342.

agreement.[198] The impact of this approach on the decision rendered on the Belgian transposition of the Directive in 2011 cannot be denied.[199]

The measure of review in respect to both the decision on commercial agents in 2011 and the earlier decision on exclusive distributors was arbitrability. This is advantageous in so far as the inarbitrability of conflicts falling within the scope of Arts 18 to 21 Code de droit économique would still allow for arbitration of all other disputes arising between the principal and the commercial agent, e.g. relating to late payment of commission or damages for harm done to the principal's reputation. However, it is interesting to note that in spite of this classification, the latest string of decisions which related to the pre-award review and the Belgian law on commercial agency did not mention arbitrability but instead focused on the validity of the arbitration agreement.[200] Although this approach could do away with the aforementioned advantage of differentiation among potential disputes, Belgian courts at least in principle determine both arbitrability and validity of an arbitration agreement by the *lex fori*.[201] The level of scrutiny requires an analysis of the law chosen by the parties. Although the depth of the analysis cannot be ascertained, the decision in *Air Transat* appears to imply that the arbitration agreement will be recognised where the chosen law provides equivalent protection.[202]

[198]In the *Van Hopplynus* case involving the choice of Californian law in combination with an arbitration clause for arbitration in accordance with the AAA rules, the Belgian Cour de cassation expressed in an *obiter dictum* that parties cannot be referred to arbitration *per se* if the arbitral tribunal do not have to apply the Loi du 27 julliet 1961 (cf. Cour de cassation (Belgium), 16 November 2006, *Van Hopplynus Instruments S.A. v Coherent Inc.*, Revue Belge de Droit Commercial 2007, 889). In a different case in 1988, the lower courts had refused to refer the parties to arbitration because they had no guarantee whatsoever that the arbitral tribunal would apply the 1961 Act and it was thus putting its respective rights at risk. The Cour de cassation approved this ruling, stating that the fact that the lower court had given some reasoning to the question sufficed in this instance (Cour de cassation (Belgium), 22 December 1988, *Gutbrod Werke GmbH v Usinorp de Saint-Hubert et Saint Hubert Gardening*, Journal des Tribunaux 1988, 458 (belg.)).Worth mentioning is also the earlier *Audi NSU* case, where obviously the court described the mission to be not to enforce those arbitration agreements that have the object and effect of leading to the application of a foreign law (cf. Cour de cassation (Belgium), 18 June 1979, *Audi NSU v Adelin Petit S.A.*, Pasicrisie I 1979, 1260). In the *Bibby Line* case the parties had explicitly agreed to settle their disputes before the courts of Sweden and to have the Swedish courts apply the internationally mandatory provisions of Belgium. In this context, the Cour de cassation felt able to sweep aside the fears of uncertainty as to whether the Swedish courts would apply Belgian law (cf. Cour de cassation (Belgium), 2 February 1979, Bibby Line v. Ins. Co. of N. Am., PASICRISIE I 1979, 634 (belg.)).

[199]Matray and Vidts (2012), p. 235; cf. Willemart and Willemart (2005), p. 20.

[200]Cour de cassation (Belgium), 5 April 2012, C.11.0430.N., *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, [2012] Pas. No 219, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20120405-2 accessed 26 November 2016; cf. Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare* EU:C:2013:301, Opinion of AG Wahl, para. 22, n. 5.

[201]Cf. supra 35.

[202]Cf. Hollander (2014), p. 339.

4.2.9.3 Post-award Review by Belgian Courts

Art. 1713 (9) Code Judiciaire stipulates that domestic awards have the same effect as a court decision between the parties. Thus, awards have *res judicata* effect subject to the ability of either party to challenge them under Arts 1717 and 1721. The same standards are applied with regard to foreign arbitral awards.[203] Accordingly, the incidental question whether an award denying indemnity under Art. 18 Code de droit économique can be relied upon as a defence by the principal against a subsequent action by a commercial agent before Belgian courts can be answered according to those standards.

Belgian courts have so far not engaged in post-award review of awards in which the application of the regime of Art. 18 Code de droit économique has become relevant. Yet the aforementioned pre-award decisions as well as post-award decisions relating to the Loi du 27 juillet 1961 provide meaningful indications of the Belgian position in this respect. Along those lines, the measure of review applied by Belgian courts can be expected to be arbitrability. Post-award review regarding the comparable provisions of the Loi du 27 juillet 1961 occurs in light of arbitrability and explicitly not in light of public policy.[204] Belgian jurisprudence gives a telling example in a decision by the Cour de cassation dating from 1979. In that decision, a Swiss award was reviewed in light of the inarbitrability of disputes falling within the scope of the Loi du 27 juillet 1961. The review entailed ascertaining that the arbitrators had not applied Belgian law despite the fact that a distributor had performed the contract in Belgium. As the non-application was undisputed, the court concluded that the dispute was inarbitrable by virtue of Art. 4 Loi du 27 juillet 1961 and refused to recognise and enforce the award.[205]

The Code de droit économique itself does not imply that courts would come to a different result in post-award review regarding the regime for termination fees for commercial agents. Neither have Belgian courts interpreted *Ingmar* in this sense. Equally, the unequivocal understanding of Belgian courts in pre-award review is that the application of their indemnity regime is a question of arbitrability. Hence, the focus can be considered to be on review in the light of arbitrability—in annulment proceedings pursuant to Art. 1717 (3) (b) (i) Code Judiciaire or

[203] Keutgen (1984), p. 35.

[204] Hollander (2005) p. 45 cites the advocaat generaal from the *Audi NSU* case (for the decision see Cour de cassation (Belgium), 18 June 1979, *Audi NSU v Adelin Petit S.A.*, Pasicrisie I 1979, 1260) to the effect that 'Toutefois, et c'est en cela, que les dispositions dites "imperatives" différent des dispositions d'ordre public, de telles clauses ne sont pas illicites en soi, elle ne touchent pas aux intérêts essentiels de l'Etat ou de la collectivité ou ne fixent pas, dans le droit privé, les bases juridiques sur lesquelles repose l'ordre économique ou moral de la société, de sorte que sie le risque de pression qui pourrait être exercé vient à disparaitre, la cause peut être valablement conclue.'; cf. Erauw (2005), p. 66; Kröll (2009), para. 16–36; Matray and Vidts (2012), p. 240.

[205] Cour de cassation (Belgium), 18 June 1979, *Audi NSU v Adelin Petit S.A.*, Pasicrisie I 1979, 1260.

proceedings for the enforcement of a foreign award pursuant to Art. V (2) (a) - New York Convention or Art. 1721 (1) (b) (ii) Code Judiciaire.

Construing arbitrability in the aforementioned manner is atypical in that it makes arbitrability conditional on the decision made by the arbitral tribunal on the applicable law, namely whether to disregard the choice of law in favour of Belgian law. Normally, post-award review under the spectre of arbitrability does not require an inquiry into individual decisions made by the arbitral tribunal. Subject matter arbitrability entails assigning a dispute to a certain abstract category. Therefore, post-award review normally only requires determining which standard of arbitrability is applicable and whether the dispute falls into the respective category by virtue of its subject matter.[206] In contrast, Belgian courts will also analyse the decision made by the arbitral tribunal on the application of Belgian law where a dispute falls within the scope of Art. 25 Code de droit économique. Furthermore, Belgian courts understand review under the spectre of arbitrability to also entail a comparative analysis of the protection effectively granted under the chosen law.[207] This effectively amounts to a review of the results which would be created by the recognition and enforcement of the award—a feature typically reserved to review under the spectre of public policy.

This type of review implies a high level of scrutiny. The courts are considered to be able to thoroughly trace the law applied in the award and its effect which—at least in theory—requires a detailed results-oriented check of the chosen law and its compatibility with the Belgian standard of protection.[208] In this respect, Belgian courts presume a high standard when determining what constitutes an equivalent level of protection.[209] The application of a law which does not provide for termination fees taken in isolation certainly does not live up to that standard. Where the parties have accompanied the choice of such a law with contractual substitutes for termination fees, it is doubtful how Belgian courts would respond to an award which then upholds such a choice of law. The decisions rendered by the Cour de cassation in post-award review on the Loi du 27 juillet 1961 do not indicate that protection could be understood in this broad sense. Neither did the pre-award decisions on the Code de droit économique take into account any alternative ways to compensate the commercial agent but only focused on the content of the

[206]Regarding the law applied on the question of arbitrability by Belgian laws cf. Kleinheisterkamp (2009), p. 95.

[207]Erauw (2006), p. 432.

[208]Cf. ibid.

[209]As reflected in the decisions leading up to the referral currently pending in front of the ECJ, Belgian courts are willing to consider that the minimum standard of the Directive (as implemented in Bulgaria) does not provide equivalent protection, cf. the decision by the Tribunal de Commerce de Antwerp cited in Cour de cassation (Belgium), 5 April 2012, C.11.0430.N., *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, [2012] Pas. No 219, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20120405-2 accessed 26 November 2016.

law chosen by the parties. It is therefore rather unlikely that contractual methods of compensation will be accepted as equivalent protection by Belgian courts.

4.2.9.4 Analysis

Review proceedings before Belgian courts are influenced by the strong tradition of protecting commercial agents who carry on their activity in Belgium. If the choice of law is in favour of a law which differs from the Belgian transposition in a way which could potentially be detrimental to the commercial agent, they will not refer the parties to arbitration in pre-award review. If an award arises under those conditions nevertheless, Belgian courts will in principle also refuse to grant *res judicata* effect to the award. Substitutes in terms of a higher commission will most likely not have an impact on this. Accordingly, an arbitrator facing post-award review in Belgium can be considered to be aware that anything but the application of the Belgian transposition of the Commercial Agents Directive severely endangers the *res judicata* effect of his award. Furthermore, parties aiming at contracting around the Code de droit économique will not conclude an arbitration agreement in combination with a choice of law in favour of the law of a country which does not grant termination fees to commercial agents. Hence, the Belgian system of review shows evidence of a strategy which would trigger the NO ARBITRATION equilibrium. This leads to an over-enforcement of the regime for termination fees in view of both arbitration agreements and arbitral awards.

4.2.10 England

4.2.10.1 Transposing the Commercial Agents Directive

The Directive was transposed on 1 January 1994 when the Commercial Agents (Council Directive) Regulations 1993 came into force.[210] The United Kingdom had made derogations which allowed delaying the duty to transpose the Directive by 4 years in view of the expected difficulties in adopting its legal system.[211] Especially in view of the Directive's aim to protect commercial agents as the structurally weaker party, European efforts to harmonise the law of commercial agency were originally met with strong scepticism in the United Kingdom. This attitude was summarised by the English Law Commission in 1977, which concluded its report on an earlier proposed version of the Directive by stating that 'the Directive's defects of substance, presentation and drafting are such that it fails to even provide a

[210] SI 1993 No. 3053 as amended by SI 1993 No. 3137 and SI 1998/2868. For Northern Ireland see SI 1993/483 (NI), which is almost identical to the English transposition see Singleton (2010), p. 30.

[211] Art. 22 (3) and Recital 6 of the Commercial Agents Directive.

basis for negotiation'.[212] Especially the idea of indemnity and compensation after termination collided with the general position under common law that a self-employed person can only receive what he bargains for and that he must make provision for the case of retirement on his own.[213] Commercial agents were also not perceived as a socially distinguishable group, let alone one that was cardinally worthy of protection.[214] The Law Commission's outcry was later put into perspective by the House of Lords Select Committee on the European Communities.[215] It level-headedly evaluated the proposed Directive as one that called for detailed regulation in an area in which it simply had not existed in the United Kingdom previously.[216] Ultimately, the Directive was approved after the proposal had been downsized substantially and after the opportunity to replace indemnity payments with compensation had been added.[217] In spite of these adjustments, the European Commission reported occasions in the United Kingdom on which the regime of Arts 17 to 19 was the cause for commercial agency contracts not being entered into or where it caused agents to be taken on as employees instead.[218]

The Commercial Agents (Council Directive) Regulations 1993 transposed the Directive's regime for termination fees in a peculiar (and perhaps unlawful)[219] way by giving parties a measure of choice between indemnity and compensation, with compensation being the default solution according to Regulation 17 (2). The majority of commercial agency contracts in the United Kingdom do not provide for indemnity, thus making compensation the commonly applicable type of post-contractual reparation.[220] Under the compensation option, the maximum amount is

[212]The Law Commission, Report on the earliest version of a Proposed E.E.C. Directive on the Law Relating to Commercial Agents, (Law Com No 84) (Cmnd 6984, 1977) para. 53. The respective Proposal for a Council Directive to coordinate the Laws of the Member States relating to (self-employed) Commercial Agents, OJ 1964, 869/64, included a mandatory provision on indemnity in Art. 30, which was later replaced by Arts 17 and 18 Commercial Agents Directive. Art. 30 of the proposed version did not grant the opportunity to provide for compensation instead of indemnity.

[213]The Law Commission, Report on the Proposed E.E.C. Directive on the Law Relating to Commercial Agents, Law. Com. No. 84, Cmnd. 6984 (1977), para. 25.

[214]*Tamarind International Limited and Others v Eastern Natural Gas (Retail) Limited and Eastern Energy Limited* [2000] EuLR 708, para. 21; The Law Commission, Report on the Proposed E.E.C. Directive on the Law Relating to Commercial Agents (Law Com No 84) (Cmnd 6984, 1977) para. 12; Bogaert and Lohmann (2000), p. 671.

[215]Select Committee on the European Communities, 51st Report, Session 1976–1977.

[216]Cf. Watts and Reynolds (2014), para. 11-001, who refer to the Law Commission's report as hysterical.

[217]What ultimately motivated the approval is uncertain. One potential influence could have been that the United Kingdom was holding the presidency of the Council of the European Communities at the time, cf. Hagemeister (2004), p. 10.

[218]*Commission,* Report on the Application of Article of Council Directive on the Co-ordination of the Laws of the Member States relating to Self-employed Commercial Agents (86/653/EEC), COM (1996) 364 final, 7.

[219]Randolph et al. (2000), p. 669; Hagemeister (2004), p. 20.

[220]Williamson and Milligan (1997), p. 9.

assessed in light of the duration of the contract, its terms and conditions, the (non)-exclusivity of the agreement and restraint of trade clauses.[221] Irrespective of which of the two ultimately applies, parties cannot opt out of either solution according to Regulation 19. This was considered not to imply that the regime for termination fees constituted overriding mandatory provisions prior to *Ingmar*.[222] The Commercial Agents (Council Directive) Regulations 1993 address the conflict of laws questions that surround international commercial agency contracts and hence go beyond the scope of the Commercial Agents Directive itself. Art. 1 (2) Commercial Agents (Council Directive) Regulations 1993 provides that the Regulations apply in relation to the activities of commercial agents in Great Britain. Yet the English transposition gives parties the possibility to choose any other Member State's law applicable in place of Regulations 3 to 22 according to Art. 1 (3) (a) Commercial Agents (Council Directive) Regulations 1993.

4.2.10.2 Pre-award Review by English Courts

The High Court of England and Wales decided a case in 2009 which can be compared to the Belgian decision in *Air Transat v Agencies Air Belgium* and the German decision by the Oberlandesgericht München in 2006. A decisive difference is, however, that at the time of the decision of the High Court arbitration had already been initiated and an 'Award on Preliminary Issue of Law' had been rendered.[223] This award gave the High Court the certainty that the arbitral tribunal would not apply the Commercial Agents (Council Directive) Regulations of 1993.[224] Nevertheless, the decision has meaningful implications for pre-award review and Section 9 (4) Arbitration Act 1996.[225]

The decision pertained to the case *Accentuate v Asigra*, which was outlined above.[226] After the arbitral tribunal in Toronto had held in the 'Award on Preliminary Issue of Law' that not the Commercial Agents (Council Directive) Regulations 1993 but the law of Ontario applied, as chosen by the parties, the commercial agent disregarded the ongoing arbitration and claimed for compensation before the English courts. The principal Asigra attempted to defeat the claim by relying on the preliminary award.[227] In doing so the principal aimed at having the proceedings

[221] Hesselink et al. (2006), p. 146.

[222] *Department of Trade and Industry*, Guidance Notes on the Commercial Agents (Council Directive) Regulations 1993, Annex, No. 4.

[223] This places this case outside the strict classification of pre- and post-award review. While awards did already exist, the winning party had no interest in enforcing them. Most decisively for discussing this case in the section on pre-award, however, in its decision the High Court focused on Section 9 (4) Arbitration Act 1996, i.e. the key provision in pre-award review.

[224] *Accentuate Ltd v Asigra Inc*, 24 June 2010, 2010 ONSC 3364, para. 18; cf. supra 142f.

[225] Green and Weiss (2011), p. 674.

[226] Cf. supra 142f.

[227] *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB), para. 67.

stayed according to Section 9 Arbitration Act 1996 and expressly stated that the proceedings in England constituted the commercial agent's attempt at an inadmissible 'second bite at the cherry'.[228]

The High Court held that an arbitration clause 'would be "null and void" and "inoperative" within the meaning of s.9(4) of the Arbitration Act, in so far as it purported to require the submission to arbitration of "questions pertaining to" mandatory provisions of EU law, and Regulation 17 in particular'.[229] This clear and unequivocal stand was reached by translating *Ingmar* directly to arbitration agreements.[230] There is nothing in *Accentuate v Asigra* which would indicate that this assessment is affected in any way by the level of protection under the chosen law or any contractual substitutes for termination fees Directive such as higher commission. This has recently been confirmed in a decision regarding a choice of court agreement in favour of the courts of Texas, which was combined with a choice of the laws of Texas.[231] Hence, the English position is that a commercial agent and a principal will not be referred to arbitration if their arbitration agreement is working in tandem with a choice of the law of a non-Member State. Accordingly, the arbitration agreement would be struck down in pre-award review applying the validity of the arbitration agreement as the measure of review.

[228] ibid para. 7.

[229] ibid para. 89. As the arbitration agreement was deemed null and void only 'in so far as' it purports to the arbitration of claims under Regulation 17, the High Court's decision can be interpreted to carve out only this type of dispute and maintain the arbitration agreement's validity for all other disputes. Therefore, despite the reference to the arbitration agreement becoming null and void, the decision could also be understood to imply a selective impact on the parties' possibility to arbitrate their dispute, cf. supra 28.

[230] Cf. *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB), para. 88: 'The decision in *Ingmar* requires this court to give effect to the mandatory provisions of EU law, notwithstanding any expression to the contrary on the part of the contracting parties. In my judgment this must apply as much to an arbitration clause providing for both a place and a law other than a law that would give effect to the Directive, as it does to the simple choice of law clause that was under consideration in *Ingmar*.'

[231] *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (Ch), [2015] 1 Lloyd's Rep 1 (regarding Texas). When faced with the English commercial agent's claim for compensation under the Commercial Agents (Council Directive) Regulations 1993, the issue before the High Court was whether permission to serve out of the jurisdiction to the Texan principal should be granted. The Court held that the choice of law and the choice of court clauses should not allow the principal to evade the Regulations' mandatory provisions and the Court signalled that it was in principle willing to serve out of the jurisdiction ([54], [128]). In contrast to Tugendhat J in *Accentuate v Asigra*, however, Mann J found difficulties in finding a basis to do so in the applicable Practice Direction to CPR 6. Mann J proposed that compensation might be based on a breach of a statutory duty which can conceptually be a tort for the purposes of CPR Part 6 (sub-paragraph 9 of the Practice Direction). Neither party had argued that point, so the Court gave the parties an opportunity to make submissions on this point. No final decision has been made in this matter so far.

4.2.10.3 Post-award Review by English Courts

The final award on termination fees in *Accentuate Ltd v Asigra Inc* was not reviewed by English courts.[232] Nevertheless, the earlier rejection of the effectiveness of the underlying arbitration agreement under Section 9 (4) indicates that English courts would not have enforced it. According to Sections 58 and 101 (1) Arbitration Act 1996, domestic and foreign arbitral awards are binding on the parties but they remain subject to the rights of the parties in post-award review. Hence, a principal will be able to use an award denying termination fees as a defence against any later action for compensation or indemnity termination fees brought by the commercial agent—unless the award is successfully challenged in post-award review.

Possible measures of post-award review are the validity of the arbitration agreement and public policy. An understanding that any arbitration agreement that has the effect that commercial agents must submit claims for termination fees under the Commercial Agents Directive to arbitration are 'null and void' and 'inoperative' would allow to consider domestic awards rendered on such a basis to suffer from lack of substantive jurisdiction. Accordingly, they can be annulled under Section 67 Arbitration Act 1996 or refused recognition and enforcement under Section 103 (2) (b) where a party relies on the respective measure of review.

At the same time, the court only referred to one measure of post-award review directly—the portion of Section 103 (3) Arbitration Act 1996 as far as it pertains to public policy.[233] The parts in Section 103 (3) referring to arbitrability were left out.[234] Hence, *Accentuate Ltd v Asigra Inc* can be understood to also imply that an award which fails to grant compensation or indemnity to a commercial agent carrying on his activities in Great Britain would be reviewed *ex officio* under the spectre of public policy and would not be recognised under Section 103 (3) Arbitration Act 1996.[235] At the same time, it is important to note that English courts are extraordinarily reluctant to apply public policy as a measure of post-award review. So far there is no recorded English case refusing to enforce a foreign award on the ground of public policy.[236] However, it has been stated in the wake of *Eco Swiss* that one area in which foreign awards would potentially be refused recognition and

[232]Accentuate went on to successfully enforce the final award in Ontario, cf. *Accentuate Ltd v Asigra Inc*, 24 June 2010, 2010 ONSC 3364, 2011 ONCA 99 (CanLII).

[233]*Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB) para. 68.

[234]Ibid the High Court cites Section 103 (3) as follows: 'Recognition or enforcement of the award may ... be refused if .... it would be contrary to public policy to recognise or enforce the award' instead of the full text 'Recognition or enforcement of the award may also be refused if the award is in respect of a matter *which is not capable of settlement by arbitration*, or if it would be contrary to public policy to recognise or enforce the award' [emphasis added].

[235]Green and Weiss (2011), p. 675; Grimm (2012), p. 200, n. 181.

[236]Veeder (1997), p. 66. The first case in which an award was ever refused enforcement was *Soleimany v Soleimany* [1999] QB 785 (EWCA) which referred to a domestic award, cf. Lew et al. (2003), para. 26-120.

enforcement is the field of EU law (in particular EU competition law) and its influence on public policy.[237] Decisions by English courts have been understood to imply that they will apply a stricter standard of public policy and a high level of scrutiny to awards that are connected to England.[238]

The decision in *Accentuate Ltd v Asigra Inc* certainly attests to this impression regarding the Commercial Agents Directive.[239] The lack of decisions refusing recognition on grounds of public policy poses difficulties in drawing the line as to where a violation of the regime for termination fees would entail a refusal of recognition. What is certain is that English courts are reluctant to engage in a thorough analysis of the tribunal's decision on the merits and refrain from doing so if the reasoning of the award makes it clear that the relevant consideration of public policy has been taken into account by the arbitral tribunal.[240] Hence, if an award relating to a commercial agent's termination fees includes this type of analysis, it would probably not be considered to be in violation of public policy. If it was palpable and undisputed that the award disregarded the protection provided for in the Commercial Agents (Council Directive) Regulations 1993, the resulting award would not be upheld.

4.2.10.4 Analysis

In the constellation which is of interest in this inquiry English courts will consider the arbitration agreement invalid and will not refer parties to arbitration in pre-award review. Parties will therefore not include an arbitration agreement and a choice of law in favour of a law which does not provide for termination fees in order to overcome the shortcomings of *Ingmar* if the commercial agent is carrying on his activity in England. Similarly, if a party relies on the arbitration agreement's invalidity in post-award review, English courts will not enforce an award which fails to safeguard the protection afforded by a transposition of the Commercial Agents Directive. This categorical approach to review could trigger the NO ARBITRATION equilibrium.

If review could theoretically only occur *ex officio* under the spectre of public policy, recognition would depend on the reasoning of the award. If it is discernible from the reasoning of the award that the arbitrator ascertained that the level of protection under a chosen non-Member State law is equivalent to that in Art. 17 Commercial Agents Directive, a resulting award will most likely be recognised. It remains uncertain under what conditions any substitute for the lack of termination fees under the chosen law, such as a higher commission, can be considered

[237] Veeder (1997), pp. 22, 66; Mustill and Boyd (2001), p. 81.

[238] Lew et al. (2003), para. 26-122; Hilbig (2006), p. 418.

[239] Cf. also Case C-381/98 *Ingmar* [2000] ECR I-9305, para. 26.

[240] *R v V* [2008] EWHC (Comm) 1531, [2008] APP LR 07/03 para. 30.

equivalent.[241] Using the award's reasoning regarding the protection which the commercial agent ultimately received as the criterion for post-award review could trigger a different equilibrium. If awards address the level of protection the commercial agent received, the vagueness of the approach can be likened to a mixed strategy capable of triggering the PARTIAL ARBITRATION equilibrium. Yet this approach does not come to fruition in this sense as the overzealous pre-award review always allows commercial agents to avoid arbitration and therefore already discourages parties from adding an arbitration agreement into their contract in the first place. In this sense, the English system of reviewing arbitration agreements and arbitral awards over-enforces the Directive's mandatory regime for termination fees.

4.2.11 Conclusion

Within the game theoretic model, the attractiveness of arbitration ultimately depended on the ratio between the relevance assigned to Art. 17 Commercial Agents Directive and the costs of review. This corresponds with the observations made in respect to EU law's impact on its Member States' substantive legal order and their procedure of judicial review. *Ingmar* referred to the primacy of EU law and implied an increase of the relevance of Art. 17 Commercial Agents Directive. At the same time, the principle of procedural autonomy, the Directive as well as *Ingmar* leave considerable leeway for courts when determining what exactly is the standard which has become on overriding mandatory provision. The costs of review depend on the conditions of review in each Member State, which continue to differ from one another under the conditions of procedural autonomy. These differences in costs can contribute to the different approaches detected towards the review of arbitral awards. The interaction of these factors has lead to an over-enforcement of the Directive's regime for termination fees in the review systems in Germany, Belgium and France. The regime for termination fees is however effectively under-enforced in French courts' liberal system of reviewing arbitration agreements and arbitral awards in France in spite of *Ingmar*.

4.3 Summary

1. Arbitral practice reflects the fact that arbitrators favour the application of the law chosen by the parties as a matter of principle. The available awards do not reflect a particular disdain for granting termination fees in favour of commercial agents.

[241] Again, at least all other transpositions are equivalent in the sense of Art. 1 (3) (a) Commercial Agents (Council Directive) Regulations 1993.

The driving force in the arbitrators' decision in this respect appears to be the system of review which they expect the award to encounter.

2. In a game theoretic model, a rational arbitrator will best be incentivised to adhere to the ECJ's ruling in *Ingmar* as if they were Member State courts by a mixed strategy of the courts which review the respective awards. This means that arbitrators may not be certain about how the courts will treat their awards.
3. The model also showed the preference for a coordinated approach to post- and pre- award review. Furthermore, the measure of review at both stages should be rather a results-oriented one than one of categorical nature.
4. The analysis of the transposition of the Commercial Agents Directive and the respective review proceedings in Germany, France, Belgium and England has revealed distinct differences. The system of review in Germany fails to coordinate pre- and post-award review. French review shows indications of triggering a situation which violates the principle of effectiveness. Review is the strictest in Belgium, where it is almost impossible for a commercial agent with a principal seat of business in Belgium to arbitrate his disputes with a foreign principal if the parties did not choose Belgian law as the applicable law. The system in England is unique in that it focuses on the validity of the arbitration agreement on the one hand, but on the other hand allows for post-award review under the spectre of public policy. The PARTIAL ARBITRATION which was determined preferable in the model does not come to fruition in any of the surveyed Member States.

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Chapter 5
Preferable System of Review Regarding Adherence to Arts 17 to 19 Commercial Agents Directive

The preceding two chapters have outlined the possibilities and restrictions of arbitrating cross-border disputes between principals and commercial agents. The game theoretical model has shown that the system of review is a potent direct constraint on the decision-making process of arbitrators. Therefore, the goal of mitigating *Ingmar's* effect through arbitration within the insurmountable constraints set by EU law appears accomplishable through an adequately designed system of review. The model has also shown that it is possible to constrain arbitrators to adhere to a certain standard of protection for commercial agents in spite of a choice of law pointing them towards a law which does not provide for termination fees. Yet, the heterogeneous methods of both pre- and post-award review throughout the four surveyed Member States leaves doubt as to whether any of them has found the right recipe to address arbitrators in this way. Therefore, a system of review which can be considered preferable will be developed in the following. It is possible to design a system of review which balances the constraints set by EU law, the results of the normative analysis of the Directive's regime for termination fees, the inferences drawn from the game theoretical analysis regarding arbitrators' behaviour and the conditions of review in the four surveyed Member States.

Before designing the actual system of review, the purposes which should be followed in doing so (Sect. 5.1); then the preferable system of pre-award review (Sect. 5.2); and the preferable system of post-award review (Sect. 5.3) will be outlined.

J. Engelmann, *International Commercial Arbitration and the Commercial Agency Directive*, International Law and Economics, DOI 10.1007/978-3-319-47449-6_5

5.1 Purposes of Review Proceedings in Light of Arts 17 to 19 Commercial Agents Directive

The preferable type of review can be developed drawing upon the results of this inquiry in order to balance three purposes: respecting party autonomy (Sect. 5.1.1), facilitating cost-efficient dispute resolution (Sect. 5.1.2) and safeguarding an appropriate standard of protection to the commercial agent through pre- and post-award review (Sect. 5.1.3).

5.1.1 Respecting Party Autonomy

Merchants should be held to their word. The inquiry has revealed that in particular in the case of cross-border commercial agency, there is little reason to assume that commercial agents are structurally weaker parties which should be protected against the consequences of their own promises. Therefore, the preferable system of review should be used with caution when refusing to refer parties to arbitration or when refusing to recognise an award. To this end, the system of review requires openness towards the solutions which the parties found to the risk of opportunistic behaviour by either side.

At the same time, there can in fact be cases in which a commercial agent did fall victim to a principal with superior bargaining power, effectively losing his entitlement to termination fees without being compensated for it in any way. What is necessary, therefore, is a prudent analysis of the parties' relationship, which allows the development of a comprehensive picture of the actual need to intervene in favour of those few commercial agents. The lack of a market failure on the market for cross-border commercial agencies prohibits the use of those isolated cases as the guiding examples.

5.1.2 Facilitating Cost-Efficient Dispute Resolution

Procedural economy necessitates that parties are not referred to arbitration as soon as it is sufficiently foreseeable in pre-award review that the resulting award will not be recognised. Even at the cost of severely interfering with party autonomy, courts should not require parties to engage in costly and time-consuming but ultimately futile arbitral proceedings.

At the same time, procedural economy implies that courts engaged in pre- or post-award review should exercise caution when reviewing the actual subject matter of the parties' dispute. Otherwise parties run the risk of having to fully present their case up to three times in possibly three different jurisdictions. This argument in favour of judicial retention is the strongest as far as post-award review

is concerned, i.e. when the arbitral tribunal has already fully investigated the matter once. But also in pre-award review, the possibility that a court has to investigate the case to a degree which fully anticipates both the arbitral tribunal's decision and the decision in post-award review goes against basic considerations of procedural economy. In particular where the court's investigation leads to the conclusion that the parties should be sent to arbitration, the parties effectively would have to present their case at least twice—in spite of their perfectly enforceable arbitration agreement.

These contradicting inferences from the principle of procedural economy can be brought into line by designing a system of review which defines more clearly how sufficient foreseeability is established in pre-award review and what the courts' retention in post-award review entails. Procedural economy not only requires courts to carry out certain investigations and to refrain from carrying out others; in civil procedure achieving procedural economy equally depends on the parties, e.g. in so far as they have to bring their pleas in law and arguments to the attention of the court in the first place. Tools which can be deployed to foster procedural economy include a clearer understanding of the extent of inquisitorial investigations by the court in pre- and post-award review as well as the allocation of the burden of evidence and the burden of proof. The prudent use of those tools should therefore play a major role in the preferable system of review.

5.1.3 Standard of Protection To Be Safeguarded in Pre- and Post-Award Review

The principle of effectiveness gives review proceedings in light of substantive mandatory EU law the purpose of not making it too difficult for parties to exercise the rights conferred by EU law. However, the inquiry has shown that it is not clear under what conditions a court engaged in pre-award review should consider it too difficult to execute the rights under Arts 17 to 19 Commercial Agents Directive in arbitration. Equally, the question under what conditions an award should be annulled or refused recognition in post-award review for violating the rights conferred by the Directive and the respective principles set up in *Ingmar* cannot be answered with certainty. Both questions touch upon the capabilities and limitations of international commercial arbitration at large. They necessitate an integration of *Ingmar* into the existing systems of review and particularly the applicable measures of review. Defining the relevant standard of protection in this sense requires another question to be addressed: what is it that requires to be safeguarded in review? Is it the standard of protection which the commercial agent would enjoy under the Directive's transposition of the reviewing Member State court or only the minimum standard of protection enshrined in Arts 17 to 19 Commercial Agents Directive?

The ECJ's decision in *Ingmar* directly related only to the Commercial Agents Directive itself but not to its transpositions. Although the question referred to the ECJ by the Court of Appeal of England and Wales related to 'Council Directive 86/653/EEC, as implemented in the laws of the Member States', the Court did not address the transpositions but only answered that 'Art. 17 and 18 of the Directive must be applied although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country'.[1] After *Ingmar*, it was conceivable that either the relevant provisions in the *lex fori's* transposition of the Directive, the provisions in the Directive themselves or the core of minimum protection expressed in those provisions had to be applied where a commercial agent carried on his activity in a Member State.[2]

5.1.3.1 ECJ Decision in *Unamar v NMB*

To a certain degree, the ECJ clarified these issues in its aforementioned decision in *Unamar v NMB* in 2013.[3] The case involved a Belgian commercial agent and a Bulgarian principal. Their contract concerned a shipping agency and included the duty to negotiate service contracts for the principal. The parties had agreed on the application of Bulgarian law and on dispute resolution through arbitration under the auspices of the Bulgarian Chamber of Commerce and Industry in Sofia.[4] After the contract was terminated in 2009, the commercial agent disregarded the choice of law as well as the arbitration agreement and claimed for indemnity pursuant to Belgian law before the Belgian courts.

On 12 May 2009 the Tribunal de Commerce in Antwerp disregarded the arbitration agreement on the basis of Art. 27 of the Loi du 13 avril 1995, which has now been transferred to Art. X.25 Code de droit économique. According to that provision, all relevant disputes come under the jurisdiction of the Belgian courts, which will only apply Belgian law. In this context, the Tribunal de Commerce considered that the arbitration agreement was invalid because the Bulgarian law chosen by the parties did not grant protection equivalent to that under the Belgian

[1] Case C-381/98 *Ingmar* [2000] ECR I-9305, paras. 14, 26.

[2] Cf. Schwarz (2002), p. 70. In this respect, *Ingmar* had widely been interpreted to imply that only the minimum standard provided for in the Directive was elevated to the status of overriding mandatory provisions but not individual 'goldplating' transpositions, Kindler in; Joost & Strohn (Eds.) (2014), § 92c Anh., para. 15; Häuslschmidt (2010), para. 2224.

[3] Case C-184/12, *Unamar* EU:C:2013:663; for the reference cf. Cour de cassation (Belgium), 5 April 2012, C.11.0430.N., *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, [2012] Pas. No 219, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20120405-2 accessed 26 November 2016.

[4] Cour de cassation (Belgium), 5 April 2012, C.11.0430.N., *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, [2012] Pas. No 219, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20120405-2 accessed 26 November 2016.

transposition.[5] This was due to the fact that the Belgian transposition is applicable to agency contracts for the supply of services such as the one between the parties, while (like the Directive itself) the Bulgarian transposition is not.[6] For this reason, the Tribunal de Commerce refused to refer the parties to arbitration in Sofia.[7] The Bulgarian principal lodged an appeal against this decision, which was granted by the Cour d'appel in Antwerp on 23 December 2010. The commercial agent then took the dispute to the Cour de cassation.

The Cour de cassation underlined that it was not relevant for its decision that the arbitration agreement was potentially valid under the Bulgarian law chosen by the parties. The court instead targeted the role played by the provisions in the Belgian transposition relating to the commercial agent's indemnity. Those provisions also exceed the level of protection granted by the Directive and the Bulgarian transposition. The preliminary reference focused on whether these provisions constitute overriding mandatory provisions within the framework of the Rome Convention on the Law Applicable on Contractual Obligations.[8] It posed the following question to the ECJ:

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[5]Belgian law determines the validity of the arbitration agreement according to the law applicable to the arbitration agreement, cf. supra 35. The Belgian courts apparently concluded that the choice of Bulgarian law as the law applicable to the contract and the choice of a seat of arbitration in Bulgaria implied that the arbitration agreement would principally have to be held against the Bulgarian standard for the validity of arbitration agreements. The result of this conflict of laws analysis could, however, be altered if the relevant parts of the Belgian transposition of the Commercial Agents Directive could be held to constitute overriding mandatory provisions.

[6]According to Art. 1 (2) Commercial Agents Directive, the Directive itself does not cover this type of agency contract but refers only to commercial agents engaged in the sale or purchase of goods. Nonetheless, a number of Member States have 'goldplated' their transposition by also including this type of contract. One of those Member States is Belgium (others include Italy, Austria, Portugal, Spain, France; cf. Eftestøl-Wilhelmsson (2006), p. 168. In contrast, the Bulgarian transposition applies only to sales, cf. Art. 32 (1) Търговски закон (Bulgarian Commercial Law); cf. Case C-184/12 *Unamar* EU:C:2013:301, Opinion of AG Wahl, para. 47. Other transpositions that are limited to sales agency include the ones in Denmark, Finland, Greece, Great Britain, Ireland, Luxembourg, Norway, Northern Ireland and Sweden, cf. Eftestøl-Wilhelmsson (2006), p. 168. German law does not consider its regime for indemnity to be mandatory as far as shipping agents are concerned, cf. § 92c Handelsgesetzbuch (Germany).

[7]Even if the Bulgarian transposition were to cover this type of contract, it still could be argued that the level of protection remains below the level provided by the Belgian Code de droit économique in view of the specific claims raised by the Belgian commercial agent. Among other claims he requested additional compensation for damages suffered in connection with the consequential dismissal of the chief of staff. The broad provision of Art. X.19 Code de droit économique provides the basis for this type of additional indemnity before Belgian courts. Both the Directive and Bulgarian law strictly cap indemnity to the average value of one year's remuneration calculated on the last five years of the contract's duration, cf. Art. 17 (2) (b) Commercial A Directive, Art. 40 (2) Търговски закон (Bulgarian Commercial Law).

[8]The Convention was applicable because the contract between the parties was concluded before 16 December 2009, cf. Art. 28 Rome I Regulation. This is one of the few constellations in which the Rome regime becomes directly relevant in relation to an arbitration agreement despite the exclusion of arbitration agreements in Art. 1 (2) (d) Rome Convention and Art. 1 (2) (e) Rome I Regulation, see supra 83ff.

> Having regard, not least, to the classification under Belgian law of the provisions at issue in this case (Articles 18, 20 and 21 of the Belgian Law of 13 April 1995 relating to commercial agency contracts) as special mandatory rules of law within the terms of Article 7(2) of the Rome Convention, must Articles 3 and 7(2) of the Rome Convention, read, as appropriate, in conjunction with Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, be interpreted as meaning that special mandatory rules of law of the forum that offer wider protection than the minimum laid down by Directive 86/653/EEC may be applied to the contract, even if it appears that the law applicable to the contract is the law of another Member State of the European Union in which the minimum protection provided by Directive 86/653/EEC has also been implemented?[9]

The ECJ held that Member State courts are free to disregard a choice of law in favour of a correct transposition which provides for the Directive's minimum level of protection.[10] This does, however, require a detailed assessment of the Member State legislature's decision to raise the level of protection in the transposition. This assessment needs to reveal that the legislature considered it to be crucial to go beyond the Directive's minimum level of protection.[11] For this detailed assessment, courts are called upon to take into account the nature and the objective of the *lex fori's* mandatory provisions.[12] The ECJ obviously wanted to contain dilutions of the Commercial Agents Directive's harmonising effect as well as its policies in favour of party autonomy as far as possible. In this vein, it reiterated the importance of party autonomy in the Rome Convention and *obiter* the Rome I Regulation.[13] The onus of having to verify that the elevated level of protection in the *lex fori* is indispensible appears to reflect a presumption against attributing a status of overriding mandatory provision to 'goldplating' transpositions—in particular when pitted against undoubtedly correct transpositions such as the one in Bulgaria. Yet, ultimately the ECJ had to concede that the possibility for Member States to restrict party autonomy in favour of regulatory exceptionalism exists even within a framework entirely originating from the European level.[14] As long as those crucial rules

[9]Case C-184/12, *Unamar* EU:C:2013:663, para. 26.

[10]In contrast to Advocate General Wahl's opinion, which made the case for applying the Belgian goldplating provisions as overriding mandatory provisions, cf. Case C-184/12, *Unamar* EU:C:2013:301, Opinion of AG Wahl, para. 39.

[11]Case C-184/12, *Unamar* EU:C:2013:663, para. 52.

[12]ibid.

[13]ibid paras. 49–50.

[14]It stands to reason that the Court would have reached a different result if the dispute had arisen in a case involving the application of the Rome I Regulation. The Rome I Regulation includes a decisive differentiation which is not included in the Rome Convention, i.e. the differentiation between 'provisions which cannot be derogated from by agreement' in Art. 3 (3) and 'overriding mandatory provisions' in Art. 9. While the goldplating Belgian provision certainly qualifies as a provision which cannot be derogated from by agreement, its status as an overriding mandatory provision can certainly be called into question. Therefore, it could have been argued that the Belgian commercial agent would only be protected against the choice of law if all other elements relevant to the situation at the time of the choice were located in a country other than Bulgaria in the sense of Art. 3 (3) Rome I Regulation, e.g. in Belgium.

remain within 'the terms of the exceptions to European Union freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest' they trump party autonomy.[15]

The Cour de cassation later quashed the earlier decision by the Cour d'appel in Antwerp for not carrying out the detailed assessment of the Belgian transposition required by the ECJ and referred the case to the Court of Appeals Bruxelles for a decision on that matter.[16] That decision is still pending. Whether the Belgian regime for termination fees is a crucial provision in the aforementioned sense appears to be a contentious matter among commentators.[17]

5.1.3.2 *Unamar v NMB* and Its Impact on Pre- and Post-Award Review

The Belgian Cour de cassation did not turn the ECJ's attention towards the effect of its decision on arbitration agreements or arbitral awards.[18] Although *Unamar v NMB* arose in connection with pre-award review, the question before the ECJ was strictly framed as a conflict of laws question and could have been posed verbatim if the jurisdiction of Belgian courts over the dispute had been out of the question. The fact that the impact on the arbitration agreement was not addressed is regrettable—albeit understandable in view of the exclusion of arbitration agreements from the Rome Convention's scope in its Art. 1 (2) (d).[19] Neither did the ECJ comment on the Belgian courts' approach of preventing arbitration proceedings which are perceived as endangering the application of Belgian overriding mandatory provisions.[20] It can be argued that *Unamar v NMB* handed Member State courts the tools to discriminate against less strict transpositions of the Commercial Agents

[15]Case C-184/12, *Unamar* EU:C:2013:663, para. 46; cf. Joined Cases C-369/96 and C-376/96 *Arblade and others* [1999] ECR I-8453, para. 31; Fetsch (2002), p. 125ff.

[16]Cour de cassation (Belgium), 12 September 2014, C.11.0430.N, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20140912-1 accessed 26 November 2016.

[17]Cf. Dursin, De invloed van het Europees recht op Belgische distributieovereenkomsten, in: Bocken (ed), De invloed van het Europees recht op het Belgisch recht (2003) 164. In so far as the qualification of the Belgian transposition's status under Art. 9 (3) Rome I Regulation is concerned, the regime for termination fees would presumably already not qualify for not being directed at the performance of the contract but only at its termination, cf. Hollander (2014), p. 332.

[18]Neither did the Cour de cassation address it in its decision to quash the decision by the Cour d'appel de Antwerp.

[19]Art. 1 (2) (d) Rome Convention provides that the rules of the Convention 'shall not apply to (...) arbitration agreements and agreements on the choice of court (...)'. Cf. Art. 1 (2) (e) Rome I Regulation.

[20]Advocate General Wahl briefly touched upon this topic but merely pointed out that '[i]t is therefore clear from the [Cour de cassation's] reasoning that there is a close link between the determination of the law applicable to the contract and the possibility the court has of rejecting the [arbitration] clause and, accordingly, declaring that it has jurisdiction', see. Case C-184/12, *Unamar* EU:C:2013:663, Opinion of AG Wahl, para. 23.

Directive. To the degree that a Member State court is willing to incorporate the considerations behind overriding mandatory provisions into its review of arbitration agreements or arbitral awards, it can now rely on *Unamar v NMB* to do so in relation to national goldplating transpositions.[21] For example, it could refuse to refer parties to arbitration as soon as it doubts whether arbitrators will allow their goldplating provisions to override a choice of law in favour of a less protective transposition. Equally, they could interpret an award which upholds such a choice of law as a violation of public policy. This extends not only to situations in which the difference in protection between different transposition is at play, but also where the parties have chosen a law of a non-Member State which provides for a lower or no protection in the sense of the Directive.

Unamar v NMB created new possibilities for reviewing courts in as far as they determine the relevant standard of protection under secondary EU law providing for minimum harmonisation—such as the Commercial Agents Directive. Should Member State courts make use of these possibilities in order to make sure that specific advantages which goldplating provisions confer upon certain groups beyond the EU's minimum level of protection are not forfeited in arbitration? Or is it normatively preferable to use the minimum level of protection expressed in Directives as the relevant and exhaustive standard of protection?

5.1.3.2.1 Assessing the Preferable Standard of Protection for the Purposes of Pre- and Post-Award Review

The answer almost comes easily after revisiting the results of the analysis of *Ingmar* as a failed realisation of the Directive's purposes and an unwarranted response to market failure.[22] As far as the analysis above justified the goal of limiting the impact of the regime for termination fees on cross-border commercial agencies as far as possible, Member State courts should refrain from carrying out review in light of the goldplating part of their transposition. Instead, the minimum level of protection under the Directive should serve as the relevant standard of protection.

To support this, the critique levied against *Ingmar* for ignoring the interests of parties which were not represented in the political process that led to the Commercial Agents Directive can be renewed in so far as idiosyncratic transpositions of the Commercial Agents Directive are turned into the relevant standard of review.[23] Groups from other Member States were equally not present in the process that led to the enactment of goldplating transpositions. Furthermore, the Directive's goal of approximating the conditions for competition would be thwarted if courts refused to

[21] Accordingly, there has been conjecture that after *Unamar v NMB* German courts would invalidate arbitration agreements in order to safeguard adherence to German goldplating provisions, Quinke (2015), para. 29.

[22] See supra 125ff., 128 ff.

[23] Cf. supra 126.

refer parties to arbitration because they doubted that arbitrators would allow their goldplating provisions to override a choice of law in favour of a less protective transposition. Such an attitude does not coincide with the goal of approximating the conditions of competition—instead it reflects a protectionist and backward-looking policy. In this sense, framing goldplating provisions as overriding mandatory provisions and translating this notion to pre- and post-award review aggravates the distortion of the market. Focusing on the minimum standard of protection also conforms with the general understanding of Art. 3 (4) Rome I Regulation.[24] In so far as this provision would mandate the application of 'Community law, where appropriate as implemented in the Member State of the forum' in a case such as *Ingmar*, this reference would not implicate the application of goldplating provisions.[25] Focusing on the minimum level of protection also reduces the degree to which the will of the parties—who presumably structured their relationship expecting that no termination fees were owed—is neglected.[26] In this sense, a focus on the minimum level of protection provides principals from within and from outside the EU with predictable conditions and contributes to the attractiveness of the service which commercial agents are able to offer them accordingly.[27] By the same token, the incentive for the commercial agent for forum shopping is reduced.[28] Finally, imposing only the minimum level of protection as the relevant standard for review in cross-border cases increases the uniformity of treatment of arbitration agreements and arbitral awards among Member States.[29]

It is conceivable that this approach can be criticised with reference to the notion that Directives are not meant to be applied directly.[30] Yet the consideration given to the Directive in pre- or post-award review is in fact not a direct application but a mitigated observance through both the applicable measure of review reducing it to the minimum level of protection as well as the level of scrutiny. Post-award review under the spectre of public policy, for example, hardly necessitates completely unambiguous and detailed black-letter law as a starting point. Also a presumed lack of detail in the Directive has little merit in view of the fact that Member States such as Bulgaria transposed the Directive quite literally without making any changes to its text. The Directive provides a differentiated and sufficiently detailed system to deduce a minimum level of protection. It is therefore far from surprising that arbitral tribunals found no difficulty in even applying the Directive itself directly.[31]

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[24]Cf. supra 84.

[25]Magnus (2010), p. 34; Ferrari in: Ferrari, Kieninger, Mankowski et al. (2012), Art. 4 Rom-I VO, para. 63; Pfeiffer (2008), p. 625; cf. Krebber (1998), p. 156 regarding the application of Directives' minimum level of protection under the Rome Convention.

[26]Schwarz (2002), p. 71.

[27]ibid.

[28]ibid 70.

[29]ibid 71.

[30]Cf. Beulker (2005), pp. 332, 336, who points out that Directives themselves cannot represent overriding mandatory provisions, but only their transpositions.

[31]ICC Award 12045/2003, Clunet 2006, 1434; ICC Award 8817/1997, YB Comm. Arb XXV (2000), 355, 366.

5.1.3.2.2 Implementing the Preferable Standard of Protection for the Purposes of Pre-and Post-Award Review

Hence, it is preferable to disregard national goldplating provisions in pre- and post-award review and instead focus on the minimum level of protection afforded by the Directive. Where the different measures of pre- and post- award review allow incorporation of the protection afforded to commercial agents under the *lex fori*, this reference should be understood as a reference to the Directive's minimum level of protection enshrined in the national transposition.[32] This means that the effect of *Ingmar* on arbitration agreements and arbitral awards should be restricted to commercial agents which fall within the Directive's scope as defined in Art. 1 (2) and (3). For example, a commercial agency agreement for the negotiation of contracts for the supply of services governed by Californian law to be carried on in Belgium between a Belgian commercial agent and a Californian principal remain untouched by the Belgian goldplating provision which was at issue in *Unamar v NMB*. Neither *Ingmar* nor *Unamar v NMB* require that Belgian law is applied in such a contract. Although *Unamar v NMB* allows Belgian courts to apply the Belgian Code de droit économique, as outlined in the preceding sections, the better arguments speak in favour of not doing so. In so far as the Directive allows Member States to choose between indemnity and compensation in Art. 17, it can be argued that minimum protection implies a level on a par with the lowest amount calculable on the basis of the two systems. As the amount owed in indemnity is typically lower than that owed in compensation,[33] this would imply that minimum protection has to be at a level equal to or below the amount owed as an indemnity for one year in the sense of Art. 17 (2) (b) Commercial Agents Directive.[34]

5.2 Preferable System of Pre-Award Review of Disputes Implicating Arts 17 to 19 Commercial Agents Directive

Developing the preferable system of pre-award review requires the determination of the preferable measure of review (Sect. 5.2.1) and level of scrutiny (Sect. 5.2.2).

[32]Cf. Schwarz (2002), p. 72; Michaels and Kamann (1997), p. 604; Michaels and Kamann (2001), p. 308; Staudinger (2001), p. 1976.

[33]Cf. supra 98.

[34]However, it can be argued that indemnity does not always provide less protection than compensation. Then the requirement of legal certainty suggests that the *lex fori's* choice between indemnity and compensation is to be considered the applicable measure, cf. Michaels and Kamann (2001), p. 308.

5.2.1 *Preferable Measure of Pre-Award Review*

There are two typical measures of pre-award review: the invalidity of the arbitration agreement (Sect. 5.2.1.1) and inarbitrability (Sect. 5.2.1.2). The inquiry will go on to develop inarbitrability of disputes resulting in an undetectable violation of public policy as the preferable measure of pre-award review (Sect. 5.2.1.3).

5.2.1.1 Invalidity of the Arbitration Agreement

The starting point for an application of the 'null and void' exception could be Art. 19 Commercial Agents Directive. It could be argued that *Ingmar* implies that an arbitration agreement is a derogation from Arts 17 and 18 Commercial Agents Directive to the detriment of the commercial agent as soon as it is accompanied by a choice of law which would have to be overridden following *Ingmar*. Two conditions would have to be fulfilled for the validity of the arbitration agreement to become the preferable measure of pre-award review in this sense: first, the Member State courts would always have to consider the Directive (or its transposition) as applicable to determine the validity of the arbitration agreement in the first place. Second, *Ingmar* would have to require that the nullity arising from Art. 19 Commercial Agents Directive is extended to all parts of the contract which can indirectly contribute to a deterioration of the commercial agent's position.

As far as the first condition is concerned, it must be pointed out that it is not certain that Member State courts will always apply their own law to determine the validity of the arbitration agreement. There exist different approaches in conflict of laws across the Member States when it comes to that question. Some use the law which is applicable to the arbitration agreement, others apply an international standard of validity.[35] Accordingly, transpositions of Art. 19 Commercial Agents Directive can require unhinging the validity of an arbitration agreement only if *Ingmar* turned the regime for termination fees into overriding mandatory provisions also for the determination of the law applicable to the validity of the arbitration agreement. Yet determining the law applicable to the validity of the arbitration agreement does not centre on the result of applying a contractual clause. In *Ingmar* it was certain that upholding the choice of law clause would mean that the commercial agent would lose his claim to termination fees. The same is not certain in the case of an arbitration agreement. Deeming Arts 17 to 19 Commercial Agents Directive or their transpositions to be overriding mandatory provisions in the determination of the law applicable on the validity of the arbitration agreement in pre-award review would mix substantive considerations regarding the protection of commercial agents with the purely jurisdictional considerations which form the basis of the system of pre-award review in general and the validity of the arbitration agreement as a measure of pre-award review in particular.[36]

[35] Cf. supra 21ff.

[36] Weller (2005), p. 166 (regarding choice-of-court agreements).

The analysis of the second condition necessitates an analysis of the wording of Art. 19 Commercial Agents Directive. Art. 19 refers to Arts 17 and 18, i.e. to the regime setting up the conditions for the principal's duty to pay termination fees. In the first instance, an arbitration agreement is only an agreement by which parties derogate from the jurisdiction of state courts. Only a perspective which takes into account the 'tandem' effect of an arbitration agreement and a choice of law clause could allow arriving at the invalidity of a respective arbitration agreement.[37] An arbitration agreement would thus be tantamount to a derogation if it was certain that the arbitral tribunal will ignore the Directive's regime for termination fees. Yet there are no reliable indicators that that is always the case.[38] Arbitrators are not barred from overriding the choice of a non-Member State law in favour of the Directive or its transposition in the Member State where the commercial agent provided his services. Art. 19 Commercial Agents Directive itself makes its application dependant on a detriment to the commercial agent arising from the respective agreement by the parties. The abstract risk that the arbitration agreement will end up being detrimental to the commercial agent can hardly suffice to justify an effect of Art. 19 Commercial Agents Directive on all arbitration agreements which are not accompanied by a choice of the reviewing court's *lex fori*.

But even if it could be predicted that arbitral tribunals will systematically ignore the minimum level of protection afforded by the Directive, the validity of the arbitration agreement would remain an inappropriate measure of review in view of its consequences. It would mean that parties are robbed of the opportunity of arbitrating all of their disputes under that agreement, i.e. also those disputes which do not pertain to the payment of termination fees (or any other mandatory provision of the Directive). This consequence cannot be connected to Art. 19 of the Directive, which only pertains to the regime of termination fees. Equally, *Ingmar* only pertained to the protection of claims under Arts 17 and 18 Commercial Agents Directive. There is no reason to conclude that the particular importance which the ECJ attached to indemnity and compensation payments should preclude principals and commercial agents from having an arbitral tribunal decide typical contractual disputes, e.g. whether their contract was validly concluded, whether commission was paid in time, whether the commercial agent has withheld necessary information etc.[39] An approach along the lines of partial invalidity is not capable of equally addressing this concern. The severability of the invalid part of the agreement from the valid part of the agreement is a prerequisite to maintaining the effectiveness of the latter. Hence, the part of an arbitration agreement under which termination fees are to be awarded would have to be severable from the rest of the arbitration

[37]Cf. supra 23.

[38]This holds true as long the pure strategy of always recognising arbitral awards is not applied, cf. supra 155f.

[39]Kröll (2009), para. 16-28; cf. Brekoulakis (2009), para. 2–66.

agreement.[40] This is hardly ever going to be the case. But even if the question of termination fees is addressed in a severable part of the arbitration agreement, the court could only assume partial invalidity if it can be assumed that the entire arbitration agreement would have been undertaken even without the part referring to arbitration. This assumption would insinuate that the parties were originally willing to split up the jurisdiction of their potential disputes in a rather uneconomic fashion. Courts that addressed this question answered it with no accordingly.[41] Therefore, the validity of arbitration agreements is not an appropriate measure of pre-award review for the cases which are of interest here.

5.2.1.2 Inarbitrability

It is conceivable that *Ingmar* implies that all disputes which implicate the application of the regime for termination fees under the Directive are not arbitrable if the parties chose the law of a non-Member State to apply. In contrast to the validity of the arbitration agreement, review under the spectre of arbitrability in this sense would at least limit the unenforceability of the arbitration agreement to the subject matter of termination fees.[42] Yet it is an equally problematic measure of review for different reasons.

It should be recalled that the question whether certain provisions are overriding mandatory provisions must be distinguished from the question whether disputes relating to those provisions are arbitrable.[43] The essential question relating to arbitrability should be whether the arbitration process as such is incapable of adequately resolving those disputes due to an inherent flaw—in this case a flaw in relation to the application of Arts 17 and 18 Commercial Agents Directive. It is not obvious that arbitration suffers from such a flaw. After all, disputes relating to commercial agency contracts make up a large portion of the cases in international commercial arbitration and commercial agents were granted termination fees in a number of them.[44] Neither is there reason to assume that the disparities of bargaining power between commercial agents and principals are systemic to an extent which turns arbitrators into inadequate decision makers *per se*. This holds true in particular in the realm of cross-border commercial agency contracts.[45] The cases in which bargaining powers are balanced or favour the commercial agent are

[40]Cf. Oberlandesgericht München (Germany), 10 September 2013, 34 SchH 10/13, SchiedsVZ 2013, 287, 290; Oberster Gerichtshof (Austria), SchiedsVZ 2005, 54: 'Nur wenn die nichtigen Teile das Gesamtgepräge der vereinbarten Schiedsgerichtsbarkeit betreffen (...)'.

[41]Oberlandesgericht Stuttgart, 29 December 2011, 5 U 126/11, IHR 2012, 163, 165–166; confirmed by Bundesgerichtshof (Germany), 5 September 2012, VII ZR 25/12, BeckRS 2012, 20587, para. 7.

[42]Kröll (2009), para. 16-28; Basedow (2014), p. 344: 'Das Kontrollinstrument sollte nicht die Wirksamkeit der Klauseln, sondern die Ausübung der damit begründeten Rechte betreffen.'

[43]Cf. supra 25ff.

[44]Shelkoplyas (2003), p. 151.

[45]Cf. supra 128ff.

not merely individual and extraordinary cases. Another possible argument for keeping certain disputes from being arbitrated would be that arbitration is ill-suited as a matter of principle with regard to disputes touch upon the interests of third parties.[46] Yet disputes relating to the EU regime for termination fees only involve two parties, i.e. a principal and a commercial agent. The typical facts of a dispute between a commercial agent and principal do also not require any complex investigations which only a state court can carry out. Neither is there any reason to assume that arbitrators are not qualified decision makers because of the complexity of the regime for termination fees.[47]

5.2.1.3 Alternative Measure of Pre-Award Review

As has been shown above, the two common measures of pre-award review—arbitrability and validity of the arbitration agreement—are essentially inadequate to account for the implications of *Ingmar*. This could allow the conclusion that pre-award review cannot be carried out in the constellations of interest here. This conclusion might not seem entirely beside the point at first sight. After all, post-award review provides the possibility that the arbitral tribunal's allegiance can be incentivised to a sufficient degree. Yet, the model has revealed that a court which can ultimately review the award should only refer parties to arbitration if the benefit to the court of having the transposition of Art. 17 Commercial Agents Directive effectively applied is twice as high as the costs of the required review.[48] Always referring parties to arbitration would require that this always is the case—there are, however, no indications to this effect. Furthermore, it would go against both the principle of effectiveness as well as basic considerations of procedural economy to refer parties to arbitration if the court can foresee that the resulting award will not be recognised. Although the imminent violation of public policy could still be avoided in post-award review, reaching this point would require costly arbitral proceedings. Furthermore if the principal has no assets within the direct reach of Member States' courts or a court which will uphold the purposes of the Directive, the threat of post-award review is severely decreased. A referral would then carry the risk of irrevocably perpetuating a violation of public policy. A Member State court which knowingly allows this scenario to unfold runs the risk of violating the principle of effectiveness.

Member State courts engaged in pre-award review are thus confronted with the challenge of avoiding exposure of commercial agents to that scenario while strictly

[46]See Brekoulakis (2009), paras. 2-42 to 2-57.

[47]Such objections have been raised against the arbitrability of competition law matters, cf. *R. Posner* in *University Life Insurance Co. v Unimarc Ltd.*, 699F 2d 846, 850–851 (CA 1983): '[Federal anti-trust issues] are considered to be at once too difficult to be decided competently by arbitrators—who are not judges, and often not even lawyers—and too important to be decided otherwise than by competent tribunals.'

[48]See supra 155f.

speaking there is not an applicable measure of pre-award review to do so. This requires an appraisal of the specific situation of a commercial agency which the traditional understanding of the two measures of pre-award review appears not to be able to accommodate. Hence it is advisable to develop a different understanding of arbitrability as a safeguard against an inherent flaw of arbitration: disputes should be considered inarbitrable if it can be anticipated that they will result in an undetectable violation of public policy.

The advisability of this measure of pre-award review will be laid out in the following (Sect. 5.2.1.3.1), before three specific indicators for such an undetectable violation will be outlined (Sect. 5.2.1.3.2).

5.2.1.3.1 Inarbitrability of Disputes Resulting in an Undetectable Violation of Public Policy

The pre-award decisions by the courts of the four surveyed Member States all centred on the desirability of what the reviewing courts assumed to result from arbitration. In this instance, courts limit their analysis to the content of the law chosen by the parties and the forecast of the impact of that choice on the arbitral tribunal's decision. This results-oriented approach is reminiscent of post-award review under the spectre of public policy. Using this as a point of departure, the preferable measure of review can be developed, which can be integrated into the approach currently adopted by courts.

In a first step, it can be determined that the concept of arbitrability is preferable to the invalidity of the arbitration agreement as the point of departure for developing the preferable measure of review. The selective effect of arbitrability on individual matters allows exclusion of those matters in which a decision violating public policy is anticipated.[49] One of those matters can be termination fees according to the minimum standard of protection under the Commercial Agents Directive. In particular cases, that matter can in fact be unfit for arbitration. However, a commercial agent and a principal should still be able to arbitrate all matters which do not touch upon public policy, irrespective of the result reached regarding termination fees. Questions such as whether the commercial agent has withheld necessary information or whether commissions were paid in time should be resolved by an arbitral tribunal.

In a second step, it can be determined that the concept of arbitrability should be connected with public policy as a post-award measure of review to form the preferable measure of pre-award review. Arbitrability in this sense could be rephrased as the ability of arbitrators to make a final and binding decision in

[49]The Supreme Court of the United States held in relation to a case involving claims under securities law that the 'Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possible inefficient maintenance of separate proceedings in different forums', *Dean Witter Reynolds Inc. v Byrd*, 470 US 213, 217 (1985).

accordance with public policy as understood in Art. V (2) (b) New York Convention. The inherent flaw of arbitration in this sense is the effects which the restrictions of the system of post-award review have on arbitration. There exists the possibility that a violation of public policy ultimately goes undetected in post-award review because it never occurs before courts which consider the minimum level of protection under the Directive to form a ground for a refusal of recognition. If there is both no reason to assume that an award falling short of the minimum level of protection will not be annulled and a lack of seizable assets within reach of Member State courts, such an award could effectively gain *res judicata* effect between the parties. As soon as the court anticipates that the award will violate the Directive's minimum level of protection from this results-oriented public policy perspective, the court should not refer the parties to arbitration. If there is sufficient reason to expect otherwise, the parties should be referred to arbitration. Pre-award review that uses arbitrability in this sense is in line with the principle of effectiveness. It aims at safeguarding the ability to pursue the goals established by the norms of substantive EU law—i.e. the minimum level of protection under the Directive.[50]

This approach recalls that arbitrability has historically been seen as connected with public policy. Yet, as also pointed out earlier, this connection is incongruous.[51] After all, a large proportion of matters which touch upon public policy are in fact arbitrable—with competition law being the most prominent example. Equally, it cannot be concluded that an arbitral award which refuses to override a choice of law in an *Ingmar*-like scenario would violate public policy *per se* as long as the equilibrium envisaged by the Directive is reached otherwise. A simple inference from public policy to arbitrability is therefore not admissible. Instead, the pre-award review should only occur in so far as the arbitration concerns the actual realisation of the Directive's minimum level of protection at its public-policy core. It remains necessary to draw a line between this understanding of arbitrability and one which can frequently be encountered in practice, i.e. one which uses arbitrability to capture the likely non-application of overriding mandatory provisions by arbitral tribunals.[52] The traditional understanding of arbitrability and its categorical mode of operation does not conform with the necessary results-oriented approach. The inarbitrable cases cannot be indentified in *grosso modo*. Mixing arbitrability and overriding mandatory provisions in this sense misinterprets what it means that a certain provision has been deemed to be immune to a choice of law. This occurs where the provisions fulfil certain criteria as to their substantive content and regulatory purpose. Yet, the core of the decision taken in pre-award review is a decision taken on jurisdiction and the priority among different decision makers. Those jurisdictional considerations have to be distinguished from the substantive

[50]Galetta (2010), p. 18.

[51]Cf. supra 25ff.

[52]In particular the decision by the Oberlandesgericht München reflects this approach, cf. Oberlandesgericht München, 17 May 2006, 7 U 1781/06, IPrax 2007, 322.

considerations behind the status of overriding mandatory provisions.[53] Only if additional considerations relating to jurisdiction and Kompetenz–Kompetenz can be identified can it be appropriate to extend the overriding effect to the arbitration agreement and the question of whether an arbitral tribunal should be permitted to decide the matter.[54] Yet within the realm of arbitration those jurisdictional considerations are already covered by the concept of arbitrability. A judge-made approach, according to which all disputes implicating the application of overriding mandatory provisions shall not be referred to arbitration *per se*, must be rejected as must the understanding which considers those disputes sweepingly inarbitrable.[55] In so far as the Commercial Agents Directive is concerned, it should also be pointed out that the decision to elevate the regime for termination fees to the level of overriding mandatory provisions was void of jurisdictional considerations.[56]

5.2.1.3.2 Three Indicators for an Undetectable Violation of Public Policy

Pre-award review aimed at anticipating an undetectable violation of public policy must address the question under what conditions such a violation will occur with sufficient likelihood. So far, Member State courts that have engaged in pre-award review have based their respective decisions exclusively on the fact that the parties had chosen a law which did not provide for termination fees. In one way or another they have concluded that this alone makes a violation likely enough to not refer the parties to arbitration.

The choice of law is, however, only one indicator of the result which is ultimately achieved between the parties. This result equally depends on other contractual stipulations which can compensate for the absence of termination fees. Furthermore, the way in which arbitrators decide the issue depends on the efficacy of review which their award would be facing. Those conditions influence the benefit of having Arts 17 and 18 Commercial Agents Directive applied in the model's sense.[57] Pre-award analysis which overlooks these additional factors runs the severe risk of confusing the substantive concern behind overriding mandatory provisions and the jurisdictional concern behind arbitrability.[58] This confusion can be avoided by taking into account those factors in addition to the ostensible effect of the choice of law.

Accordingly, there are three different indicators which should be addressed in pre-award review. The reviewing court should only refuse to refer parties to

[53]Cf. *W*eller (2005), p. 166.

[54]Cf. ibid 168.

[55]Cf. supra 25ff.

[56]Cf. supra 133ff. It can also be reiterated that the Commission had explicitly denied the need to secure the mandatory nature of the regime for termination fees through any jurisdictional measures prior to *Ingmar*, cf. *Commission,* Report on the Application of Article 17 of Council Directive on the Co-ordination of the Laws of the Member States relating to Self-employed Commercial Agents (86/653/EEC), COM (1996) 364 final, 10.

[57]Cf. supra 149.

[58]Cf. Weller (2005), p. 246.

arbitration if the court comes to the conclusion that all of the three following indicators are fulfilled: a choice of a law which does not provide for termination fees (1), a lack of an alternative scheme compensating for the lack of an entitlement to termination fees (2) and a lack of effective post-award review (3).

5.2.1.3.2.1 First Indicator: Arbitral Tribunal Likely to Not Apply a Law or Rules of Law Which Provide for Termination Fees

The starting point for the concern that an arbitral tribunal could ignore the implications of *Ingmar* is a clause in favour of a state law which does not provide for termination fees (Sect. "Parties Making A Choice in Favour of State Law"). But also if the parties did not make a choice of law, the concern remains that the arbitral tribunal will determine a law to be applicable which does not provide for termination fees (Sect. "Parties Not Making a Choice of Law"). Lastly, the parties can make a choice in favour of non-state rules of law.

Parties Making A Choice in Favour of State Law In most cases before arbitral tribunals, the parties have made a choice of law in favour of a state law.[59] If the parties choose a law which does not provide for termination fees in the sense of the Directive's minimum level of protection, the commercial agent can in fact be put at a disadvantage by an award upholding that choice of law. Therefore, the first indicator necessitates an analysis of the law chosen by the parties for an entitlement for post-contractual payment to the commercial agent quantified based on the goodwill which the principal gains through termination or the loss which he incurred through the termination. The maximum indemnity under Art. 17 (2) (b) Commercial Agents Directive can serve as a simple point of reference for quantitative comparison.

Along those lines, the broad consensus is that the laws and regulations within both Canada and the United States do not provide for a concept of compensation or indemnification for commercial agents which is equivalent to that of the Commercial Agents Directive.[60] European case law reflects this finding for the laws of California, New York, Virginia and Texas as well as for Ontario.[61] In so far as individual states of the USA and provinces ib Canada have enacted regulations which could be applied to a commercial agency, those typically refer to commercial agents as sales representatives or sales agents. Those regulations merely set up requirements for the content and form of the contract between the parties.[62] If post-

[59]In 2014, Cuniberti analysed 8,991 requests for arbitration filed with the International Court of Arbitration at the ICC and found that parties made a choice of law in favour of state law in 80 to 85 % of the cases: Cuniberti (2014), p. 398.

[60]Kraus (2013), p. 39; Harris (2012), p. US11; Katz (1997), p. 6.

[61]Cf. supra 123, n. 127.

[62]E.g. Section 1738.13 Civil Code (California); Section 686.201 (2) Florida Statutes 2010; Section 191-b Labor Law (New York); Section 35.82 Business and Commerce Code (Texas); Section 59.1-456 Code of Virginia 2006.

termination payments are addressed at all, the provisions only stipulate that outstanding commissions shall be paid within a certain period of time under the threat of liability in case of a default in payment (e.g. triple the amount of commission found to be due, attorney's fees and court costs under the Florida statutes).[63]

The exception within the United States' territory appears to be the Law of the Commonwealth of Puerto Rico, which is equivalent to the Directive's minimum level of protection. Under Section 278b Ley de Contratos de Distribucion (10L.P.R. A. § 278b), commercial agents working for foreign principals are entitled to compensation for the damage they incur through unwarranted termination.[64] The damages are calculated *inter alia* on the basis of the value of goodwill accumulated by the commercial agent and lost profits. In this respect, the commercial agent may receive as much as the amount of the profit obtained during the five years prior to termination.[65] In an approach mirroring Art. X.25 Code de droit économique (Belgium), any choice of law establishing a governing law other than the laws of Puerto Rico and any agreement to arbitrate the respective disputes is deemed invalid under Section 278b−2. This has, however, been deemed to be pre-empted by federal law as far as arbitration agreements are concerned.[66]

Post-contractual compensation in the sense of the minimum protection under the Directive is also not known under the law of Australia,[67] Chile,[68] China,[69] Hong Kong,[70] Indonesia,[71] Mexico,[72] Russia,[73] Serbia,[74] Singapore,[75] South Africa[76] and Thailand.[77]

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[63]Section 686.201 (3) (b) Florida Statutes 2010.

[64]The Act's motives reflect this intention: 'The Commonwealth of Puerto Rico cannot remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaires or agents, as soon as theses have created a favourable market and without taking into account their legitimate interests. The Legislative Assembly of Puerto Rico (...) deems it necessary to regulate, insofar as pertinent to the field of said relationship, so as to avoid the abuse caused by certain practices.'; cf. Born (2015), p. 181, n. 6. For a full English translation cf. Garner (2001), p. 664ff.

[65]*Telenetworks Inc v Motorola Universal Data Systems Inc* 906F Supp 75 (DPR 1995).

[66]*Mitsubishi Motors Corporation*, 723F 2d, 155, 158 (1st Cir 1983).

[67]Feinauer and Weingarten (2013), p. 33.

[68]Álvarez (2013), p. 70.

[69]Maaz (2013), p. 75; Hajjar (2011), p. 206. Contract law No. 2200/19991.03.15 grants a right to damages incurred through termination but does not specify what is understood as such a loss. This does not suffice as equivalent protection.

[70]von Ortenberg (2013), p. 131.

[71]Schlüter (2013a), p. 143.

[72]de Pay (2013), p. 255.

[73]Tarandschik and Serdjuk (2013), p. 304.

[74]Häring (2013), p. 325.

[75]Weingarten (2013), p. 328.

[76]Brückner (2013), p. 348.

[77]Klose (2013), p. 360.

Obvious candidates for a choice of law which does not establish the first indicator are clauses in favour of the law of any Member State. Equivalent protection is also afforded by non-Member States which essentially copied the Commercial Agents Directive or one of its predecessors in German or French law. Provisions which fall into this category include the Swiss provision in Art. 418u Obligationenrecht,[78] the Turkish provision in Art. 122 Ticaret Kanunu[79] and the Cypriot provision in Art. 166 Νόμος του 51(I)/1992.[80] In 2012, also Israel enacted a law based on the Commercial Agents Directive which provides for mandatory indemnity to commercial agents upon termination.[81] Its Section 5 provides that the commercial agent is entitled to a maximum of one year's commission upon termination, calculated on the basis of the new clients he brought in and the increase of the scope of the principal's business with existing clients. Equally, the law of Argentina,[82] Brazil,[83] Columbia,[84] Croatia,[85] Norway,[86] South Korea[87] and Vietnam[88] provides for mandatory termination fees which can be considered equivalent to the Directive's minimum level of protection.

Furthermore, a considerable number of Middle Eastern countries have taken the French Code de Commerce as a point of reference and developed a comparable regime for mandatory post-contractual compensation for commercial agents. In Kuwait, for example, Art. 281 (1) قانون التجارة الكويتي رقم 68 لسنة 1980 grants commercial agents a mandatory right to compensation upon termination.[89] According to Art. 282 (3) the amount of the compensation shall reflect 'the damages occurring to the agent and the benefits realized by the principal as a result of his efforts in promoting the commodity and increasing the number of clients (...)'.[90]

[78]Koller (2000), p. 111; Collart (2011), p. 938ff; Meyer and Reinfried Egli (1997), p. 8.

[79]Demir Gökyala (2011), p. 994.

[80]Neocleous and Christoforou (2012) CYP/5, CYP/23-CYP27; Landas and Sīmane (2013), p. 404.

[81]Levenfeld and Novogroder-Shoshan (2012), ISR/36-ISR/37; cf. 2012 – חוק חוזה סוכנות (סוכן מסחרי וספק), התשע'ב (The Agency Contract Law (Commercial Agent and Principal), 2012) available in Hebrew at http://www.knesset.gov.il/Laws/Data/law/2338/2338.pdf accessed 26 November 2016; unofficial English translation available at http://www.export.gov/israel/doingbusinessinisrael/eg_il_058074.asp accessed 26 November 2016. Prior to the enactment of the 2012 Law, Israel had not had a comparable regime, cf. Levenfeld and Novogroder-Shoshan (2012), ISR/16-ISR/17.

[82]Nudenberg (2011); Jebsen (2013), p. 26.

[83]Art. 27 Lei 4886/65 (amended by Lei 8420/92), cf. Geide and de Pay (2013), p. 57.

[84]Arts 1324 and 1325 Codigo de Comercio, Decreto 410/1971 (Colombia), cf. Mafla (2012) COL/14-COL15; Ule (2013), p. 203.

[85]Art. 830 Zakon o obveznim odnosima (Croatia), cf. Will (2013), p. 213.

[86]Bortolotti (2001), p. 48, n. 1.

[87]Art. 92-2 Korean Commercial Code; cf. Garbrecht and Fischer (2013), p. 207.

[88]Art. 177 (2) Commercial Law No. 36/2005/QH11, English translation available at http://faolex.fao.org/docs/pdf/vie117980.pdf accessed 26 November 2016; cf. Schlüter (2013b), p. 398.

[89]Kuwait Commercial Code; English translation of parts relating to commercial agency available in Krüger (1997), p. 60ff.

[90]Cf. ibid 68.

Furthermore, according to Art. 285 any dispute relating to a commercial agency shall be referred to the courts in the place of the performance of the contract. This has been interpreted to imply that any arbitration agreement disregarding the respective jurisdiction of a Kuwaiti would not be recognised.[91] In the same vein, the law of the United Arab Emirates, Art. 9 of 1993 قانون المعاملات التجارية رقم 18 لسنة requires compensation of commercial agents after termination or non-renewal of the contract in the absence of any 'justifiable' reason.[92] Compensation is to be paid based on the investment made by the commercial agent in the commercial agency and the loss of future profits. In particular, arbitration clauses have been held unenforceable by the Federal Supreme Court of the United Arab Emirates if they relate to a commercial agency contract performed in the United Arab Emirates.[93] Middle Eastern countries which have enacted comparable provisions include Bahrain,[94] Lebanon,[95] Morocco,[96] and Qatar.[97]

The law of Saudi Arabia is an exception to the general approach in the Middle East as its strict adherence to Sharia law impedes it from awarding any benefits from future profits. Although this would appear not to militate against a compensatory approach along the lines of Art. 17 (3) Commercial Agents Directive, Saudi Arabian law does not compensate a commercial agent upon termination to the extent of any future profits which a principal might make based on the commercial agent's prior efforts.[98] Neither does there exist a comparable right to compensation under the laws of Jordan.[99]

Parties Not Making a Choice of Law If the parties do not choose the law applicable to the merits, the arbitral tribunal determines on its own whether it will apply a law which provides for termination fees. If is not likely to find sufficient

[91] El-Ahdab and El-Adhab (2011), p. 316.

[92] Federal Law No. 18 of 1981 concerning the Organization of Commercial Agencies (UAE) as amended 2010; English translation available at http://www.wipo.int/edocs/lexdocs/laws/en/ae/ae007en.pdf accessed 26 November 2016.

[93] المحكمة الاتحادية العليا أبوظبي (UAE), 6 May 2009, Appeal No. 713-Civil of the 27th Judicial Year, reported at http://aidarous.com/uploads/publications/Legal_Pinch_October_2013.pdf accessed 26 November 2016.

[94] Arts 8 (d), 9 (b) Legislative Decree No 10/1992 (Bahrain) amended by Legislative Decree 8/1998 and Legislative Decree 49/1992.

[95] Arts 4, 5 Decree-Law No. 34 of August 5, 1967 (Lebanon); cf. Reindel and Seiffert (2013a), p. 231. Those provisions were held to render arbitration agreements concluded before the dispute arose unenforceable, cf. Cour de cassation (Lebanon), 4th chamber, Decision 34/2001, 19 July 2001, The Lebanese Review of Arab and International Arbitration (22), 62–63, Cour de cassation (Lebanon), 5th chamber, Decision No. 4/2005, The Lebanese Review of Arab and International Arbitration (33), 65; El-Ahdab and El-Adhab (2011), p. 360.

[96] Art. 402 Commercial Code, Law No. 15/95 (Morocco); cf. Yakhloufi (2013), p. 249.

[97] Arts 8, 9 Commercial Agency Law No. 8/2002 (Qatar), English translation available at http://www.tawfikcpa.com/Assets/documents/law%208.pdf accessed 26 November 2016; cf. Reindel and Seiffert (2013a), p. 197.

[98] Reindel and Seiffert (2013c), p. 309.

[99] Krüger and Oechsner (1996), p. 28.

connecting factors between the dispute and such a law, the first indicator for an undetectable violation of public policy will be satisfied. However, the conflict of laws rules to which arbitrators can have reference in this respect do not constrain them in a way which would allow the conclusion that they will (or will not) apply a certain law.[100] While the respective prognosis in international litigation can be based on the conflict of laws rules applicable before a foreign court, arbitrators enjoy virtually unrestricted freedom when it comes to determining the applicable law in the absence of a choice by the parties.[101]

Accordingly, it cannot be argued that the absence of a choice of law between a commercial agent carrying on his activities in a Member State for a principal from a non-Member State indicates that the arbitral tribunal will disregard all laws which provide for termination fees. This conclusion could not be supported by reference to conflict of laws rules in the different conventions, laws and rules which directly address arbitral tribunals. Neither can it be concluded from the structure of the incentives facing arbitrators that they are likely to fail to realise the Commercial Agents Directive standard of protection whenever parties do not make a choice of law. Instead, arbitral practice provides examples of where arbitral tribunals have applied the Directive in spite of the lack of a choice of law when they are able to tie it to a sufficient connecting factor, e.g. the country where the commercial agent provided his services.[102] Therefore, if the parties fail to make a choice of law, the first indicator will not be fulfilled. In that case, parties should be referred to arbitration.

Parties Making a Choice in Favour of Non-State Rules of Law The parties' choice can also designate the applicability of non-state rules. If the parties choose the Directive itself to be applicable, they should be referred to arbitration although such a choice would prove difficult before a national court. Equally, if they deem their contract to be governed by the Draft Common Frame of Reference (DCFR) or the Principles of European Law on Commercial Agency, Franchise and Distribution Contracts (PEL CAFDC), the protection afforded to the commercial agent conforms with the minimum level of protection under the Directive.[103]

The situation differs if the parties select *lex mercatoria*. Although this is not a common occurrence, as far as pre-award review is concerned it raises the question whether an application of *lex mercatoria* entails an entitlement to termination fees in the sense of the minimum level of protection under the Directive.[104] The ambivalent content of the concept of *lex mercatoria* makes it questionable whether this question can be answered definitively. An analysis in this respect would have to

[100] Cf. supra 78ff.

[101] Shelkoplyas (2003), p. 266; Kleinheisterkamp (2009b), p. 108.

[102] ICC Award 8817/1997, YB Comm. Arb. XXV (2000), 355, 366, paras. 47–48.

[103] Cf. IV.E. – 2:305, IV.E. – 3:312 DCFR; Arts 1:305,. 2:312 PEL CAFDC.

[104] *Cuniberti* found that parties made their contract subject to *lex mercatoria* in less than 2 % of cases, see Cuniberti (2014), p. 403.

be carried out under the spectre of finding a consensus among the international commercial community to the question of termination fees aiming at excluding idiosyncratic provisions of national law.[105] In light of the global picture drawn by the comparative analysis above, the Directive's minimum level of protection does not represent an uncommon quirk of European law but an element common to the commercial laws of numerous countries throughout the world. The overall picture is, however, far from a broad consensus in favour of termination fees, in particular in view of the overwhelming repudiation of the concept in common law countries. Termination fees are not provided for in either the United Nations Conference on Trade and Development (UNCTAD) Minimum Standards for Shipping Agents or the Convention on Agency in the International Sale of Goods of 1983, i.e. the only international convention on the substantive law of commercial agency.[106] The DCFR and the PEL CAFDC, which provide for termination fees, could be pitted against those Conventions, but their European origin gives them less weight in this respect. It should also be noted that the ICC has published a model contract for commercial agency which also does not allow an inference as to whether termination fees form part of the *lex mercatoria* or not.[107]

Turning towards arbitral practice, attention can be turned towards an ICC award dating from 1979 in which the tribunal applied the *lex mercatoria* to a commercial agency contract.[108] Based on the principle of good faith, the tribunal awarded the commercial agent a *réparation du préjudice* in the amount of roughly three years' commission.[109] So far, this has remained the only published award in which an arbitral tribunal applied *lex mercatoria* on the question of post-contractual compensation in commercial agency contracts. In view of these diverging indications, neither the mandatory nature of termination fees nor their repudiation can be considered to form part of *lex mercatoria*. Parties choosing *lex mercatoria* should therefore be treated like parties who did not make a choice at all in respect to termination fees.[110]

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[105]Born (2014), p. 2760 with reference to Smit (1991), p. 1312.

[106]Ten countries need to ratify the Convention in order to come into force. So far only four have done so (France, Italy, Netherlands, Mexico, South Africa).

[107]Art. 21 of the ICC Model Contract provides parties with two options: Alternative A which does not allow for termination fees and Alternative B which effectively incorporates the indemnity regime of Art. 17 (2) Commercial Agents Directive into the contract, cf. International Chamber of Commerce (2015), p. 7.

[108]ICC Award 3131/1979, YB Comm. Arb. IX (1984), 109.

[109]ibid: '[The principal] must therefore be held responsible for the breach of the agency. The Tribunal is also of opinion that this termination has caused damages to [the commercial agent] as a result of its inactivity during one year, its loss of customers and the blow to its commercial reputation. Because of the extreme difficulty which would arise when itemising and calculating a separate figure for each of these heads of damages, which moreover partially overlap, the Tribunal has evaluated in equity by way of a global lump sum, the amount of the damages due to Pabalk by reason of the breach of the agency agreement at the sum of 800,000 French francs.'; see Bortolotti (2001), p. 51.

[110]Cf. ICC Award 8117/1995, 12 ICC. Bull. 69 (2001), in which the commercial agency contact included a choice of law clause in favour of the 'Laws of the International Chamber of Commerce

Parties can also refer to rules of law whose scope certainly does not cover the question of termination fees in commercial agency relations, e.g. the UNIDROIT-Principles or the Principles of European Contract Law. In this sense their choice is void of any direct expression of will regarding the commercial agent's entitlement to termination fees. Comparable to a choice of *lex mercatoria*, such a choice is likely be understood as not determining the applicable law regarding this matter so that arbitral tribunals can proceed to determine the applicable law on their own in this respect.[111]

5.2.1.3.2.2 Second Indicator: No Alternate Scheme of Compensation

A choice of law in the aforementioned sense is not sufficient in and of itself for the conclusion that the resulting award is likely to violate public policy without it being detected. In the market for cross-border commercial agency, a choice of law implicating a waiver of termination fees seldom means that a commercial agent automatically loses the relevant entitlement without any substitution.[112] Instead, the waiver leads to a change in how the commercial agent is remunerated in the broadest sense.[113] Where the alternative scheme of remuneration ensures that the commercial agent is (at least) set on a par with the application of the Directive, post-award review in light of public policy would consequentially lead to the result that the award will be recognised or not be annulled.[114]

The most likely scenario is that the market replaces the possibility of receiving termination fees with the possibility of receiving higher commission in advance of termination—in particular in the cross-border market for commercial agency.[115] Alternatively, the fact that the applicable law does not provide for termination fees can be compensated for by contractual stipulations which incorporate the principal's duty to pay termination fees into the parties' contract. This regime can be equivalent to the one included in the Directive and its transposition—in fact it may even directly incorporate the Directive's or a transposition's language into the

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Paris'. While the arbitral tribunal could have understood this as choice in favour of the *lex mercatoria*, it considered the contract to be silent on the applicable law and determined the applicable law itself, cf. ibid 52.

[111] Cf. ICC Award 8817/1997, YB Comm. Arb. XXV (2000), 355, 366, paras. 47-48: While the UNIDROIT Principles and the CISG were deemed to apply to the contract in general, the arbitral tribunal also applied the Directive's provisions on termination fees relying on the fact that they were common to the country of the principal (Denmark) and the country of the commercial agent (Spain).

[112] Cf. supra 128ff.

[113] Cf. supra 108.

[114] Cf. supra 44.

[115] Zhou (2014), p. 361; generally Basedow (1996), p. 354.

contract.[116] For example, it is common for parties to commercial agency contracts in Canada and South Africa to contractually provide for termination fees although neither of the applicable laws requires parties to do so.[117] Furthermore, it is possible that the parties prolonged the notice period for termination in accordance with Art. 16 (4) Commercial Agents Directive to an extent which allows the commercial agent to realise his investments before the contract lapses.[118] What can be deemed to be equivalent in this sense is a contractual stipulation which entitles the commercial agent to an adequate share in post-contractual profits. One year's average commission in the sense of Art. 17 (2) (b) Commercial Agents Directive can serve as a reference point. The compensatory capacity of a certain level of commission can be established easily if the standard rate of commission in the respective field where the contract is undoubtedly governed by a transposition of the Directive is known or can be established by recourse to an expert.[119]

Another contractual stipulation which can compensate for the waiver of termination fees is one allowing the commercial agent to maintain access to his customer base after the termination of the commercial agency. Termination fees aim at compensating the commercial agent for losing access to his customer base, so continuous access to the customer base can compensate for the lack of termination fees. By using his contacts to distribute products or services of a different principal, the commercial agent could continue to use the goodwill to his economic advantage also after termination. However, it requires that he finds a different principal who is offering products which he can distribute to his customers. As long as changing principals is possible while making use of his relationship-specific investments in the customer base, termination does not cause a grave detriment. Interestingly, the Directive does not as a matter of principle prohibit restraint of trade-clauses, i.e. clauses which restrict the business activities of a commercial agent after termination. Instead, Art. 20 Directive permits restraint of trade clauses as long as they are made in writing, define the geographical and substantive reach of the restraint of trade and are only valid for 2 years after the termination of the commercial agency. It is therefore not surprising that commercial agency contracts within the EU often include restraint of trade clauses. To a certain extent, the

[116] *Singleton* proposes a stipulation according to which 'the commercial agent will be paid compensation as if the 1993 Regulations applied' in order to protect commercial agents operating in a country where no such compensation is provided for, Singleton (2010), p. 152.

[117] Bremermann (2013), p. 186; Brückner (2013), p. 348.

[118] Cf. *Zohar v Travenol Labs*, CA 442/85, [1990] IsrSC 44(3) PD 661.

[119] Let X be expected or actual duration of the commercial agency in years, Y expected or actual volume of yearly transactions entitling the commercial agent to commission, C_s standard commission and C_a commission agreed upon by the parties. YC_s accounts for termination fees based on Art. 17 (2) (b) Commercial Agents Directive. Then C_a can be considered to provide equivalent protection if $XYC_s + YC_s = XYC_a$ or $X = (C_a - C_s)/C_s$. This means that a commercial agent who receives 50 % instead of the standard rate of commission of roughly 25 % can be considered to be put on a par with the Directive's minimum level of protection as soon as the commercial agency agreement could be expected to last or actually lasted for at least one year. For a case with comparable facts in which an English court refused to refer the parties to the prorogated forum after a commercial agency which lasted for over 3 years, cf. supra 135.

Directive's permissive regime towards restraint of trade clauses can be construed as an effort to counterbalance its mandatory regime for termination fees.[120] Coincidentally, jurisdictions which do not provide for termination fees can be observed to treat restraint of trade clauses more restrictive than the Directive does. The law of California for example extensively prohibits restraint of trade clauses in § 16600 Business & Professions Act. This prohibition is considered to form part of California's 'settled public policy in favor of open competition'.[121] It suggests itself that protecting commercial agents through such a policy against restraint of trade clauses possibly qualifies as a functional equivalent to the EU's policy in favour of termination fees.[122] It equally suggests itself that post-award review can reveal that the effects of a waiver of termination fees through a choice of law have effectively been made up for through a lack of a restraint of trade clause. Accordingly, a public policy violation could be avoided. Pre-award review as envisioned here takes this possibility into account. Thus, the absence of a restraint of trade clause can provide grounds for referring parties to arbitration just as much as an adaptation of the remuneration scheme.

To the same effect, the lack of an entitlement to termination fees under the chosen law can be made up for through employment in a different position without any financial losses.[123] Similar to a continuous access to the customer base, continuous employment in a different position without can perpetuate the commercial agent's source of revenue. Equally, the principal can grant the commercial agent a prolonged period for the notice of termination in order to allow him to reap the benefits of his investments for longer than otherwise possible. Whether the alternate schemes of remuneration mentioned above prevent a violation of the Commercial Agents Directive's public-policy core requires a functional comparative analysis between the minimum level of protection through termination fees under the Commercial Agents Directive and the alternate scheme of remuneration to the commercial agent.

The necessary value judgement regarding the equivalence of all possible alternate schemes of remuneration is typical for review under spectre of public policy. Review of arbitral awards for compliance with EU competition law requires an analysis as to whether an award must be annulled or required recognition for upholding an agreement with anti-competitive effects in the sense of Art.

[120]The connection between restraint of trade clauses and termination fees is reflected in Belgian and German law on commercial agency. Where a contract including a restraint of trade clause bars a commercial agent from benefitting from the customer base after termination, both laws assume that termination fees should be paid, cf. Art X.18 (2), Code de droit économique (Belgium); § 90a (1) Handelsgesetzbuch (Germany). It is also interesting to note that all of the drafts of the Directive included provisions according to which a suitable indemnity had to be paid for the duration of a restraint of trade, cf. Randolph and Davey (2010), p. 128.

[121]*Kelton v Stravinski*, 138 Cal App 4th 941, 946–947 (Cal.App Ct 5th Dist 2006); *Hill Medical Corp. v Wycoff*, 86 Cal.App 4th 895, 900 (Cal App Ct 2d Dist. 2001); cf. generally Kränzlin (1983), p. 170.

[122]Kleinheisterkamp (2009b), p. 108, n. 50.

[123]Cf. Quinke (2007), p. 249.

101 TFEU. Post-award review then necessitates a value judgement whether such anti-competitive effects were in fact caused. Equally, review in view of Arts 17 to 19 Commercial Agents Directive as envisaged here requires a normative analysis as to whether the parties' contract—including its scheme of remuneration—is detrimental to the commercial agent beyond the Directive's minimum level of protection. Taking an example from another area of law, the same type of value judgement requires to be drawn in the area of family law. Art. 23 (a) of Council Regulation 2201/2003 (Brussels II Regulation) requires courts to hold foreign judgments relating to parental responsibility against the standard of public policy 'taking into account the best interests of the child'.[124] This inevitably requires a court to normatively compare different options for a child's upbringing and to hold them against the abstract standard of the child's best interest.

It has been argued that this type of analysis can hardly be mastered by a court.[125] It could lead to speculative decision-making by courts and unconsidered simplifications and thus decrease the legal certainty for the parties involved.[126] The number of factors to be considered for an alternate scheme of remuneration and their interdependency supports this objection. Yet as far as the risk of an increased degree of speculation is concerned, it should be pointed out that the necessary prognosis in pre-award review inevitably includes elements of speculation. The relevant question is which consequences the remaining uncertainties involve, i.e. to whom the risk of uncertainty regarding the equivalence of different models is allocated. As long as parties can predict which decision the court will take if it cannot sufficiently ascertain equivalence in this sense, legal certainty can be brought to an acceptable level. Accordingly, the fear of speculative decision-making can be addressed by designing an adequate level of pre-award scrutiny which incorporates this question.[127] The same holds true regarding the practical difficulties which a court might endure when carrying out the comparative analysis. Completely disregarding alternative remuneration as a factor in the measure of pre-award review would mean that courts would knowingly have to refuse to refer parties to arbitration although any resulting award would have to be granted *res judicata* effect by courts of the same country—e.g. because a sufficient increase in commission safeguards recognition.

[124]Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 [2003] OJ L338/1.

[125]Kleinheisterkamp (2009b), p. 108; Kleinheisterkamp (2009a), p. 832 in reference to a waiver of restraint of trade clauses.

[126]ibid.

[127]The risk of uncertainty should ultimately remain with the principal, cf. infra 232ff. Also Kleinheisterkamp prefaces his objection to the equivalence test by observing that such a test should at least not be preferable if the party seeking enforcement of the arbitration agreement did not even raise equivalence in pre-award review, Kleinheisterkamp (2009b), p. 108.

5.2.1.3.2.3 Third Indicator: No Efficacy of Post-Award Review

The first two indicators alone are insufficient to determine whether parties should be referred to arbitration. Despite a choice of a law not providing for termination fees and a lack of a remuneration scheme compensating for this, arbitral tribunals can still be incentivised to adhere to parts of the Directive as overriding mandatory provisions and to award termination fees accordingly. This incentive depends on the question whether an award ignoring the entitlement to termination fees under the Directive would be enforceable.[128] For this condition to be fulfilled, post-award review has to provide a realistic possibility of relief. Courts carrying out pre-award review should therefore determine where a commercial agent would most likely aspire to overcome the *res judicata* effect of an award which perpetuates the effects of an opportunistic termination—and what the likely outcome of the ensuing post-award review would be. While the award can only be annulled at the seat of arbitration, it can be close to impossible to predict where the award could be reviewed in enforcement proceedings. Additionally, it is at least uncertain whether an award which was annulled at the seat of arbitration would be enforced elsewhere nonetheless.[129]

A rational commercial agent will restrict his efforts to have the award's *res judicata* effect overturned by courts at the place where he could also successfully enforce a state court judgment granting him some form of termination fees after all. Thus, what is necessary is the possibility of review in a country where the principal has seizable assets and which considers termination fees to be part of public policy.[130] Post-award review in a Member State must be considered efficient in this sense where the principal has assets within that Member State or even the EU at large.

Presumably this is not the case in the vast majority of commercial agencies between a European commercial agent and a non-European principal.[131] Only in some cases could seizable assets still be present in the form of a continuous flow of the principal's goods into the European market.[132] For example, it is possible that even after termination there is an ongoing flow of the principal's goods to a new commercial agent into the country previously served by the former commercial agent. Those goods could be used to enforce a judgment by a Member State court which is rendered after the *res judicata* effect of an award denying termination fees is done away with in post-award review.[133] Equally, bank accounts or outstanding

[128]The review of arbitral practice has revealed examples in which arbitral tribunals have expressly adapted their decision making in light of concerns over enforceability, cf. supra 144. Furthermore, the model has explained the inner workings of the process which makes arbitrators behave this way—in spite of the unquestionable significance of party autonomy in arbitration.

[129]See supra 40.

[130]Mankowski (2006), p. 152.

[131]It can be assumed that enforcement against the principal will not be effective in 90 % of those cases, Basedow (2014), p. 351.

[132]Cf. Kleinheisterkamp (2009a), p. 834.

[133]ibid. The respective enforcement would not even require any exequatur under the Brussels I Regulation (recast).

claims against creditors within a Member State can serve this purpose. Under those conditions, a Member State court engaging in pre-award review is not merely a passive gatekeeper with one shot at influencing the process. Instead it has the ability to steer the arbitral tribunal's decision by the shape of its imminent post-award review under the spectre of public policy.[134] Even if there are no assets within reach for Member State courts, post-award review could still be effective if courts in non-Member State courts which could potentially seize assets consider it a violation of their public policy if a commercial agent is not granted termination fees. For example, this is the case if assets are located in the United Arab Emirates or in Lebanon.[135]

However, prudent principals have potentially placed their assets outside those non-Member States and Member State. In particular *Ingmar* and the decisions which extended *its* effects to choice of forum selection clauses can be assumed to have had this effect.[136] To this end, day-to-day payments can, for example, be made through bank accounts in Liechtenstein.[137] Furthermore, a complete lack of seizable assets in this sense can occur if the principal leaves the European market altogether after termination or if his *modus operandi* simply does not provide for any seizable assets (e.g. if services, custom-made or intangible goods are being distributed). It is even more likely that the assets of a non-European principal are located at a place where overriding a choice of law to the advantage of a commercial agent is not held in high regard. Californian courts, for example, do not consider it to be crucial to protect commercial agents through termination fees. More decisively, Californian courts also have shown a pronounced lack of deference to foreign mandatory law in post-award review.[138] It is unrealistic that Californian courts would ignore both an express choice of law in the contract and the *res judicata* effect of an award upholding the said choice of law in favour of a

[134]A condition for this court's post-award review to become imminent is obviously that the principal possesses assets in the said country. A possible target for enforcement could also be a persisting stream of the principal's goods into the EU, cf. ibid.

[135]For example, Art. 9 United Arabs Emirates Federal Law No. 18 of 1981 concerning the Organization of Commercial Agencies (as amended 2010) requires to commercial agents to be compensated if a commercial agency agreement is terminated or not renewed in the absence of any 'justifiable' reason. Compensation is to be paid in respect of the investment made by the commercial agent in the commercial agency and the loss of future profits. In particular, arbitration clauses have been held unenforceable by the Federal Supreme Court of the United Arab Emirates if they relate to a contract governed by UAE Federal Law No. 18 of 1981, cf. المحكمة العليا الاتحادية (أبوظبي) (UAE), 6 May 2009, Appeal No. 713-Civil of the 27th Judicial Year, reported at http://aidarous.com/uploads/publications/Legal_Pinch_October_2013.pdf accessed 26 November 2016. In Lebanon, disputes which relate to Lebanese Decree-Law No. 34 on Commercial Representation Agreements (issued on 5 August 1967) are considered inarbitrable *per se*, cf. Comair-Obeid (2012), p. 2.

[136]Basedow (2014), p. 351.

[137]ibid.

[138]Cf. Rau (2009), pp. 144 with reference to *Northrop Corp. v Triad Int'l Marketing S.A.*, 811F 2d 1265 (9th Cir 1987).

transposition of the Commercial Agents Directive as foreign mandatory provisions. Therefore, assets which cannot be seized by a court favouring the mandatory payment of termination fees do not allow the conclusion that potential violations of the Commercial Agents Directive's purposes would be detected and remedied at the post-award stage.

These observations allow two conclusions: on the one hand, even if the first and second indicator are not fulfilled, an undetectable violation of public policy can be avoided if there are sufficient seizable assets within reach of a Member State court (or a like-minded court such as those of the United Arab Emirates or Lebanon). On the other hand, if the first and second indicators are not fulfilled, a lack of seizable assets will create a situation in which no reliable factor is left to prevent an arbitrator from perpetuating the effects of a principal's opportunistic termination. As a result, if pre-award review is understood to be aimed at and restricted to avoiding those undetectable public policy violations in advance, pre-award review must also include an analysis of the presence of seizable assets in this sense.[139]

In view of the above, an effective violation of public policy can only be considered to be imminent if all three indicators are fulfilled. If one of the three indicators is not fulfilled, it is unlikely that an undetectable violation of public policy will ultimately occur. Therefore, letting only one or even two indicators suffice to refuse a referral raises the risk that the court interferes with party autonomy although it is neither necessary in light of the ECJ's case law nor advisable in light of the normative considerations on the question.

5.2.2 Preferable Level of Pre-Award Scrutiny

It has been outlined above how the level of pre-award scrutiny reflects the negative side of Kompetenz-Kompetenz as it relates to the degree to which state courts are precluded from determining an arbitral tribunal's jurisdiction.[140] Courts are considered to be able to restrict themselves to a mere *prima facie* review of the

[139] A lack of seizable assets will always make it difficult to ultimately bring about a situation which does not violate public policy. Also if the commercial agent is granted termination fees by a Member State court, the commercial agent will have difficulties enforcing the respective judgment. He will face the common problems connected with enforcing a foreign judgment as well as the added difficulty that the Member State court assumed jurisdiction in spite of an arbitration agreement which can be considered to be valid *prima facie*. Nevertheless, if there are no seizable assets, it is still preferable to expose the commercial agent to those challenges than to refer him to arbitration. Otherwise the courts would run the risk of creating a situation in which an arbitral tribunal decides the dispute without being incentivised to override a choice of law by post-award review favouring the purposes of the Commercial Agents Directive. If the commercial agent also did not receive any alternative compensation, an undetectable violation of public policy becomes palpable. A court which knowingly exposes a commercial agent to that risk violates the principle of effectiveness.

[140] Supra 30.

arbitration agreement which trusts in the capabilities of arbitration—or it can carry out a thorough review which uses the slightest doubt regarding application of overriding mandatory provisions in arbitration as an opportunity to refuse to refer the parties to arbitration. The underlying problem is that reviewing courts do not know which decision the arbitrators will take. With this in mind, the preferable level of pre-award scrutiny is achieved by addressing this uncertainty.

5.2.2.1 Risk of Uncertainty and Pre-Award Review Level of Scrutiny

The preferable level of pre-award scrutiny revolves around the question of when the three indicators can be considered to be established with sufficient certainty. In so far as legislative acts, court decisions and commentators address the level of certainty required to refer parties to arbitration at all, it is done in normative expressions such as 'manifest', 'sufficient' or 'naheliegend'.[141] What is often overlooked is that the court's prognosis in pre-award review is closely related to the question of which party bears the risk that a certain aspect can ultimately be resolved with certainty.[142] In other words, the level of pre-award scrutiny implicates the allocation of the burden of proof as distinct from the burden of evidence and the actual burden of proof regarding the three indicators for an undetectable violation of public policy.[143] The preferable level of pre-award scrutiny uses these implications to design review in a way which balances the goals of respecting party autonomy, facilitating cost-efficient dispute resolution and realising the Directive's minimum level of protection.

5.2.2.1.1 Burden of Evidence and Burden of Proof in Pre-Award Review

The initial burden of evidence and the burden of proof for the existence of an arbitration agreement basically rests with the party which wants to resist litigation and demonstrate the parties' duty to arbitrate their dispute.[144] Pre-award review is typically triggered by that party through its application for a stay of proceedings relying on an arbitration agreement.

In contrast, the party striving to litigate the dispute bears the burden of proof for the lack of enforceability of an existing arbitration agreement. This is reflected in the wording of the provisions regulating pre-award review, which indicate that the

[141] Cf. supra 34, 167f.

[142] Niedermaier (2014), p. 20.

[143] Cf. Case C-8/08, *Telekom Nederlands BV* [2009] ECR I-4529, Opinion of AG Kokott, para. 80, n. 60: 'The burden of proof determines, first, which party must put forward the facts and, where necessary, adduce the related evidence (subjektive or formelle Beweislast, also known as the evidential burden); second, the allocation of that burden determines which party bears the risk of facts remaining unresolved or allegations unproven (objektive or materielle Beweislast).'

[144] Wilske and Fox in: Wolff (Ed.) (2012), Art. II, para. 287; Schramm, Geisinger and Pinsolle in: Kronke et al. (Eds.) (2010) Art. II, 102.

parties should be referred to arbitration unless certain facts may lead to a finding that the parties should not be referred to arbitration.[145] Accordingly, this allocation of the burden of proof has been confirmed by state courts, commentators and arbitral tribunals.[146] Therefore, it would lie with the commercial agent in the constellation of interest here to prove that an undetectable violation of public policy will occur. The commercial agent would therefore have to prove that all three indicators are fulfilled. Practically, this is presumably overly difficult, which raises the question whether the risk of remaining uncertainties can be shifted to the advantage of the commercial agent.[147]

5.2.2.1.2 Allocating the Burden of Proof Under the Principle of Effectiveness

The justification for shifting the risk of uncertainty in this sense cannot be derived directly from the principle of effectiveness. As analysed above, the ECJ has interpreted this principle to require pre-award review to only generally take account of the conditions governing the arbitral procedure and the possibilities for challenging the award.[148] In particular, the ECJ has not directly addressed the role played by the burden of proof in pre-award review.

The allocation of the burden of proof as outlined above is based on the assumption that pre-award review is subject to the adversarial principle. The ECJ has in

[145]Cf. Art. II (3) New York Convention 'The court of a Contracting State (...) shall (...) refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'; § 1032 (1) Zivilprozessordnung (Germany) '(...) so hat das Gericht die Klage als unzulässig abzuweisen, (...) es sei denn das Gericht stellt fest, dass die Schiedsvereinbarung nichtig, unwirksam oder undurchführbar ist'; Art. 1448 NCPC (France) '(...) une jurisdiction de'l Etat (...) se déclare incompétente sauf si le tribunal n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable'; Art. 1682 (1) Code Judiciare (Belgium) 'Le juge (...) se déclare sans jurisdiction à la demande d'une partie, à moins qu'en ce qui concerne ce différend la convention ne soit pas valable ou n'ait pris fin'; Section 9(4) Arbitration Act 1996 (England) 'On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'.

[146]*Inco Europe Ltd. v First Choice Distribution*, YB Comm. Arb. XXV (2000), 765, 777 (EWCA 1998); Bishop et al. (2008), p. 323; Schramm, Geisinger and Pinsolle in: Kronke et al. (2010) Art. II, 102; Huber and Bach in: Böckstiegel et al. (Eds.) (2015), § 1032, para. 17; cf. *Lobo v Celebrity Cruises*, 426F Supp 2nd 1296 (SD Fla 2006), YB Comm. Arb. XXXIII (2008), 820, 831.

[147]In simple cases it might be possible to accomplish this for the first indicator if the court applies a black-letter approach to the comparison, looking exclusively for mandatory indemnity or compensation payments under the chosen law. It becomes distinctly more difficult regarding the second indicator, i.e. the economic comparison between different schemes of alternative compensation, which can be time consuming and require the input of experts. It becomes close to impossible for the third indicator. After the termination of the commercial agency a commercial agent will realistically be unaware of the whereabouts of the principal's assets.

[148]Cf. supra 75.

principle recognised the adversarial principle in relation to the enforcement of rights conferred by EU law as consistent with the principle of effectiveness in *van Schijndel*.[149] At the same time, the court pointed out that an exception can be applicable in exceptional cases where public interest requires a court's intervention.[150] It is instructive to analyse the ECJ's case law on the review of contractual terms under the Unfair Terms Directive. The reviewing court must determine *ex officio* whether the Unfair Terms Directive applies and whether the terms of contract are unfair.[151] However, the duty to analyse a term's fairness *ex officio* only means that the Member State court has to raise the respective questions on its own motion, irrespective of whether a party relied on it. It does not mean that the Member State court also has to answer the questions inquisitorially and fully investigate the underlying matters. The burden of proof remains with the party which invokes the unfairness of any contractual term under the Directive, i.e. typically the consumer.[152] After raising the respective question, courts merely have to ensure that the parties make full and timely statements in relation to all facts and supplement insufficient information given in respect of the facts.[153] Accordingly, the ECJ has clarified that the review of contractual terms by Member State courts follows the adversarial principle.[154]

The fact that EU law categorises both commercial agents and consumers as structurally weaker suggests that the approach developed in light of the Unfair Terms Directive could be translated to commercial agents and arbitration agreements.[155] Admittedly, there are a number of indications for the assumption that structural weakness is not a predominant trait among commercial agents providing their services across borders.[156] Yet, it remains possible that a subgroup of risk-averse and economically weak commercial agents lose the protection under the Directive approximating their structural position to that of consumers. Accordingly, a court can *ex officio* raise the question whether an arbitration agreement between a commercial agent and a principal lacks arbitrability in light of the possibility of an undetectable violation of public policy. The court must refrain from conducting an inquisitorial review beyond raising the initial question and describing the three relevant indicators for it to assume a lack of arbitrability. The principle of effectiveness does not require that the commercial agent is further relieved of the burden of proof of the lack of arbitrability.

[149] Joined Cases C-430/93 and C-431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705, para. 22.

[150] ibid para. 21.

[151] Case C-137/08 *Ference Schneider* [2010] ECR I-10847, para. 56.

[152] Niedermaier (2013), p. 243.

[153] Case C-137/08, *Ferenc Schneider* [2010] ECR I-10847, Opinion of AG Trestenjak, para. 114.

[154] Case C-472/11 *Banif Plus Bank* EU:C:2013:88, paras. 29, 33 with reference to Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, para. 53.

[155] Cf. Niedermaier (2013), p. 67ff, 363.

[156] Cf. supra 117ff.

5.2.2.1.3 Allocating the Risk of Uncertainty in Light of the Concrete Conditions of Pre-Award Review

Upon further review, it becomes clear that the concrete conditions for establishing all three indicators themselves necessitate allowing the commercial agent to shift the burden of proof to the principal. It suffices if the commercial agent bears the burden of evidence, which is satisfied if he can establish all three indicators *prima facie* (Sect. 5.2.2.1.3.1). The principal can rebut any *prima facie* indication of an undetectable violation of public policy but should be held to a high standard in this regard (Sect. 5.2.2.1.3.2).

5.2.2.1.3.1 Commercial Agent's Burden to Establish All Three Indicators prima facie

Where it is unfair or unjust to require a party to prove a certain fact, it may be necessary to adapt the burden of evidence and the burden of proof accordingly. It is a recognised principle that if a party with the initial onus to prove a negative can at least establish the negative *prima facie*, it then falls upon the other party to prove the positive.[157] All three indicators can be understood to require the commercial agent to prove a negative. The first indicator is a negative in so far as it pertains to the lack of a regime for termination fees under the law or rules of law to be applied in arbitration; the second indicator is a negative in so far as it pertains to the lack of an alternative scheme of compensation; the third indicator is a negative in so far as it pertains to the seizability of the principal's assets. The commercial agent will run into difficulties in proving all three negatives. The first indicator can require giving comprehensive evidence of an entire legal system. As far as the second indicator is concerned, while the commercial agent can use the parties' contract for a lack of an alternative remuneration scheme therein, he may not be able to effectively prove the absence of any oral modifications of the contract, any side-payments made by the principal etc. Lastly, the commercial agent will have difficulties proving the lack of seizable assets as he typically will not have extensive knowledge about the location of the principal's assets.

This approach also is supported by the principle of allocating the risk of remaining uncertainties to the party in whose sphere of influence the relevant circumstances occur.[158] Here, the relevant circumstances for pre-award review are the reasons for the termination of the commercial agency. An opportunistic termination should be sanctioned by having to compensate or indemnify the commercial agent—a non-opportunistic termination should not.[159] In this context,

[157] Bundesgerichtshof (Germany), NJW-RR 93, 746, 747; Bundesgerichtshof (Germany), 16 October 1984, NJW 1985, 264, 265; *Walker v Carpenter*, 57 SE 461, 461 (NC 1907): 'The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative.'

[158] Cf. Niedermaier (2013), p. 357; Rose (2014), p. 217.

[159] Cf. supra 103ff.

the Directive presupposes that the principal always terminates opportunistically. This inquiry has gone to show that this broad assumption is misplaced. Thus, pre-award review should explore whether the termination was done opportunistically or not—as made possible through the three indicators. Part of the relevant information in this respect, however, resides with the principal, so his motivation for terminating may be unknown to the commercial agent. The allocation of the risk of uncertainty should be modified accordingly.

Approaches allocating evidentiary burdens in this are already known and applied in Member States in the field of European private law. In anti-discrimination cases, for example, the relevant circumstance is the motivation for an employer not hiring a certain applicant. The applicant will hardly be able to prove that the employer's motivation was discriminatory, e.g. based on racial or ethnic origin. Accordingly, EU Directives in the field of anti-discrimination which establish the principle of equal treatment ease the burden of proof in favour of those who invoke a violation.[160] They provide that it shall suffice if persons who consider themselves wronged under the principle of equal treatment can establish facts from which it may be presumed that there has been direct or indirect discrimination. If they can do so, it is for the respondent to prove that there has been no violation of the principle of equal treatment.[161] This approach can and should be transferred to the pre-award review of arbitration agreements where appropriate.[162]

It is also in accord with the need for cost-efficient, swift and reliable dispute resolution to allow *prima facie* evidence to suffice for not referring parties to the prorogated forum.[163] Requiring a higher preponderance of evidence provided by the commercial agent would go against these basic considerations of procedural economy. Pre-award review should not require courts to completely (albeit implicitly) anticipate the decision by the arbitral tribunal when considering whether to refer the parties to arbitration—without then bringing the anticipated decision about itself.[164] In spite of the *prima facie* standard, the cumulative effect of all three indicators under the measure of review prevents courts from refusing referrals to arbitration after a superficial, one-sided and protectionist type of pre-award review. The three indicators give a comprehensive picture of the core question—the possibility of an undetectable violation of public policy to the detriment of the commercial agent. Taken together, *prima facie* evidence of all three indicators can be argued to give good and substantial reason for the inarbitrability of the subject matter.[165]

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[160]Cf. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin.

[161]Cf. Art. 8 (1) Directive 2000/43/EC; Art. 9 (1) Directive 2004/113/EC; Art. 4 Directive 97/80/EC; Art. 19 Directive 2006/54/EC; cf. Case C-127/92 *Enderby* [1993] ECR I-5566, paras. 16, 17.

[162]Niedermaier (2013), p. 357.

[163]Cf. Weller (2005), p. 354.

[164]Kleinheisterkamp (2009a), p. 830.

[165]Thus, they would also permit to refuse to refer parties to arbitration under Art. VI (3) European Convention.

5.2.2.1.3.2 Principal's Burden to Rebut at Least One Indicator

If the commercial agent can provide *prima facie* evidence for all three indicators, the burden of proof shifts to the principal. *Prima facie* evidence for all three indicators requires a strong counter-argument in favour of the lack of an imminent undetectable violation of public policy. Accordingly, the principal must be required to fully overcome the concern related to at least one indicator. Any lesser standard would equally go against the need for swift and reliable decisions in pre-award review. The possibilities for the principal to rebut one of the three indicators emerge from realigning the mechanism of pre-award review with a focus on the effect of a potential award on public policy. This means that if a principal can provide a reliable commitment which substantially impedes arbitral tribunals from undetectably violating public policy, parties should be referred to arbitration in spite of *prima facie* evidence for all three indicators. The details of the possibilities for such rebuttals will be outlined below.

5.2.2.2 Determining the Three Indicators *prima facie*

5.2.2.2.1 First Indicator: Choice of Law Not Providing for Termination Fees

As far as the first indicator is concerned, the commercial agent has to establish *prima facie* that the law chosen by the parties does not compensate or indemnify him in the sense of the Directive's minimum level of protection. What is necessary is that he can make a conclusive argument referring to the chosen law in this sense. The commercial agent should be able to establish this by reference to the available comparative studies on the law of commercial agency.[166] Where such evidence is not available experts should be employed on that question.

5.2.2.2.2 Second Indicator: No Alternative Schemes of Compensation

Regarding the second indicator, the commercial agent needs to establish *prima facie* that he was not sufficiently compensated through contractual stipulations either. This is fairly straightforward in so far as the commercial agent can establish that the contract conforms with the common practice for commercial agency contracts in Member States in that it lacks contractual stipulations for termination fees, an entitlement to a share in post-contractual profits, an extension of the notice

[166] E.g. Campbell (2012); Rödl and Partner (2013); Albaric and Dickstein (2011); Jausàs (1997); Saintier (2002). For details on proving the content of foreign law in Member State courts cf. Trautmann (2011); Geeroms (2004); Fentiman (1998).

period and a waiver of a restraint of trade clause. Equally, the lack of continuous employment in a comparable function can easily be demonstrated.

In so far as the commercial agent has to establish *prima facie* that the contract did not compensate for the waiver of termination fees by granting a possibility for higher profits through higher commission, his task is more difficult. The commercial agent can do so through a comparison between the commission in the contract and the common commission in the respective field in the territory where the services were provided. Reference can be made to average commission rates and further contractual stipulations on the respective market. Rates of 5–6 % represent the majority of commissions granted, while for commercial agency services regarding computer software, marketing, high-value journalism and educational products rates of 20–30 % are not unknown.[167] Again, if the commercial agent cannot readily provide *prima facie* evidence in this sense, he can have recourse to an expert witness. If respective comparison reveals a significant gap in compensation for the commercial agent, he can be considered to have established the second factor *prima facie*.

5.2.2.2.3 Third Indicator: No Efficacy of Post-Award Review

Lastly, the commercial agent has to establish *prima facie* that post-award review will not be able to effectively rectify a potential violation of public policy as defined in *Ingmar*. On the one hand, this is the case if the courts at the seat of arbitration do not treat termination fees conforming to the Directive's minimum standard of protection as a principle reflecting public policy, i.e. the Member States (and like-minded countries like, for example, the United Arab Emirates and Lebanon).[168] Otherwise, annulment proceedings and the effect of an annulled award under Art. V (1) (e) New York Convention would provide for efficient post-award review. On the other hand—and more decisively—it requires showing that the courts in potential enforcement proceedings at the location where the principal has seizable assets will equally not disregard the *res judicata* effect of an award which does not award termination fees to the commercial agent.

In view of the potential difficulties for the commercial agent to locate the principal's assets, it must be sufficient if the commercial agent can establish *prima facie* that the principal is able to remove all the relevant seizable assets from the respective countries. If the principal's business does not generate seizable assets, then this can be assumed to be the case *per se*. But even if there is a continuous presence of seizable assets, there is always a danger that the principal will withdraw them from the reach of Member State courts. In particular monetary assets should be considered to be easily transferable at short notice. Therefore, the commercial agent will not be able to establish the first indicator only if the principal

[167] Singleton (2010).

[168] See supra 218f.

has a large amount of assets in a Member State which can hardly be divested or transferred.

5.2.2.3 Possibilities for a Rebuttal of a *prima facie* Undetectable Violation of Public Policy

If the commercial agent can establish all three indicators *prima facie*, the principal can achieve a referral to arbitration by clearly rebutting the underlying concern behind at least one of the three indicators. In order to do so, the principal must alter the parties' relationship *ex post*. This can either involve agreeing to a *dépeçage* in favour of the Directive, a transposition or another law which provides for termination fees (1), altering the remuneration scheme retroactively, e.g. by adequately increasing the commission (2) or agreeing to deposit the amount owed under the minimum level of protection under the Directive in the respective Member State (3).

5.2.2.3.1 Rebuttal Through a One-Sided *dépeçage*

Where the commercial agent is able to establish the lack of termination fees under the law chosen by the parties, the principal should be able to rebut the indicative effect by making a binding commitment that the arbitral tribunal shall apply a law which provides equivalent post-contractual protection. This can be the transposition of the reviewing court's Member State, the transposition of any other Member State, the Directive itself or a non-Member State's law which provides equivalent protection.[169]

A possibility along those lines was first proposed by *Kleinheisterkamp*.[170] The distribution of the burden of proof in pre-award review was also the point of departure his proposal in an article on the Oberlandesgericht München's decision from 2006.[171] He implies that it should ultimately be up to the principal to show that the chosen law provides an equivalent level of protection. What he puts forward is

[169] *Kleinheisterkamp* proposes that principals should concede the application of the *lex fori's* overriding mandatory provisions: Kleinheisterkamp (2009b), p. 116. In line with the analysis of the preferable standard of protection above, every *dépeçage* expressing the Directive's minimum standard of protection should suffice.

[170] ibid 114; see Kleinheisterkamp (2009a), p. 837.

[171] The distribution of the burden of proof in pre-award review was also *Kleinheisterkamp's* point of departure. Commenting on the decision by the Oberlandesgericht München from 2006 he argued that a refusal to refer parties to arbitration 'reflects nothing else but the weakness of the arguments presented by the [principal] who could have made the effort to show that the effectiveness of German mandatory rules [transposing the Commercial Agents Directive] would not be imperilled by the combined choice-of-forum and choice-of-law clause.' Kleinheisterkamp (2009b), p. 106 in reference to Oberlandesgericht München, 17 May 2006, 7 U 1781/06, IPrax 2007, 322.

essentially a one-sided undertaking by the principal tracing the effect of a *dépeçage* in favour of the Directive's overriding mandatory provisions.[172] It is this undertaking which works as sufficient evidence that the commercial agent's level of protection will be sufficient in arbitration. This solution has been criticised by a number of authors.[173]

This proposal has been met with counter-arguments regarding its dogmatic reasoning and its practical capabilities, which fail to convince upon further review. As far as the proposal's dogmatic reasoning is concerned, it has been held against the proposal that it allows parties to decide the application of overriding mandatory provisions although those rules are as a matter of principle applicable independent of any agreement by the parties.[174] This line of reasoning is flawed in so far as it indiscriminately transfers the understanding of overriding mandatory provisions as applied by state courts to the realm of arbitration. Arbitral tribunals effectively enjoy considerably more liberty than state courts when it comes to applying any provision—in particular if they can retrace their decision to the parties' will. Accordingly, if parties have expressly mandated the applicability of the *lex causae's* overriding mandatory provisions, the arbitral tribunal must render its award in accordance with those provisions.[175] The mechanism proposed by Kleinheisterkamp should not be confused with an enforceable obligation for the arbitral tribunal to apply the overriding mandatory provisions. Instead it merely provides reviewing courts with a strong indicator in order to determine the reliability of arbitration as a forum in which the application of overriding mandatory provisions is safeguarded through a reliable connecting factor. This becomes particularly evident from an often overlooked reference in the Supreme Court of the United States' decision in *Mitsubishi* to which Kleinheisterkamp refers. The party which relied on the arbitration agreement had to defend it against the apprehension that the parties' choice of Swiss law would endanger the application of American antitrust law.[176] In oral argument, however, that particular party had in fact 'conceded that American law applied to the antitrust claims'.[177] Tracing this course of events, the mechanism proposed by *Kleinheisterkamp* does not necessitate a contractual stipulation in the sense of a meeting of the agent's and the principal's minds, but allows a one-sided undertaking by the principal to suffice.

[172] Kleinheisterkamp (2009b), p. 117.

[173] Rau (2007), p. 51; Cheng (2009), p. 121; Thorn and Grenz (2011), p. 197.

[174] Thorn and Grenz (2011), pp. 197–198.; *Kleinheisterkamp* already acknowledged this point in Kleinheisterkamp (2009a), p. 839.

[175] Beulker (2005), p. 230.

[176] At an earlier stage the enforceability of the arbitration agreement was also questioned under the aforementioned Puerto Rican Ley de Contratos de Distribucion protecting commercial agents *inter alia* against arbitration agreements working in tandem with a choice of law. This argument was, however, dropped before the case reached the Supreme Court of the United States, see *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*, *Inc.,* 473 US 614 (1985), n. 8.

[177] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.,* 473 US 614, 637 (1985), n. 19; cf. Kleinheisterkamp (2009b), p. 115.

From the court's point of view this undertaking can be construed as a corroboration of the prevalence of the respective provisions as overriding mandatory provisions in arbitration. In view of the far-reaching liberty of arbitral tribunals when it comes to determining the applicable law, this type of undertaking can be considered to be a particularly strong indicator that the arbitral tribunal will apply the respective transposition of the Directive. Therefore, this dogmatic counterargument does not impair the proposal's viability.

Another flawed counter-argument is raised with regard to the proposal's practical capacity to actually address the underlying problems.[178] Retroactively conceding the applicability of Arts 17 to 19 Commercial Agents Directive implies a financial burden for a principal.[179] If a principal refuses to make such a concession, he risks that the reviewing court will ignore the arbitration agreement and render a judgment ordering him to pay termination fees under the *lex fori's* transposition. The counter-argument raised in this respect is that this threat is potentially not enough to make the principal agree to take on the financial burden and to make a one-sided *dépeçage* if the principal has no seizable assets for the enforcement of that judgment within the EU.[180] This may in fact be the case given the difficulties the commercial agent may encounter in enforcing such a judgment at the location of the commercial agent's assets.[181] It is, however, not an argument which divests the proposal of its practical capability. The group of principals which do not have seizable assets within the reach of courts which consider adherence to the Directive's minimum standard of protection to form part of an applicable measure of review will always stay unruffled at the prospect of pre-award review. This group of principals are effectively in a safe position. However, they will be equally unimpressed by the proposal of *Kleinheisterkamp's* critics, who rely on the 'pre-emptive binding effect from the setting aside procedure'. They argue that the prospect of annulment of an award that ignores the Directive's applicable transposition will drive arbitrators to adhere to the said transposition.[182] Even in the presumably rare case that the seat of arbitration is in a country which considers a standard equivalent or higher than the Directive's minimum standard of protection

[178]Thorn and Grenz (2011), p. 198.

[179]In terms of the model, it triggers the worst possible outcome for the principal. He paid high commission and takes on the risk of having to pay termination fees (i.e. $P_h - f/2$), cf. supra 148, n. 30.

[180]Thorn and Grenz (2011), p. 198.

[181]In California, for example, foreign judgments do not carry full faith and credit. Instead courts retain the freedom not to recognise a foreign judgment if the courts hold that 'the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court', cf. Code of Civil Procedure (California) 1716 (a) (5) (based on Section 4 (b) (5) Uniform Foreign Money-Judgments Recognition Act). The lack of deference towards foreign mandatory law outlined above allows the assumption that a foreign judgment would not be recognised and enforced readily if it ignored an arbitration agreement in the name of provisions which did not have a counterpart in substantive Californian law. The same effect can be assumed to be present in other places of enforcement outside the EU.

[182]Thorn and Grenz (2011), p. 205ff.

to form part of its public policy, the annulment of an award denying termination fees should not be confused with an enforceable judgment in awarding termination fees. The risk of effectively having to pay termination fee remains low for these principals. This problem needs to be addressed and is most effectively done with the third indicator presented in this chapter. It does not, however, take anything away from the practical capability of the possibility to rebut *prima facie* establishment of the first indicator.

5.2.2.3.2 Rebuttal Through Post-Contractual Stipulation of Alternative Schemes of Remuneration

Alternatively, the principal can rebut the *prima facie* violation of public policy by retroactively offering a scheme of remuneration which compensates the commercial agent for the lack of termination fees under the chosen law. Such a stipulation removes the possibility that the commercial agent is ultimately put in a position which violates the minimum standard of protection envisaged by the Directive to a degree which amounts to a violation of public policy. In essence, this mechanism rebuts the second indicator regarding remuneration in parallel to the way in which a post-contractual *dépeçage* rebuts the first regarding the applicable law.

The principal can, for example, waive a restraint of trade clause included in the contract if it is evident that the commercial agent will be able to draw appropriate benefits from this. Equally, the assumption can be rebutted if the principal offers the commercial agent appropriate employment in a position which guarantees equivalent remuneration for a sufficient time period. The principal can also offer to retroactively increase commission rates to a level which accounts for the lack of termination fees under the chosen law. As the Directive and not the transposition in the *lex fori* is the preferable measure for equivalent protection, termination fees are accounted for if the increased commission provides for an amount equivalent to the minimum level of protection using one year's commission as the maximum in accordance with Art. 17 (2) (b) Commercial Agents Directive. The resulting lump sum payment of now outstanding commission resulting from this should, however, not be confused with a pre-emptive payment of termination fees themselves. If the principal rebuts the second indicator, the parties will be referred to arbitration where the commercial agent can argue anew that the choice of law needs to be overridden. However, such a payment significantly increases the probability that the arbitral tribunal will uphold the choice of law because it eliminates the risk of non-enforcement for a violation of public policy.

Admittedly, it is improbable that the principal will make use of the opportunity to rebut the second indicator. If he is willing to do so, it is likely that he has already offered a settlement to the commercial agent in order to avoid the conflict. Yet it remains a possibility that a principal will value the possibility to arbitrate the dispute more highly than, for example, a restraint of trade clause. The rebuttal mechanism allows him to achieve this exchange even if the commercial agent was not willing to agree to a settlement.

5.2.2.3.3 Rebuttal Through Deposit of the Amount Owed in Termination Fees Under the Directive

Lastly, the principal can always rebut the third indicator by making post-award review and the subsequent state court proceedings efficient. He can do so by turning the court's attention to assets within its reach, which ensures that any award which does not conform with the minimum level of protection under the Directive does not gain *res judicata* effect. He can, for example, refer to an affiliated company seated in a Member State with sufficient assets.[183]

The principal can also rebut the third indicator by depositing an amount which roughly covers the amount owed in termination fees under the Directive's minimum level of protection at the disposal of a Member State court. He thus creates seizable assets within reach of the courts, which regard it to be part of their public policy that commercial agents are awarded termination fees.[184] By creating the imminent threat of effective post-award review by a court which recognises the minimum level of protection for commercial agents, this type of deposit can be held to sufficiently incentivise arbitral tribunals to render an award in conformity with the public-policy core of the Directive. The deposit could, for example, be made in the form of an irrevocable and unconditional guarantee of unlimited term issued by a bank or other financial institution from a Member State. Equally, the principal can lodge cash or securities.

The deposit itself should only be used for the enforcement of a subsequent state court judgment in favour of termination fees. This means that it is made for the situation in which the arbitral tribunal's award does not accord with the Directive's minimum level of protection and the *res judicata* effect of that award is therefore not recognised. The deposit must therefore be made conditional on not being used for the actual enforcement of any resulting award. The deposit should be paid back as soon as either *res judicata* effect of a resulting award are recognised in the last instance.

5.3 Post-Award Review of Disputes Implicating Arts 17 to 19 Commercial Agents Directive

In the following the preferable system of post-award review will be designed addressing both the preferable measure of review (Sect. 5.3.1) and the level of scrutiny (Sect. 5.3.2).

[183] Cf. Oberlandesgericht Stuttgart, 29 December 2011, 5 U 126/11, IHR 2012, 163, 164.

[184] Arbitration had a comparable mechanism to safeguard compliance with arbitral awards by requiring a deposit by the party at the onset of the proceedings in pre-Islamic arbitration in the Middle-East, cf. El-Ahdab and El-Adhab (2011), p. 5; Schacht (1961), p. 8; Walkin (2008), p. 16.

5.3.1 *Preferable Measure of Post-Award Review*

By effectively elevating the transpositions of Arts 17 and 18 Commercial Agents Directive to overriding mandatory provisions where the commercial agent provided his services in a Member State, *Ingmar* interpreted them as an instrument for asserting the EU legislator's will to impose a specific result on a given situation regardless of the parties' agreement to the contrary.[185] Accordingly, the preferable focus of post-award review is the question whether the result created by the award conforms with the specific result which would have been achieved under the application of the Directive's minimum level of protection. Therefore, the preferable measure of post-award review in this regard is public policy. This is also the conclusion which the majority of commentators have drawn from *Ingmar*.[186] Public policy allows such an analysis of the specific result created by the award. It enables courts to analyse the parties' relationship in a comprehensive manner as it enables the reviewing court to take into account the effects of the recognition of the award as such. In this sense, it does not restrict the court to an analysis of the conformity of the law applied by the arbitral tribunal with considerations of public policy. Accordingly, it enables courts to take the numerous alternative means of achieving the standard of protection envisaged in the Directive into account. Furthermore, it enables courts to selectively recognise different parts of an award dependent on whether the specific part violates public policy.[187]

This accords with the situation in post-award review in Germany and France as well at least partly in England.[188] Apart from a review focusing on a violation of public policy, English courts would presumably also permit review in light of the potential invalidity of the arbitration agreement. This route should not, however, be taken for reasons comparable to those for why the invalidity of the arbitration agreement is not an apt measure in pre-award review. Also, after the award has been rendered, the validity of the arbitration agreement is only a question of whether the arbitral tribunal was vested with the authority to decide a certain dispute but not one of an assessment of the substantive results created by the award. Equally, considering the arbitration agreement invalid if the resulting award fails to uphold the Directive's minimum standard of protection would mean that the award would not be recognised in its entirety, even if it did not touch upon termination fees. Accordingly, invalidity is not a preferable measure of post-award review. Finally, the idiosyncratic way in which the courts of Belgium carry out review under the spectre of arbitrability has the advantages of a public policy review. Arbitrability as understood by Belgian courts allows the results to be taken into account, which

[185] Kleinheisterkamp (2009b), p. 105; Kleinheisterkamp (2009a), p. 828.

[186] Basedow (2004), p. 304; Michaels and Kamann (2001), p. 310; Hopt (2009), § 92c, para. 12.

[187] Oberster Gerichtshof (Austria), 26 January 2005, 3 Ob 221/04b, YB Comm. Arb. XXX (2005), 421; *Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd* [2009] 1 Lloyd's Rep 89 (EWCA); Kröll in: Böckstiegel et al. (Eds.) (2015), § 1061, para. 46.

[188] Cf. supra 170 (Germany), 176 (France), 191f (England).

would occur from the recognition and enforcement of the award, i.e. a feature typically reserved to public policy review.[189] Therefore, the Belgian system of post-award review can be understood to use public policy, turning the reference to arbitrability into a merely semantic matter.

As far as the content of public policy is concerned, the preferable option is to consider only the minimum standard of protection established by the Directive to form part of public policy. This implies a standard of comparison in accordance with Art. 17 (2) (b) Commercial Agents Directive, i.e. an amount not exceeding the commercial agent's commission for 1 year.

5.3.2 Preferable Level of Post-Award Scrutiny

The level of post-award review must effectively balance the competing policies of safeguarding both the finality of awards and the public policy considerations enshrined in Arts 17 and 18 Commercial Agents Directive. A level of scrutiny which is too superficial will violate the principle of effectiveness. At the same time, a level of scrutiny which is too thorough will eventually diminish the incentive to conclude commercial agency contracts across borders. The preferable level of post-award review balances those interests. It needs to address both the preferable degree required regarding the violation of public policy (Sect. 5.3.2.1) and the depth of the respective review (Sect. 5.3.2.2).

5.3.2.1 Required Degree of Violation of Public Policy

The preferable level of scrutiny allows any detected violation of public policy to suffice as a reason not to recognise an award—as long as public policy is understood as only the absolute minimum level of harmonisation under the Directive. Using this minimum level, there is no need to further increase the required degree of violation, e.g. to a manifest violation in the sense of *Renault v Maxicar*.[190] The principle of effectiveness stands in the way of making gradual differences in the protection afforded to commercial agents. *Ingmar* aims at unrestrictedly protecting commercial agents from losing the rights guaranteed by Arts 17 and 18 of the Directive when they are active in a Member State. Restricting the post-award protection of commercial agents to cases in which the loss of those rights was particularly severe runs the risk of making it excessively difficult (if not impossible) for commercial agents to fully retain the rights guaranteed by the Directive's minimum level of protection conferred in Arts 17 and 18. The principle of effectiveness does not, however, come into play where Member States' transposition and

[189] Cf. supra 186.

[190] See supra 75 regarding the obstacles for transferring this standard to post-award review.

the respective legal practice exceed the minimum level of protection provided for in the Directive. Foregoing the requirement of a particularly severe violation of public policy does not equate consequential review to a *révision au fond*. It does not turn any violation of any transposition of the Commercial Agents Directive into a violation of public policy—only those which are severe enough not to pass the minimum threshold.

Review under the spectre of public policy effectively allows the parties to replace the regime for termination fees with an alternative scheme—e.g. an increased rate of commission. The court engaged in post-award review has the task of analysing whether the arbitral tribunal assessed the commercial agent's protection against opportunistic termination correctly. This inevitably necessitates a value judgement of different models. For example, courts can come to a position where they have to make a value judgement as to what increase in commission is required in order to compensate for a lack of termination fees. As outlined above, courts can make that value judgement easily based on one year's commission in the sense of Art. 17 (2) (b) Commercial Agents Directive as their benchmark.[191] Courts are equally capable of value judgements in this sense regarding the compensatory capacity of, for example, a waiver of a restraint of trade of trade clause, a prolonged notice of termination or employment in a comparable position.

5.3.2.2 Depth of Post-Award Review

The preferable approach to post-award review is to be found in a contextual approach.[192] Adopting a contextual approach in this instance means that the preferable depth of the court's analysis should depend on the results of an initial *prima facie* analysis of the award's reasoning. If this analysis produces a *prima facie* case for an inadmissible lack of compensation for the commercial agent, the review should go further and ultimately require the commercial agent to provide further evidence. If there is no such *prima facie* case, review should go no further and the award's *res judicata* effect should be recognised.

5.3.2.2.1 Preferability of a Contextual Approach to the Depth of Post-Award Review

Construing the depth of post-award review in this sense is preferable in view of the properties of arbitral practice, the requirements of EU law, the normative analysis

[191] Cf. supra 216.

[192] Cf. Poudret and Besson (2007), paras. 938, 941 for the phrase 'contextual approach' with reference to the approach adopted by the Court of Appeal in *Soleimany v Soleimany* [1999] QB 785 (EWCA).

of the Commercial Agents Directive and the conclusions drawn from the game theoretical analysis.

The majority of the members of the International Law Association's Committee favoured an approach which takes the award as a starting point for review and goes further 'only when there is a strong *prima facie* argument of violation of international public policy' in their Report on Public Policy as a Bar to Enforcement of International Arbitral Awards in 2002.[193] This Committee was composed of 43 members among which were some of the most high-profile international arbitrators.[194] The approach favoured by them can also be brought into line with the analysis of the ECJ's case law above.[195] The ECJ repeatedly noted that the depth of the court's review is dependent on the circumstances which are available to the reviewing court.[196] Advocate General Saggio had already assumed in *Eco Swiss* that in order for circumstances to be available in this sense they had to 'be apparent from the documents in the case and that no specific inquiry has to be undertaken into matters of fact'.[197] Without ever making it part of its case law, the ECJ never implied that it objected to Advocate General Saggio's standard. Contextual post-award review is also preferable in light of the results of both the normative analysis of the Commercial Agents Directive and the results of the game theoretical analysis of the system of review. The severe difficulties in normatively justifying the overriding mandatory nature of the Directive's regime for termination fees call upon courts to not engage in an overly thorough and invasive review without having good cause. As far as the results of the game theoretical analysis are concerned, the lack of clear boundaries of what a court will be able to establish *prima facie* allows benefitting from the advantages which were identified for mixed strategies in review proceedings. Moreover, starting out with a *prima facie* standard is also the preferable approach for pre-award review – and hence in line with the need for coordinated pre- and post-award levels of review inferred from the analysis of the model.

5.3.2.2.2 First Step: *prima facie* Analysis of the Award

The first step of contextual review implies an analysis of the award for a *prima facie* violation of public policy. A necessary, albeit insufficient, condition for this is that

[193] Mayer and Sheppard (2003), p. 262.

[194] Including the following 9 arbitrators which *Chambers & Partners* ranked among the 35 'Most In Demand Arbitrators – Global-wide' in 2015: Guillermo Aguilar Alvarez, Karl-Heinz Böckstiegel, Charles N. Brower, Bernardo Cremades, Yves Derains, Bernard Hanotiau, Pierre Mayer, V. V. Veeder, David Williams, see Ghosh et al. (2015), p. 22ff.

[195] Cf. supra 76ff.

[196] Case C-40/08 *Asturcom Telecomunicaciones* [2009] ECR I-9579, para. 53; C-76/10, *Pohotovost'* [2011] ECR I-11561, paras. 51, 53; cf. also Case C-243/08 *Pannon v Erzsébet Sustikné Győrfi* [2009] ECR I-4713, paras. 32, 37.

[197] Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, Opinion of AG Saggio, para. 42.

the award does not grant termination fees in accordance with the standard of minimum harmonisation under the Directive. Yet an award cannot be considered to violate public policy for that reason alone. An award denying termination fees does not violate public policy *prima facie* if it also reflects the fact that the arbitral tribunal was willing to apply a transposition of the Directive in spite of the choice of law but held that the respective distributor did not qualify as a commercial agent in the sense of the Directive in the first place.[198] The same applies if the arbitral tribunal decided that the commercial agent did not carry out his services within the relevant geographical scope in the sense of *Ingmar* or that termination fees were not owed in the sense of Art. 18 Commercial Agents Directive.[199] Neither is a refusal of recognition warranted where the arbitral tribunal upheld a choice of law in favour of a law without termination fees but came to the conclusion that the commercial agent was sufficiently compensated through an alternative scheme of remuneration.[200] If the arbitral process means anything, it is that the assessment of facts is not in the hands of national courts but in those of the arbitral tribunal.[201] Otherwise post-award review becomes an unwanted appeals process. An exception to this principle can only be made if is certain that the arbitral tribunal's fact finding suffered from a severe violation of procedural principles, which became causal for establishing a certain fact before the tribunal.[202]

In contrast, a *prima facie* case is made if the award justifies the denial of termination fees merely with the inapplicability of a transposition of the Commercial Agents Directive, the Directive itself or at least the minimum level of protection under the Directive—without affirming that the Directive's protective notions have been fulfilled through an alternate scheme of remuneration. A typical example of a *prima facie* case in this sense would be the 'Award on Preliminary Issue of Law' rendered in *Accentuate v Asigra*.[203] Equally, the recognition of an arbitral award which applies the law chosen by the parties without affirming that the level of protection afforded under that law is at least equivalent to the minimum level of protection under the Directive would *prima facie* violate public policy. Lastly, a *prima facie* violation of public policy in this sense can also be assumed if the

[198]E.g. ICC Award 7134/1995, YB Comm. Arb. XXIII (1998), 49, 60 (rejecting the qualification of a distributor as commercial agent under the Greek transposition of the Directive); ICC Award 16655/2011, 4 Int'l J. Arab Arb. 125, 177–181 (2012) (rejecting the qualification of a distributor as commercial agent under the French transposition of the Directive); Michaels and Kamann (2001), p. 310.

[199]The published awards which address this question conclude that Art. 18 Commercial Agents Directive was not fulfilled, Bortolotti (2001), p. 59, n. 41; cf. e.g. ICC Award 8463/1996, 12 ICC Bull. 100, 105, 106 (2001).

[200]It is possible in all those cases that the arbitral tribunal made a wrong assessment of the facts—yet this does not warrant the reversal of its decision in post-award review. The nature of post-award review would otherwise be approximated to that of an appeals process.

[201]Paulsson (2013), p. 214; cf. van den Berg (1981), p. 269; Berger (1992), p. 16.

[202]Hilbig (2006), p. 71.

[203]Cf. supra 142ff.

reasoning in a final award denying termination fees fails to address the relevant factors completely (i.e. the effect of the Directive on the parties' choice of law and the potential compensation through an alternative scheme of remuneration).[204]

5.3.2.2.3 Second Step: Review of the Arbitration File

However, a *prima facie* violation does not in and of itself suffice to justify not recognising an award. Even if an arbitral award fails to address the existence and equivalence of statutory rights under the chosen law or of an alternate scheme of remuneration, recognition will only violate public policy if the said equivalent means do not exist in fact. Resolving the essential questions regarding the equivalence and effectiveness of rights under the chosen law and/or an alternative scheme of remuneration becomes more difficult and involves facts of increased complexity.

Therefore, where a *prima facie* violation can be detected, the reviewing court should be allowed to undertake a reassessment of facts based on the file of the arbitration.[205] This extends in particular to the pleadings and the evidence which was put before the arbitral tribunal.[206] In so far as the file of the arbitration enables the reviewing court to assess whether recognition of the award would perpetuate a situation which falls short of the Directive's minimum level of protection, the decision on recognition should be taken from there. For example, if the award does not address whether the level of commission was increased to a level which compensated for the lack of termination fees, the reviewing court can presumably draw the level of commission from the file of the arbitration and assess its capacity to compensate for termination fees itself.[207]

5.3.2.2.4 Third Step: Remaining Risk of Uncertainty

Where neither the award nor the arbitration file clarifies sufficiently whether recognition would violate public policy, the quintessential question is how the remaining risk of uncertainty is allocated. What should a court do if the first and second steps unearth indications for a possible violation of public policy but do not allow the applicable standard of proof for a violation of public policy to be met?

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[204] A lack of sufficient reasoning in and of itself justifies annulment under the arbitration law of Born (2014), pp. 3274–3275.

[205] Cf. Radicati di Brozolo (2011), paras. 22-071ff in relation to EU competition law.

[206] Cf. ibid para. 22-071.

[207] As was apparently possible in the case *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (Ch), cf. supra 135.

Although review under Art. V (2) (b) New York Convention will be initiated *ex officio*, the burden of proof for a violation of public policy lies with the party opposing recognition.[208] Hence, in principle it lies on the commercial agent to avoid recognition of the award by putting forward evidence in the third and last steps. As far as possible, this should not lead to a full factual and legal exploration of the matter underlying the arbitration agreement. Therefore, evidence should be limited to aspects which can support the fact that the recognition of the award would leave the commercial agent in a position which is worse than the one provided for under the Directive's minimum level of protection. The permissible evidence in this respect can extend to presenting experts on the standard rate of commission in the respective field. However, the commercial agent can run into the same difficulties as at the pre-award stage, i.e. the difficulties connected with proving a negative in relation to which the relevant information will lie in the principal's sphere of influence.[209] Therefore it makes sense to allocate the remaining risk of uncertainty along the lines of the allocation developed above: if the commercial agent is able to establish a *prima facie* case of a violation of public policy, the principal bears the burden of rebutting it under the threat of annulment or a refusal of recognition.

5.4 Summary

1. Courts carrying out pre- and post-award review should consider only the minimum level of harmonisation under the Directive to establish the relevant standard of protection. Although the ECJ enabled Member State courts to refer to national goldplating transpositions in this respect in *Unamar v NMB*, they should refrain from using this opportunity when reviewing choice of law clauses and arbitration agreements included in cross-border commercial agency contracts.
2. The preferable measure of pre-award review is the inarbitrability of disputes resulting in an undetectable violation of public policy. Those disputes are detected by a system of indicators.
3. These indicators are (1) the likelihood that the arbitral tribunal will not apply a law or rules of law which provide for termination fees, (2) the lack of an alternative scheme of remuneration and (3) the lack of efficient post-award review. The parties should be referred to arbitration unless all three are fulfilled.

[208] Oberlandesgericht Saarbrücken (Germany), 30 May 2011, 4 Sch 03/10, SchiedsVZ 2012, 47, 49; *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] EWCA Civ 988; Otto and Elwan in: Kronke et al. (eds) (2010), Art. V (2), 348 with reference to Bezirksgericht Zürich (Switzerland), 17 July 2003, YB Comm. Arb. XXIX (2004), 819, 828; Adolphsen in: Krüger and Rauscher (Eds.) (2013), Art. II UNÜ, para. 66; cf. Kröll and Kraft in: Böckstiegel et al. (Eds.) (2015), § 1059 ZPO, para. 50.

[209] Cf. supra 232f.

4. In pre-award review, all three indicators are to be established *prima facie* by the commercial agent. If he can do so in regard to all three indicators, the burden of proof for overcoming the resulting presumption falls upon the principal. The principal should be held to a high standard in doing so. He can rebut the individual indicators by making a credible commitment in regard to at least one indicator, i.e. (1) by making a one-sided *dépeçage* in favour of the application of a law or rules of law which accord with the Directive's minimum level of protection, (2) post-contractual stipulation of alternative schemes of remuneration, which has the same effect or (3) by making a deposit of the amount owed in termination fees owed under the Directive at the disposal of a Member State court.
5. The preferable measure of post-award review is public policy. In line with the preferable standard of protection, only the Directive's minimum level of protection should be considered to embody public policy.
6. In principle, any violation of the Directive's minimum level of protection which is detected in post-award review warrants the annulment of the award or refusal of its recognition. The depth of review should be determined based on a contextual approach. If the award itself reveals no *prima facie* case for a violation of public policy in a first step, the award should be recognised. This primarily leaves those award for further review in which the denial of termination fees is justified with the application of a non-Member State law without affirming that the level of protection afforded under that law is at least equivalent to the minimum level of protection under the Directive. The further review should be carried out in a second step which allows courts to extend their review of the arbitration file. Where the review of the arbitration file does not sufficiently clarify whether recognition would violate public policy, the commercial agent bears the burden of providing *prima facie* evidence of a violation of public policy. If he can successfully do so, the principal bears the burden of proof that no such violation would occur.

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Overall Summary

International commercial arbitration is designed to accommodate the interests of parties who are carrying on business across borders. Where substantive provisions of EU law pursue regulatory goals, they occur not to be in line with the parties' interests. This inquiry investigates the consequential tension between private and regulatory interests in international commercial arbitration. In doing so, it focuses on one of the most frequent sources of tension in this respect, i.e. the Commercial Agents Directive's regime for termination fees.

The inquiry is structured in five chapters. The first chapter introduces the objet of research and the methodology. The second chapter investigates how Member States balance EU law and party autonomy in their review proceedings concerning arbitration. The third chapter takes a closer look at the regime for termination fees and analyses its economic effect on cross-border commercial agencies. In the fourth chapter, the focus turns towards arbitrators' practice when faced with a claim for termination fees. Finally, the fifth chapter develops a system which Member State courts should preferably adopt in the review of arbitration agreements and arbitral awards pertaining to disputes in cross-border commercial agency contracts.

The analysis of termination fees' economic effect reveals that their impact on cross-border contracts should be limited to commercial agents worthy of protection. Within the constraints set by EU law, this can be facilitated by the remaining flexibility detected in international commercial arbitration's legal framework. The inquiry explores the conditions of this flexibility through comparative legal analysis, a look into the observable part of arbitral practice as well as game theoretical analysis of the arbitral process. What is unearthed is that the decisive factors for dissolving the tensions between private and regulatory goals lie within the intricacies of the systems of judicial review. Review of both arbitration agreements and arbitral awards must focus on a limited number of reliable factors for individual commercial agents' worthiness of protection as well as the respective burden of proof. The inquiry goes on to design a comprehensive system for the preferable type of review.

J. Engelmann, *International Commercial Arbitration and the Commercial Agency Directive*, International Law and Economics, DOI 10.1007/978-3-319-47449-6