The Second Look in European Union Competition Law: A Scandinavian Perspective

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Under European Union (EU) law, arbitrators and national courts are obligated to apply, ex officio, EU competition law. Also according to EU law, any failure by an arbitral tribunal to apply such rules, or any erroneous interpretation or application hereof, constitute grounds for setting aside the subsequent award, if and when such measure is dictated by the Member State's procedural rules. This article examines the relevant procedural rules in Denmark and Sweden based on two recent decisions by the national Supreme Courts. It concludes that under Scandinavian procedural law, courts will generally limit their inquiry to a superficial review of the premises of the award and will only reluctantly set aside an otherwise valid award based only on matters of merit. The main purpose of this article is to provide an up-to-date analysis of the position of the Scandinavian courts, thus helping to 'map' the European arbitration landscape. Even so, we have attempted to include and contribute to a few of the main discussions concerning the landscape in which the decisions were rendered in the introductory section. In the last section, we build on the reasoning of the two Supreme Courts in order to propose a framework for understanding the interplay between national and EU law, at least in the Scandinavian countries.

1 INTRODUCTION: THE PRECEDENT OF *ECO* SWISS[1]

Since the *Eco Swiss* judgment,[2] it has been well-established that European Union (EU) competition law pertains to public policy in all Member States[3] and that,

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1 Because Norway is not an EU Member State, the article includes only Swedish and Danish law, with the latter as its main point of focus. While Denmark is a UNCITRAL Model Law country, Sweden is not. The Swedish Arbitration Act is inspired by, but not identical to, the Model Law. Importantly for this article, though several provisions in the Swedish Arbitration Act differ from the Model Law, the requirements for setting aside awards in violation of public policy under the Swedish Arbitration Act is similar to its Danish counterpart and to the Model Law, *see The Swedish Arbitration Act of 1999 Five Years on: A Critical Review of Strengths and Weaknesses* (Lars Heuman & Sigvard Jarvin eds, JurisNet, LLC 2004), noting that the public policy reservation in s. 33 of the Swedish Arbitration Act is 'essentially the same' as its counterpart in the Model Law. The requirements under both the Model Law and the Swedish and Danish Arbitration Acts are introduced *infra* in s. 2.

2 Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV* [hereinafter *Eco Swiss*].

3 *See* Radicati di Brozolo, *Chapter 22: Court Review of Competition Law Awards in Setting Aside and Enforcement Proceedings*, in *EU and US Antitrust Arbitration, A Handbook for Practitioners* (Gordon Blanke & Phillip Landolt eds, 1st edn, Kluwer Law International 2011), namely para. 22-012.

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accordingly, arbitrators must apply EU competition law *ex officio* whenever it is applicable.[4] If not, the arbitral award risks being set aside or denied enforcement.[5]

In one of the prominent works on antitrust (and competition law) arbitration, the duty to apply, *ex officio*, EU competition law is said to apply when 'the arbitration has its legal seat or its place of arbitration in one of the Member States of the EU, then the arbitrators must apply EU competition law or risk having the award set aside by the forum state's national courts'.[6]

The limitation quoted here appears to rest on procedural considerations. Given that EU competition law is a matter of substantive and not procedural law, it appears to us that the scope of relevance of EU competition law is not limited to arbitrations seated in a Member State, but that it includes all arbitrations where the applicable substantive law is that of an EU Member State.[7] Taking a

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4 *See also* Cases C-295/04 and C-298/04 *Vincenzo Manfredi and others v. Lloyd Adriatico Assicurazioni SpA and others* (ECJ, 2006) [hereinafter *Manfredi*]. For an in-depth analysis of the arbitrators' *ex officio* application of European competition law, *see* Diederik de Groot, *Chapter 16: The Ex Officio Application of European Competition Law by Arbitrators*, in *EU and US Antitrust Arbitration, A Handbook for Practitioners* 599ff. (Gordon Blanke & Phillip Landolt eds, Kluwer Law International 2011).

5 Two notes on the scope of applicability of the arguments raised in this article must be made here. First, considering the overlap between the reasons for setting aside an award (under both the Model Law and the two Scandinavian Arbitration Acts, *see infra* s. 2) and denying enforcement (under the New York Convention), there seems little reason that the conclusions should differ, if the question is raised in enforcement proceedings. This conclusion was reached by the District Court of the Hague in its decision of 24 Mar. 2005 in *Marketing Displays International v. VR Van Raalte Reclame B.V.* (on this case, *see* Diederik de Groot, *Observations on Court of Appeal of The Hague (Van Raalte/MDI)* 2 Stockholm Intl. Arb. Rev. 217 (2006). reprinted in *International Arbitration Court Decisions*, 1039–1066 (Stephen Bond & Frederic Bachand eds, 3d ed., Juris Publishing 2011)). Accordingly, while the focus of this article is setting aside proceedings – and barring cases where national procedural law sets up different standards for annulment proceedings and enforcement proceeding – the conclusions apply *mutatis mutandis* to enforcement proceedings. Secondly, while the issues discussed in this article concern, directly, cases where EU competition law has been erroneously applied, the conclusions apply, *mutatis mutandis*, to cases where EU competition law had not even been addressed. The failure of arbitrators to raise issues of EU competition law, *sua sponte*, does not in and of itself force courts to annul the award (*see* the French *Thales Air Defence* decision analysed in Denis Bensaude, *Thalés Air Defence BV V. GIE Euromissile: Defining The Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law*, 22 J. Intl. Arb. 239–244, 239 (2005), and the District Court of the Hague decision of 24 Mar. 2005 cited *supra*). Thus, whether the award can and should be annulled must be decided in accordance with the relevant procedural rules, and by applying the same standard applicable to awards suffering from an erroneous application of competition law. That the standard applied is the same does not, however, mean that the failure to even address the issues is not significant. As examined in this article, the review under Danish and Swedish law tends to focus on the reasoning of the award, a reasoning which will be absent if the issue has not even been raised. It appears reasonable to expect the courts to be less reluctant to set aside awards that do not address the relevant issues compared to awards which do address (albeit perhaps erroneously) these issues. This also highlights the practical importance of rendering a reasoned award; the court can seldom conclude with any certainty whether the lack of premises concerning a specific issue has arisen because the issue was 'forgotten' or whether it was addressed but the arbitrators opted not to include their assessment of the issue in the final award.

6 de Groot, *supra* n. 4, at 569, n. 2.

7 The related, but separate, private law question of whether the parties may opt out of the substantive law of an EU Member State to render EU competition law inapplicable will not be addressed here. In our view, such choice-of-law is not likely to be considered valid.

more practical view, the definition offered by de Groot as quoted above falls short by focusing only on the risk of having an award set aside. From a practical point of view, however, since the parties must reasonably expect to have the ability to enforce the award, the issue of denied enforcement under the New York Convention is of equal concern. In this context, it appears more fitting to define the scope of relevance of EU competition law as (at least) all arbitrations applying the substantive law of an EU Member State to a dispute that raises questions of competition law in at least two situations: (1) when the award has been rendered by an arbitral tribunal seated in an EU Member State; or (2) when the award must reasonably be expected to be enforced in an EU Member State. In short, EU competition law, and thus the precedent of *Eco Swiss*, may be considered relevant in all arbitrations between actors situated in, or operating in, EU Member States.

It follows directly from the precedent of *Eco Swiss* that a national court *can* set aside an arbitral award on the grounds that the arbitrators failed to apply, or misconstrued, EU competition law. In the words of the European Court of Justice (ECJ)[8]:

> where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty … a national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.

As is equally evident from these citations, it does not follow from *Eco Swiss* that the wrongful application of EU competition law by an arbitral tribunal *must* cause a national court to set aside an award.[9] Nor does it necessarily follow that a national court must conduct an in-depth analysis of the issues raised or set aside an award only because the court disagrees with the conclusions of the arbitrators.[10] This apparent 'openness' of the reasoning in *Eco Swiss* leaves us with the question of *when* courts should set aside (or deny

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8 *Eco Swiss*, *supra* n. 2, paras 37 and 41.

9 Brozolo, *supra* n. 3: 'Read in conjunction with the rest of the judgment, this passage seems to indicate that the Court of Justice does not require a stricter review of awards under EU competition law at the review stage than is required for domestic competition law.'

10 The degree of scrutiny – the character of the 'second look' – and the standards for setting aside are closely linked, if not in fact 'mirror images'. A leniency in accepting 'errors of law' reduces the need for a close inspection by the international courts while a 'no margin of error' approach requires a detailed review of the arbitral award. In the following, we discuss these issues without a strict separation between the two mirror images, although predominantly from the viewpoint of the 'margin of error' discussion. Apart from the intertwinedness of the two issues, this approach has been chosen because it appears to be the approach taken by the Supreme Courts in the cases discussed. In our final remarks, we include a brief comment on the degree of scrutiny exhibited by the courts. For a more thorough analysis of the interplay between the two issues *see* Radicati Di Brozolo, *Arbitration and Competition Law: The Position of the Courts and Of Arbitrators*, 27 Arb. Intl. (2011).

enforcement of) awards because of erroneous application of EU competition law. From a practitioner's view (whether the view of the lawyer or that of the arbitrator)[11] this may well be the most important question to ask.[12] But, because the key to answering this question has been explicitly left within the procedural autonomy of each state, the answer may well differ from one Member State to another. In answering this question, the national courts are bound by the EU principles of equivalence and effectiveness which serve to delimit the autonomy of each Member State's procedural rules by balancing the autonomy of the Member States against the values of the Union.[13] The relevance of these principles is more than hinted at in the *Eco Swiss* judgment itself, wherein the ECJ specifically equates EU competition law with national laws pertaining to public policy, which has since been firmly confirmed in *Luchinni*.[14]

Applying these principles in setting aside proceedings means that EU competition law (pertaining to public policy) cannot be treated less favourably than those

[11] Many modern institutional rules impose an explicit obligation on the arbitrators to render enforceable awards, *see* e.g. ICC Rules of Arbitration, Art. 41. Whether contained in the relevant rules or not, the obligation to render a valid and enforceable award may well be considered one of the arbitrators' core obligations, and thus questions of enforceability (or possible challenges to an award) can always be expected to play a role in the adjudication of cases by arbitrators.

[12] As noted elsewhere, the complex interplay between arbitral tribunals, national courts and the ECJ gives rise to a myriad of (legal and practical) issues which cannot all be meaningfully addressed here. One issue which we feel must be mentioned, albeit briefly, is the questions of the competence of tribunals to obtain preliminary rulings from the ECJ. Addressing this issue in depth falls outside the scope of our article, but, as evidenced by the fact that in both the cases discussed in this article, the court was met with a request for submitting the case for a preliminary ruling, access to the ECJ has great practical importance. When faced with the question, the ECJ has consistently refused to give preliminary rulings to traditional tribunals, a view first expressed in Case C-102/81 *Nordsee*, but has accepted that non-traditional tribunals may, depending mainly on the basis of their competence, be considered 'courts' (it appears that the ECJ distinguishes between 'traditional' arbitral tribunals which derive their competence from the parties' agreements, and 'non-traditional' arbitral tribunals which derive their competence from governmental acts and serve as (governmentally established) alternatives for courts in specific types of cases). From a Danish perspective, this is further complicated by the so-called 'bypass rules' (on the topic of the Danish bypass rules *see* Therkildsen & Lysholm Nielsen, *Arbitral Tribunals and Article 267 of the Treaty of the Functioning of the European Union – The Danish By-Pass Rule*, http://dandersmore.com/sites/default/files/files/Terdilksen-Nieslen_AYIA_2012.pdf, (accessed 19 Dec 2016)). The relevance of access to the ECJ is intertwined with the question of which standard the courts wish to apply when assessing arbitral awards. Because arbitrators do not have access to the ECJ they will rarely have absolute certainty concerning issues on EU law. By contrast, because the national courts have access to the ECJ they can (at least theoretically) obtain a post-award certainty which goes far beyond the material available to arbitrators. Thus, the willingness of courts to refer cases to the ECJ for preliminary rulings cannot be entirely separated from the courts' substantive review of the award. Even so, the discussion is not central to the issues discussed here. Equally important, because the courts of both Sweden and Denmark rejected a request for referral to the ECJ, the cases do not aid an analysis of this issue. Although based on a more limited review, it is our position that the rejections were made in accordance with, and based on the same considerations as, the decision on the substantive issues. As expanded below, the courts explained that it is not their role to second-guess the arbitrator. The purpose of a referral would, per definition, be to aid the court in assessing (second guessing) the award, and thus the unwillingness to refer the case seemingly follows from the position taken with regard to the standard of review.

[13] Art. 19 TFEU (effective protection of EU laws) and Art. 42 (requirement of effective enforcement).

[14] Case C-119/05 *Luchinni*.

national rules which the Member States consider public policy. Considering that most Member States appear to consider only few, if any, of their own rules of competition law as public policy, this in fact substantially impairs the autonomy of Member States to decide when to set aside awards. Thus, it is plausible that many Member States would normally not consider their national rules regulating matters similar to Article 101 of the Treaty on the Functioning of the European Union (TFEU) as public policy. The fact that part of the assessment has been made by the ECJ does not, however, mean that the procedural autonomy is rendered meaningless, a conclusion which is supported by the two cases analysed here.[15]

Since the *Eco Swiss* decision, the courts of many Member States have made clear their respective positions on this issue, with some countries adopting a very pro-arbitration application of the *Eco Swiss*, limiting both the scope of review and the threshold for setting aside, and others adopting a more EU competition law friendly view, scrutinizing the award somewhat thoroughly and reacting (by setting aside the award) to most errors in law, while still some have lingered between the two positions.[16] A thorough comparative analysis is conducted in *EU and US Antitrust Arbitration*.[17] According to this analysis, the prevailing trend is a minimalist approach,[18] but case law is far from aligned, and practices differ between and even within the European countries.

Until recently, the Scandinavian (Supreme) Courts had not had a chance to weigh in with their view on the matter.[19] However, with two recent cases decided by the Danish Supreme Court and the Swedish Supreme Court,

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[15] In an article from 2010, Michal Bobek argued that in reality there is no real procedural autonomy (Michal Bobek, *Why There Is No Principle of 'Procedural Autonomy' of The Member States*', in *The European Court of Justice and the Autonomy of the Member States* (Bruno de Witte & Hans Micklitz eds,1st ed., Intersentia 2011)). The article raises several interesting points, but while we do not disagree entirely, it is our view that the cases discussed in this chapter indicate the existence of procedural autonomy, at least within certain areas of EU law. In part, this is because we do not accept the premise that the term 'procedural autonomy' applies only if and when the states have complete competence to decide on a procedural issue, *see* Bobek at 13. The term is equally, if not better, applicable to describe the notion that in general and absent any rules to the contrary, states are free to regulate the primary mechanisms of their procedural law. The term is used in this latter sense throughout our article.

[16] For arguments in favour of both positions, *see* Brozolo, *supra* n. 3, at 755 ff., namely para. 22-012, and de Groot, *supra* n. 4, at 681 ff. *See also* Emmanuel Gaillard, *Extent of Court Review of Public Policy*, 237 (65) N.Y. L. J., discussing the SNF-cases.

[17] Brozolo, *supra* n. 3, at 768 ff. describing case law from France, Italy, Germany, and Belgium.

[18] *See also* Brozolo, *supra* n. 10, ascribing Italy, Germany, Sweden, Belgium and Greece to the countries taking a minimalistic or 'restrictive' approach to court review of awards dealing with EU competition law.

[19] In an often cited case from 2003, the Court of Appeal for Western Sweden had opportunity to assess similar issues, but sidestepped the 'standard of review'-discussion by arguing that the relevant EU acts did not have horizontal effect and thus did not apply (Case T-4366-02). *See* Stockholm Arbitration Report 2004: 2, 231 and Christoph Liebscher, *Chapter 23: EU Member State Court Application of the Eco Swiss: Review of the Case Law and Future Prospects*, in *EU and US Antitrust Arbitration, A Handbook for Practitioners* 569, n 2 (Gordon Blanke & Phillip Landolt eds, Kluwer Law International 2011).

respectively, the courts appear to have adopted a minimalistic standard of review. In brief, the Danish and Swedish Courts have confirmed that they will respect the finality of arbitral awards, unless under exceptional circumstances.

This article sets out to examine these cases in the context of the arbitral regimes of the two countries. The focus of the article is placed on the analysis of the two cases, with the Danish Supreme Court decision as the most prominent,[20] coupled with our own conclusions about what arbitrators, lawyers and parties may expect from arbitration based in Scandinavia. In commenting on the cases, we go a step further and argue that the course taken by the two Supreme Courts is both illustrative of and suitable for resolving issues relating to arbitration of EU competition law, and possibly other areas of EU law. Thus, we argue that national courts can and should exercise their powers to set aside awards cautiously to avoid violating the principles underlying both the Model Law and the New York Convention, and that this approach is by no means contrary to existing ECJ precedents.[21]

2 SETTING ASIDE UNDER 'SCANDINAVIAN LAW'[22]

Under both Swedish and Danish law, issues pertaining to competition law are arbitrable.[23] This is hardly novel within the arbitration community,[24] but rather seems to be the approach taken by countries normally associated with a strong

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[20] As will be clear from the following, the Danish case dealt much more directly with the issues raised here, while the Swedish Supreme Court stopped just short of a definitive answer because the facts of the case did not warrant a further inquiry.

[21] Case C-168-05 *Mostaza Claro* [hereinafter *Mostaza Claro*]; Case C-40/08 *Asturcom* [hereinafter *Asturcom*]; Case C-38/98 *Renault v. Maxicar* [hereinafter *Maxicar*], all of which are commented in our concluding remarks. *See also* Case C-7/98 *Dieter Krombach v. André Bamberski*.

[22] In general, the issues discussed here have not been subject to scholarly work in English in Denmark or Sweden. As the purpose of this section is only to give a general overview, the existing (Danish/Swedish) scholarly works will not be referenced. The relevant legal texts will be provided in both their native and English versions and central preparatory works, which play a significant role in the Scandinavian legal systems, will be referenced, even though these have not been translated.

[23] The issue of arbitrability of (national) competition law is discussed almost entirely in articles in Danish and Swedish, but see for an international perspective Liebscher, *supra* n. 19, at 792, reviewing case law from the Court of Appeal for Western Sweden. From a national perspective see a recent decision by the Swedish Supreme Court, Beslutmeddelat I Stockholm of 28 Nov. 2013 Mål nr. Ô 880-13.

[24] Peter E Greene, Peter S Julian & Julie Bédard, *Arbitrability of Antitrust Claims in the United States of America in Blanke and Landolt*, European Business Law Review Special Edition – Arbitrating Competition Law Issues. *See also* Brozolo, *supra* n. 3, at 766–767. For a general analysis of the pros and cons of arbitrating competition law and the barriers/considerations which may still exist, *see* the 2010 OECD hearing on arbitration and competition (http://www.oecd.org/competition/mergers/49294392.pdf (accessed 19 Dec 2016) which concludes that, when conducted in a fitting manner, arbitration can be a particularly useful method for solving competition issues.

arbitration tradition.[25] Additionally, Denmark is an UNCITRAL Model Law country, while the relevant provision of the Swedish Arbitration Act follows an approach similar to the Model Law. In short, arbitration in Scandinavia is rooted in the same foundation as most modern 'arbitration states'. A full review of the Model Law and the corresponding national rules is neither needed nor warranted for our analysis. An overview of the rules relevant to setting aside is, however, relevant for our further analysis.

We may at the outset note that the Model Law[26] allows a judge to set aside an award if it 'is in conflict with the public policy of this State'.[27] This allows, within narrow limitations, a supervision of the interpretation or application of substantive law. It follows from the 2006 explanatory note and the 2012 digest on case law, as well as the vast majority of case law from Model Law countries, that the provision should be applied only in rare (exceptional) cases.[28] It is no great leap to conclude that only serious breaches of public policy warrant interference from the national court. This is the case in the Danish and Swedish Arbitrations Acts.

In Danish Arbitration Act, section 34(2)(b)(ii), the Model Law has been implemented with the following wording[29]:

> An arbitral award may be set aside only if: …
> (b) the award is manifestly contrary to the public policy of this country.

In a similar wording, the Swedish Arbitration Act holds that an award may be invalidated: [30]

> if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system.

Looking at the wording of the provisions, both the Danish and Swedish formulations of the public policy reservation operate with what might be called a double requirement or a two-pronged test for assessing whether an award can (and should) be set aside; the award must (1) conflict with the public policy/basic principles of

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[25] Brozolo, *supra* n. 3, argues that, 'overall, the practice of the courts follows the approach that awards raising competition law issues should not be subject to a more intrusive review than other awards'. We concur with this view, and certainly it is the position taken in both Sweden and Denmark with regard to (national) competition law.

[26] In ss 4 and 5 we comment on the applicability of the Scandinavian approach outside of Denmark and Sweden. Most EU Member States are Model Law countries or at least Model Law inspired countries, for which reason we consider the Model Law a suitable starting point for the following discussion.

[27] Model Law, Art. 34(2)(b)(ii).

[28] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 80 ff. with references to court decisions.

[29] The Danish Arbitration Act has no official translation. The translation cited above, however, is the translation adopted by the Danish Institute of Arbitration. In its official wording, 'Voldgiftsloven' § 37, stk. 2, nr. 2, b states that an award can be set aside if: 'voldgiftskendelsen er åbenbart uforenelig med landets retsorden.'

[30] The Swedish Arbitration Act (SFS 1999:116), Official Translation.

the state, and (2) this conflict must be manifest/clear.[31] The first prong of the test pertains to the nature of the (national) rule or standard, which is breached by the arbitral award.[32] This part of the test is general in nature; 'is this rule of a nature that makes it public policy'. Consequently, at least in theory, it ought to be possible to make an exhaustive list of national rules that meet the public policy criteria. The term 'public policy' (or in the Swedish Act 'basic principles') is equivalent to the public policy standard of the Model Law, and although practices differ somewhat between the Model Law countries, it is generally recognized that only few (national) rules qualify as public policy. This is also the case under Danish and Swedish law.

What has been said about national rules applies equally to EU regulations, with the modification that the public policy status can be determined not only by national courts, but by the ECJ as well. The *Eco Swiss* case is a clear-cut example of the first requirement/prong in that the ECJ decided that, generally speaking, EU competition law has a content and purpose which makes it, *per se*, public policy.[33]

Concluding that a rule is public policy, however, brings us only half the way. For an award to be set aside under either Swedish or Danish law, the breach must be clear/manifest. This second prong pertains to the nature of the breach, i.e. the specific case, and accordingly, this criterion can only be assessed on a case-by-case basis. Additionally, because the standard pertains to the 'obviousness of breach'[34] or the 'visibility of breach',[35] the assessment seems inherently to include at least a partial review of the merits of the case. Thus, assessing the second criterion requires a balancing of the internationally accepted principle of finality of arbitral awards against the need to adjudicate on the correctness of the award. One solution – and as expanded upon below seemingly the chosen solution – to this challenge is to tailor the degree of scrutiny in a way that enables courts to catch major blunders, while lesser errors, those that do not meet the 'clear violation' criterion and thus do not warrant setting aside the award, are purposely allowed to go uncorrected.

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31 By contrast, under Norwegian law, an award may be set aside if 'the arbitral award is contrary to public policy (ordre public)' (official translation). It is questionable whether the wording supposes a different standard of review than the Danish and Swedish adaptions. Norway is, however, not an EU Member State and the practice of Norwegian courts will therefore not be included in the following.

32 More precisely, the rule which the challenging party alleges has been misinterpreted/disregarded by the tribunal.

33 The need for an EU concept of 'public policy' has been argued in Tim Corthaut, *EU Ordre Public* (Wolters Kluwer 2012)34–35 (in general) and 46–47 (EU competition law in particular). It is, in our view, both uncontroversial and undeniable that an EU law public policy standard does exist which is autonomous from the public policy of the individual Member States and which is subject to the adjudication of the ECJ.

34 Danish Arbitration Act.

35 Swedish Arbitration Act.

In case law, the Scandinavian courts have adopted a less stringent approach than the procedure described in the arbitration laws and outlined above. Both in a national and an international context, the tendency is that the courts practice an overall assessment of the concrete case. The starting point is the finality of arbitral awards, and it is a difficult task to convince the courts to act otherwise. This holistic approach is supported by the preparatory works for the Arbitration Acts in both countries[36] and seemingly in international case law from Model Law countries, which at least the Danish Arbitration Act is intended to reflect. Accordingly, one should be careful not to read too much into the linguistic differences between the Model Law and the national Arbitration Acts of Denmark and Sweden, respectively.

With this caveat in mind, it does appear that the two-prong test may play a role, at least with regard to EU law, where the courts might otherwise be barred from applying a wholly holistic assessment because EU law dictates that the relevant rules are, *per se*, 'public policy'. In such cases, adding a second requirement that the public policy breach must be 'manifest'[37] and, for the purpose of testing the award, assuming that a manifest breach will generally be obvious even with a lesser degree of scrutiny in testing the award can serve as a helpful tool. Thus, if the court looks only for evident errors, the court may obtain equality between EU law and national law while maintaining a balance between the need to enforce (EU) competition law and the desire, expressed both nationally and internationally, to uphold awards.[38]

3 TWO SCANDINAVIAN SUPREME COURT CASES

The Danish Supreme Court decision of 28 January 2016 has been made available in English by the Danish Arbitration Institute.[39] The translation is not official, but

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[36] Both Denmark and Sweden are civil law countries, and preparatory works play a significant role in the adjudication of the courts.

[37] We acknowledge that this may be done explicitly in the Arbitration Act (as in Denmark and Sweden) or may follow simply from case law, preparatory works or any other source of law which guides the courts. Thus, even without a two-pronged Arbitration Act, national courts may argue that an erroneous application of EU law (which is not substantial) cannot warrant the setting aside of the award because, had the same issue arisen in a national context, the court would not have set aside the award based on 'lesser mistakes'. Such a result would, in our view, be equally compatible with *Eco Swiss*. Even so, we consider the structure of the Swedish and Danish Arbitration Acts to be particularly instructive as a tool for manoeuvring current ECJ precedents.

[38] Or, perhaps more precisely to avoid testing the merits of the award, or at least keep the scrutiny to a minimum.

[39] Transcript of the Supreme Court's collection of Judgments, Supreme Court Judgment rendered 28 January 2016, http://voldgiftsinstituttet.dk/wp-content/uploads/2016/04/danish-supreme-court_s-judgment-of-28-january-2016.pdf (accessed 19 Dec 2016).

it is verified by the Institute. The Swedish Supreme Court decision of 17 June 2015 has been made available online at the Swedish Arbitration Portal.[40]

3.1 Swedish supreme court decision of 17 june 2015[41]

The parties to the arbitration and subsequent setting aside proceedings were the Swedish Systembolaget, the national alcohol monopoly, and one of its contracting parties, Absolut Company AB ('Absolut'). The facts of the case were as follows.

Several employees of Absolut, a firm that imported and exported alcoholic beverages, were charged with an attempt to bribe employees of Systembolaget. The allegations were part of a larger bribery scandal within Systembolaget. As a reaction to this scandal, Systembolaget (unilaterally) developed a set of sanctions which were all (at least to some degree) based on the sanction of refusing to accept a range of alcohols from its suppliers. Depending on the severity of the allegations against the companies, Systembolaget would refuse a smaller or larger range of products as sanction. As basis for these sanctions, Systembolaget cited 'breach of contract' by the companies. When Absolut was denied sales of certain of its products, the company initiated arbitration against Systembolaget, claiming that it had not breached the contract and that the reaction of Systembolaget was, therefore, unjustified.

The case was tried by an arbitral tribunal seated in Sweden, with Swedish law being both the applicable procedural and substantive law. After an extensive review of the facts of the case, the tribunal found that Systembolaget had violated Article 102 TFEU (and its equivalent under Swedish competition law) by abusing its dominant position, i.e. prevented Absolut from dealing with certain alcoholic beverages.

Upon receipt of the award, Systembolaget initiated setting aside proceedings before the Swedish courts, arguing, inter alia, that the award was contrary to certain provisions of 'competition law'. More specifically, Systembolaget argued that the tribunal had 'over-applied' (*overtillemning*) the relevant EU competition law. Further, Systembolaget argued that the award unlawfully prevented Systembolaget from upholding neutrality between suppliers guilty of bribery and other suppliers (of alcohol), i.e. the restrictions were necessary to counter the bribery-related gain and restore equality between different suppliers.

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[40] Case No. T 5767-13, Judgment of the Supreme Court, 17 June 2015, www.arbitration.sccinstitute.com/dokument/Court-Decisions/2476621/Judgment-of-The-Supreme-Court-17-of-June-2015-Case-No-T-5767-13-?pageid=95788 (accessed 19 Dec 2016).

[41] HD T 5767/13, SVEA HOVRÄTT, DOM, 2013-10-23 Stockholm, Mål nr T 4487-12.

The Swedish Supreme Court first laid out certain general principles for reviewing arbitral awards concerning competition law. Analysing the Swedish Arbitration Act, the Swedish Supreme Court held that, under Swedish law, cases in which an arbitral tribunal reaches a result that is contrary to (Swedish) competition law, and consequently a result that the parties could not themselves have reached by agreement, fall within section 33 of the Arbitration Act (cited above). It follows from this provision that an award cannot be rendered invalid because it violates rules pertaining to competition law, if this does not render the award 'clearly incompatible with the basic principles of the Swedish legal system'. In the words of the Swedish Supreme Court, the provision leaves an 'area of tolerance' wherein errors of law made by the arbitrators must be respected by the courts.[42]

Having laid out its legal framework, the Swedish Supreme Court turned to (national) competition law, and argued that, because the preservation of mandatory regulation of competition is significant by nature, courts ought to be more willing to invalidate awards that deal with competition law than with other legal areas.[43]

Based on these general considerations (and in part based on the preparatory works for the Swedish Arbitration Act)[44] the court provided that a review of awards dealing with (national) competition law entailed identifying first whether the particular issue of competition law in question was 'settled', either through legislation or jurisprudence.[45] If this is the case, then the award would always be invalid.[46] When the issue is not settled, a more nuanced approach is applied: [47]

> However, if the issue of competition law cannot be considered settled, the review for invalidity purposes should be aimed at whether the arbitral tribunal's conclusions are based on an acceptable legal analysis, rather than whether these conclusions correspond to those of the court. As long as the conclusions of the arbitral tribunal are reasonably motivated and fall within the scope of what could reasonably be concluded, then they cannot be considered as violating public policy in a way that would render the arbitration award invalid.

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42 Para. 11 *in fine*.

43 Within the two-pronged test described in the previous section, this comment could be explained as a 'presumption of significance' (a presumption that, based on the character of the rule in question, the award is *clearly* incompatible). This presumption may or may not prove decisive, depending on the facts of the case. As also described, the Scandinavian courts lean towards a holistic approach, at least when applying national law, and the reasoning (itself limited to national competition law) could be nothing more than an indication that competition law can justify setting aside an award based only on its merits (and that this is more plausible than with other areas of law). In our view, this latter explanation is by far the most convincing, and one should therefore not read too much into this part of the judgment.

44 Prop. 1998/99:35, 58 ff.

45 Paras 15–16.

46 The Supreme Court modified this statement by stating that it 'should not deprive a court of a certain flexibility, for reasons of proportionality, when deciding a case on invalidity to disregard a lesser breach of competition law.

47 Prop. 1998/99:35, 58 ff.

> This means that a court, in order to be in a position to determine whether an arbitration award should be deemed invalid due to peremptory competition law provisions, must undertake a certain review of the merits of the arbitral tribunal's decision on the competition law issues. However, the review should generally relate only to the tribunal's legal reasoning, and thus not re-evaluate the tribunal's evidential findings, unless particular reasons exist to do so.

The Supreme Court completed this line of reasoning by explicitly stating that its conclusions apply only to national Swedish law.[48] Thus, in the view of the Court, because the specific case concerned EU competition law, the quoted conclusions could not stand alone but had to be tested against the relevant EU precedents, more specifically the so-called *Eco Swiss* doctrine.[49] In 'testing' its 'national law approach' against this doctrine, the Supreme Court stated that *if* the relevant legal issue (of EU competition law) has been settled[50] then, according to its previous rationale, an award in violation of this legal position would have to be invalidated. However, if the legal issue has not been settled, the courts would have to adopt a different standard of review – an EU law parallel of the national law duty to examine the reasonableness of the motivation of the award. The EU law standard of review was introduced as follows:

> Under the principle of national autonomy for procedural law, the Eco Swiss Case could be interpreted to mean that when the situation under EU competition law is uncertain, then an arbitration award is invalid only if the tribunal's conclusions are not reasonably grounded or accurate (cf. paragraph 16 above).[51] It is, however, not certain that such an interpretation is acceptable from the point of view of EU law. This is mainly due to the so-called principle of equality, which provides that national procedural law may not discriminate against EU law, and due to the principle of efficacy, under which national procedural law may not render it impossible or unreasonably difficult to exercise the rights flowing from EU law.

From the quotation above it appears to be the view of the Swedish Supreme Court that the principle of procedural autonomy allows for an equal application of its conclusions under national law also in the context of questions of EU law, but that

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48 Para. 18.

49 The case before the Swedish Supreme Court concerned Art. 102 TFEU and not, as in *Eco Swiss*, Art. 101 TFEU. As reasoned by the Swedish Supreme Court, the precedent of *Eco Swiss* applies equally to Art. 102, because the ECJ, in numerous cases, held this article to (also) be essential for the inner market, *see Manfredi*, *supra* n. 4, at 31 and Case C-52/09 *Telia-Sonera* at 21.

50 Normally by a decision of the ECJ. It is noteworthy that the parties had discussed whether the EU issue in question should be referred for a preliminary ruling by the ECJ in both cases discussed here. The Swedish Supreme Court rejected the application, as, according to the Supreme Court, there was no real question as to the material issues of EU law, and accordingly under the principles of *acte eclaire* and *acte clair* the Court was under no obligation to do so. The same question arose before the Danish Supreme Court which reached the same conclusion, albeit arguably under much more interesting circumstances and with far greater significance. By refusing to submit the question to a preliminary ruling *because* the question did not give rise to any real doubts, the courts had, in the authors' view, more than half decided the cases.

51 A similar focus on the reasoning of the award may be found in international scholarship as well, *see* Brozolo, *supra* n. 3, at 781.

this can only be the beginning. Thus, the Court indicates that the approach developed in national law may be limited or nuanced *if* this is required under the EU principles of equivalence and effectiveness. Unfortunately, because the Court considered the concrete case to be 'clear', the Court never expanded further on how these two positions should be weighed against each other, and so the reader is left with the premise that it is unclear whether the well-developed solution (developed within the national competition law) can be applied equally with regard to arbitral awards dealing with EU competition law. As argued in section 4 below, it is our view that the conclusion can (and quite possibly should) be extended to EU competition law with little or no reservations, and that such an extension would be well-based in the procedural autonomy as explicitly recognized in *Eco Swiss*.

In an EU context, this is supported, although indirectly, by the many decisions from other countries upholding awards which err in the application of EU competition law. Because the principles pertaining to EU law, the limiting effect of the principles of equivalence and effectiveness, ought to be the same in all countries, a decision by a German[52] or a Belgian[53] court, holding that they do not mandate invalidating any award which runs contrary to EU law would therefore (subject to the possible limits posed by EU principles) be equally valid in Sweden. And, because the Swedish Supreme Court identified these principles as the only limitations of its 'national law rationale', the most probable conclusion would appear to be that arbitral awards enjoy the protection of the Swedish courts even if they may be encumbered with (minor) errors in law.

3.2 Danish supreme court decision of 28 january 2016

The issues in the arbitral proceedings preceding the litigation were similar to those in the Swedish case discussed above. The facts of the Danish case were as follows.

In 2006, a Korean manufacturer of tower flanges to the wind turbine industry entered into a distributorship agreement with a Danish distributor for the distribution of flanges to the European market. In 2007, the cooperation was extended to parts of the North American market. The agreement contained some clauses

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[52] *AG Co. v. Sch. AG*, VI Sch, decision of 8 Aug. 2007 by the Thüringen Court of Appeals (Oberlandesgericht Thüringen), (Kart) 01/02, OLGR. The case concerned the enforcement of a Swiss arbitral award, and the Thüringen Court of Appeals held, inter alia, that even upon 'a summary plausibility review' of the award, the arbitral tribunal had correctly applied German and European competition law. It is noteworthy that the court emphasized the 'comprehensive examination' (the reasoning) in the arbitral award.

[53] *SNF v. Cytec*, decision of 22 June 2009 by the Court of Appeal of Brussels, 'the court of arbitration was able to legally decide that' (*see* Alexis Mourre, *Courts in France and Belgium Confirm Limited Review of Awards Under European Competition Law*' Kluwer Arbitration Blog (2010)).

regulating the parties' behaviour vis-à-vis the market and the Danish distributor's customers. In 2007, the Korean manufacturer entered into a strategic cooperation with the Danish distributor's largest customer. The Korean distributor did not inform the Danish distributor thereof but requested, in broader terms, the distributor's acceptance of the manufacturer dealing directly with this customer without ever disclosing that they had already concluded an agreement with the customer.

In 2008, the Korean manufacturer terminated the distribution agreement, and shortly thereafter the Danish distributor realized that its sales had dropped dramatically, primarily because the Korean distributor was selling directly to the customers developed by the distributor. The Danish distributor initiated arbitration proceedings in accordance with the distributorship agreement for the recovery of loss suffered in consequence of the Korean manufacturer's breach of contract, including a duty of loyalty and the doctrine of good faith.

Compared to the Swedish case, the Danish case gave rise to a more 'clean' testing of the requirements for setting aside an award based on an alleged misinterpretation of EU competition law, namely because it did not concern 'over-application', but rather an alleged misinterpretation and a corresponding violation of the EU Treaty.

Much like the Swedish Supreme Court, the Danish Supreme Court began its analysis of the legal issue by highlighting that, under Danish law, the public policy reservation comprised a narrow exception from the prohibition against substantive revision. Accordingly, an arbitral award could be set aside only 'in exceptional cases where such exceedingly grave errors have been made on the part of the arbitral tribunal which makes the arbitral award manifestly incompatible with the domestic legal order [public policy]'.[54] It followed directly that it was not sufficient for setting aside an award that the result was contrary to rules that could be characterized as mandatory rules of law[55] (public policy), if the error was not in itself of some qualified nature.

Having established its starting point, the Supreme Court turned to the specific aspects concerning EU law. The court reiterated that, according to *Eco Swiss*, if under the national rules a national court must set aside an award because its national public policy has been violated, then a national court must also set aside an award that violated EU competition law. Because the Danish Arbitration Act allowed the granting of a motion to set aside only if the award was manifestly contrary to public policy, this meant that an award concerning EU competition

[54] At 9.
[55] *Ibid*.

law, also, could be set aside (only) if it was manifestly contrary to the provisions of EU competition law in question.

Against that background, the Court conducted a superficial review of the reasoning, but not the conclusions, of the arbitral tribunal; it highlighted that the arbitral tribunal had in fact assessed the EU competition law aspects and that the tribunal had on this basis concluded that there had been no violation. From this (superficial) review, the Supreme Court concluded that[56]:

> there is no basis for concluding that the arbitral tribunal, by this assessment, has made such exceedingly grave errors which make the arbitral award manifestly incompatible with the domestic legal order of Denmark [public policy].

Although not identical to the reasoning of the Swedish Supreme Court (in part because the fact-pattern differed quite distinctly)[57] this final line of argumentation runs parallel to the initial reasoning of the Swedish Supreme Court in that the deciding factor is not *whether* there has been a breach, but that *on the surface* this breach is not *extraordinary*.[58]

4 LESSONS LEARNED: ARBITRATING IN SCANDINAVIA

4.1 Court review of arbitral awards: the 'second look' in Scandinavia

Eco Swiss and subsequent ECJ cases have left open the question of when a national court must uphold or invalidate an arbitral award, which is, or may be, in conflict with European competition law.

Case law shows that the courses taken in Member States differ, but also that certain fault-lines may be identified.[59] As outlined in the introduction, our main purpose is to contribute to the 'landscape' of arbitrating EU competition law by

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[56] At 10.

[57] The Swedish case was, in essence, about over-application which can hardly be considered problematic from an EU perspective. By contrast, the Danish case concerned a possible misinterpretation of EU law and thus a possible *breach* of the relevant provisions.

[58] It may be noted that the Danish case dealt also with the limits of *jura novit curia*, and to a lesser extent a claim from the losing party that the damages had been (partly) based on *ex aequo et bono* considerations. Both arguments were dismissed by the Court. With respect to the former issue, the Supreme Court held that the tribunal had not digressed (too far) from the material arguments made by the parties (the result could be 'contained' in the arguments made), while on the latter issue the Court found that the tribunal had in fact based its decision on a legal analysis. This result was partly facilitated by the president of the tribunal giving testimony before the High Court of Western Denmark on the both issues. As noted above, the authors argued the case on behalf of the Danish company and for this reason also it would be ill-advised to venture too far into an analysis of the correlation between counsel's arguments and the arbitral award. The findings on these issues will therefore not be subject to further discussions, although it should be noted that, in the view of the authors, the case was well within the boundaries and, as such, the outcome was hardly surprising.

[59] Brozolo, *supra* n. 3. *See also* Liebscher, *supra* n. 19, at 790 ff. with a thorough review of national case law applying *Eco Swiss*.

placing Danish and Swedish arbitration law within these existing fault-lines. Although the Swedish Supreme Court stopped just short of a full analysis, the reasoning of the two cases, which were rendered within a short interval, suggest that there may be a common understanding between the two Courts – a Scandinavian model for applying the *Eco Swiss*.[60]

It seems certain that, in the view of the Scandinavian courts, even erroneous awards should rarely be set aside. From a Model Law perspective, this result can easily be explained as the courts upholding awards in all but extraordinary cases. This may also, in fact, have been the underlying reasoning of the court. The language of the Danish Supreme Court in particular lends support to this more holistic approach. Had the case before the Supreme Court been purely national, we have no doubt that this would in fact have been *the* explanation for the result.

We must, however, consider the EU aspects of the case, and more importantly the interplay between the statement by the ECJ that EU competition law is *per se* public policy, and the linguistic structure of the Danish and Swedish Arbitration Acts.

That it is at least possible – and perhaps also warranted – to conduct a more linguistic analysis is supported in particular by the reasoning of the Swedish Supreme Court and the model explained by the Court: looking at whether the legal issue has been firmly addressed in precedents and, if not, looking at the overall reasonableness of the legal analysis of the arbitrators. The same approach seems equally to have been applied, if perhaps not as thoroughly explained, by the Danish Supreme Court, and at least it may be said that, looking at the two Supreme Court rulings, that the material outcome appears to be based on similar, if not identical, methods and standards of review.

Building on, and perhaps moving beyond, the directly stated 'steps of analysis' taken by the Courts, it is our view that the Scandinavian method may, at least theoretically, be synthesized as follows.

First, the Courts will look at the alleged 'unlawfulness' of the award, and more specifically at the legal standards which the award may conflict with.

If the award concerns national legislation, the character of the rule in question is decided according to national case law. By contrast, if the relevant rules pertain to EU law, the courts will decide on the 'public policy' issue based on ECJ precedents. This decision may be based on ECJ decisions on the exact rule, as in the Danish Supreme Court's decision,[61] or it may be based on existing precedents

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[60] The Swedish case played a prominent role in the arguments by both parties in the Danish case and was therefore presumably inspirational for the court, although its direct impact should not be overestimated.

[61] In *Eco Swiss*, the ECJ *had* decided on the character of Art. 101 TFEU, the rule relevant in the Danish case.

related hereto. Alternatively, if the ECJ has not ruled on the public policy status of the provision in question, the national court may base its decision on an interpretation of the relevant rule, as in the Swedish case,[62] or the national court may, if in doubt as to the exact nature of the rule, consult the ECJ. Irrespective of the route chosen, the final word in this matter rests with the ECJ.

Secondly, the Courts will look at the case brought before it and more specifically the award being challenged.[63]

Irrespective of the basis of the material legal rules in question, be it European Union law or national law, the framework for answering this second question is almost entirely national.[64] Thus, the two questions normally asked in setting aside proceedings are: (1) how thorough must the 'second look' be?; and (2) which errors of law can be accepted/what is the threshold for rejecting the principle of finality in favour of the national public policy?

What this means, in essence, is that once the court has paid due attention to the questions of how the ECJ may view the (European) rules at issue, its subsequent review of the award can be made with little regard to the European aspect of the case; the question is now one to be resolved within a national framework, and national law, preparatory works, commentaries and case law are therefore both applicable and relevant.[65]

As should be clear from section 3 and our review of the two cases, the (national) framework applicable in Denmark and Sweden is rooted in a firm respect for the finality of awards and an aversion against second-guessing arbitrators.

Under Scandinavian law, the threshold for either setting aside or denying enforcement of arbitral awards is high, and only major errors will warrant a reaction from the courts. In the words of the Danish Supreme Court, 'It is not sufficient in itself that the arbitral award is contrary to public policy', and only 'extraordinarily serious mistakes', either blatant misapplications of well-defined rules or the failure to apply clear precedent, will warrant a reaction. This framework (or threshold for reacting) is well established, the two cases discussed here

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62 The analysis in the Swedish case was based on a combination of *Eco Swiss*, which had declared Art. 101 TFEU to be public policy because it was essential to the internal market, and case law concerning Art. 102 TFEU, which, although not dealing with the issue of public policy, had considered Art. 102 (also) essential (*Manfredi* and *Telia-Sonera*). Based on the cited case law, the Swedish Supreme Court had no doubt that Art. 101 TFEU was a rule pertaining to public policy.

63 Whether objections are raised in setting aside proceedings or enforcement proceeding is of no real importance here, *see supra* n. 4.

64 With the explicit modification that the principles of equivalence and effectiveness apply, as also highlighted by the Swedish Supreme Court.

65 Thus, an additional benefit of the 'Scandinavian approach' is that the applicability of national law, and the inherent increase in 'material' on the issue, will almost unavoidably improve the predictability of the courts' reactions.

aside, in the national case law of both countries, and one can therefore expect a firm application thereof.[66]

Mirroring this threshold, the level of scrutiny exhibited by the court is one which can hardly be called 'scrutiny'. Because the goal is not for the courts to substitute their own decision for that of the arbitrators, the second look is not a substantive review of the case,[67] but a superficial test of the arbitrators' legal rationale. Thus, the 'second look' in Scandinavia is not one of 'correctness' but of 'reasonableness'.

4.2 Scandinavian model and the ECJ

A question which has, so far, only been addressed indirectly is whether the Scandinavian model as explained above is acceptable from the viewpoint of the ECJ – a question which might be answered based either on an interpretation of the regime of EU competition law or by its compatibility with existing case law. In our view, and regardless of the test applied, the legality of the Scandinavian model is hardly debateable.

As explained by one renowned scholar, in explaining that there is no need to:

> weed out every single award which could be conceived to endorse an incorrect application of competitions rules … what is crucial for competition policy is that there be no opportunity for an award that is seriously and indisputably flawed (or that is a result of a deliberate attempt to evade competition law) to escape annulment or refusal of enforcement and, more generally, that there be no risk of a systematic abuse of arbitration to circumvent competition law.[68]

The language is almost identical to that employed by the Scandinavian Supreme Courts, and there can be no doubt that the Scandinavian standard of review is fully sufficient for Danish and Swedish courts to identify and react to those (exceptional) awards which threaten the core of European competition law.

Since *Eco Swiss*, the ECJ has delivered several decisions on similar issues, most notably the decisions in *Mostaza Claro* and *Asturcom*, both dealing with the duty of national courts to review arbitral awards dealing with community law, if and to the degree that the courts are competent to review arbitral awards compatibility with (similar) national legal principles. In the latter case, the Court held that 'a national court or tribunal hearing an action for enforcement of an arbitration award which has become final' must assess this award 'in so far as, under national rules of

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[66] This is made particularly clear in the first paragraphs of the decision of the Danish Supreme Court, where (1) no distinction is made; and (2) it is made abundantly clear that the court is not easily convinced to meddle with an arbitral award, once it has been validly rendered.

[67] *See* at 8 of the decision by the Danish Supreme Court.

[68] Brozolo, *supra* n. 10.

procedure, it can carry out such an assessment in similar actions of a domestic nature'.[69] We would be hard-pressed to understand these premises in any way other than the straightforward 'if it is allowed with regard to national rules (of public policy) then it is allowed with regard to Union rules'.

In this perspective, we consider the *Renault v. Maxicar* judgment normative as well. The case concerned the 1968 Brussels Convention on Jurisdiction and Recognition of Judgments, but even if arguments may be made that the 'public policy' standard under the Brussels Convention should differ from the 'public policy' standard in an arbitration context, the argument that they are identical is far more convincing.[70] Thus, also with regard to arbitrators' decisions, 'The court of the State where enforcement is sought cannot … refuse recognition of a decision … solely on the ground that it considers that … Community law was misapplied'.[71]

Thus, the Scandinavian model, whether tested against existing ECJ precedents or the purpose of the 'second look', is by all standards compatible.

5 CONCLUSION

We do not presume that the Scandinavian approach is *unique*. In fact, in our view, most countries adopting a pro-arbitration reading of the *Eco Swiss* follow variations of the same legal reasoning.

The two cases discussed here are the first of their kind rendered by the Supreme Courts of either Denmark and Sweden, and for this reason alone they are relevant to the arbitration community; they have placed the Scandinavian countries within the gradually defined fault-lines within the EU. What distinguishes these cases as relevant for further analysis is that the cases, partly because of the language of the national rules, partly because of the structured approach of the courts, offer a possible and, in our view, viable framework for discussing and applying ECJ precedents in the context of national courts' adjudication of international arbitrations. In summing up the reasoning of the Swedish Supreme Court, one might say that the question of the (general) nature of the rule resides within the ECJ's area of competence, while the question of the graveness of the (specific) breach, both with regard to the standard of 'seriousness' applied and the assessment of the compatibility of the specific case with this standard, lies entirely within the Member State's procedural autonomy. Without being as explicit, the Danish Supreme Court seems to have done the same, recognizing that the relevant rules

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[69] Para. 60.

[70] *See* Brozolo, *supra* n. 3, at 766–767.

[71] In our view, this reading is further supported by the Opinion of Advocate General Siegbert Alber of 22 June 1999. *See also* Case C-7/98 *Dieter Krombach v. André Bamberski*.

were public policy but deciding, on a *prima facie* basis, that the arbitrators had at least not made any extraordinarily serious mistakes.

How far this formalistic analysis may be stretched is questionable, but the basic structure appears valid and, as elaborated above, the underlying theoretical understanding of the individual sub-issues raised in setting aside proceedings and their relative place in either national law, EU law or a combination hereof, may serve as one solution for implementing ECJ precedents within the national procedural autonomy in the context of arbitration.

With this approach, the courts may, quite distinctly, carve out a part of their analysis which resides within the auspices of the ECJ, and another part which concerns *only* national, procedural law, thus defining and underpinning the procedural autonomy of the courts and, equally importantly, paving the road for applying ECJ precedents in a way that is compatible with the Model Law and international practice, and to reach results which mirror the general (national) understanding of the need to either scrutinize arbitral awards, to protect their finality or any balancing therein between.