



# Legal Remedies, Competition Law and Public Policy

Competition law as a “sword” and a “shield” in arbitration

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# Topic 1: Competition law limits to contract remedies (shield)

- Article 81(2) as a background
- Contract Remedies
  - Performance
  - Damages
  - Restitution
- Does competition law limit the availability of remedies for non-performance of anti-competitive clauses?
- Article 81 applies to the arbitration award
  - Compliance with the award amounts to an infringement
  - Relationship with “state compulsion” doctrine

# Damages

- Damages as a substitute for performance of contract clauses
- Competition law impact not limited to the implementation of restrictive clauses, but also to remedies reaching the same economic result
- C-126/97 Eco Swiss
  - “to award compensation for damage flowing from the wrongful termination of the licensing agreement would amount to enforcing that agreement, whereas it was, at least in part, void under Article [81](1) and (2) of the Treaty” (para 21 – Hoge Raad’s reasoning)
  - “a national court ... must [annul the award] if it considers that the award in question is in fact contrary to Article [81]” (p 41)



# Restitution

- Competition law as a defence against claims for restitution of money
- E.g. money paid in consideration for (defaulted) restrictive obligation
- Consequences of Article 81(2) left to national law
- EU law does not mandate either solution (if it is neutral as to competitive impact), but
  - Payments may impact on incentives
  - Payments part of restrictive arrangements, e.g. "loser's fee" between cartel members in bid rigging arrangements
  - Solution may impact on effectiveness, e.g. in terms of deterrence



## Topic 2: Competition law enforcement in arbitration tribunals (Sword)

- Between parties to a restrictive contract or from customers
- Article 10 EC
  - (Forms part of the) legal basis for duty to protect EC Law rights
  - (Forms part of the) legal basis for efficient remedies
- What duties apply to arbitration tribunals:
  - No general duty to “stretch” national remedies in order to safeguard rights?
- Relationship with public policy, will principles of efficient enforcement come in the backdoor via the Eco Swiss-principles?

# Private & public enforcement compared

<b>Function</b>	<b>Type</b>	<b>Public remedies</b> (The Commission and NCAs)	<b>Private remedies</b> (National courts & arbitration tribunals)
<b>Prevention</b> (of further infringements)		<ul style="list-style-type: none"><li>• Interim injunction</li><li>• Cease-and desist order</li><li>• Structural relief</li></ul>	<ul style="list-style-type: none"><li>• Interim injunctions</li><li>• Final injunctions</li><li>• Nullity (non-perfor- mance of contracts)</li></ul>
<b>Deterrence</b>		<ul style="list-style-type: none"><li>• Fines</li></ul>	Not a task for private parties (but damages may serve this end)
<b>Compensation</b>		Not a task for public bodies	<ul style="list-style-type: none"><li>• Restitution</li><li>• Damages</li></ul>



# Restitution (cartel prices)

- Customer agreements
  - Not directly covered by 81(2), but
  - Customers protected by EC Law – a right to a remedy
  - Several cases in the aftermath of the Gas Negotiation Committee-case
- Restitution of money unlawfully collected
  - E.g. royalties post-expiry
  - Courage principles – party responsible for the infringement



# Damages

- The right to damages established in C-453/99  
Courage
  - Protection of rights
  - Efficient application
  - Article 10
- E.g.
  - Customers of cartel members or other parties to restrictive arrangements
  - Victims of abusive behaviour (e.g. discriminatory tariffs)