

Arbitration and Competition Law

Enforcement of Arbitral Awards and
Public Policy

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The Problem

- Arbitrability
 - *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985)
 - *ET Plus SA v Welters* [2005] EWHC 2115 (Comm)
- EU competition rules are rules of public policy
 - Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, [1999] ECR I-3055
- Arbitral tribunals are not courts or tribunals of the Member States
 - Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* [1982] ECR 1095
- Review of arbitral awards
 - At the seat of the arbitration
 - In the country where enforcement is sought

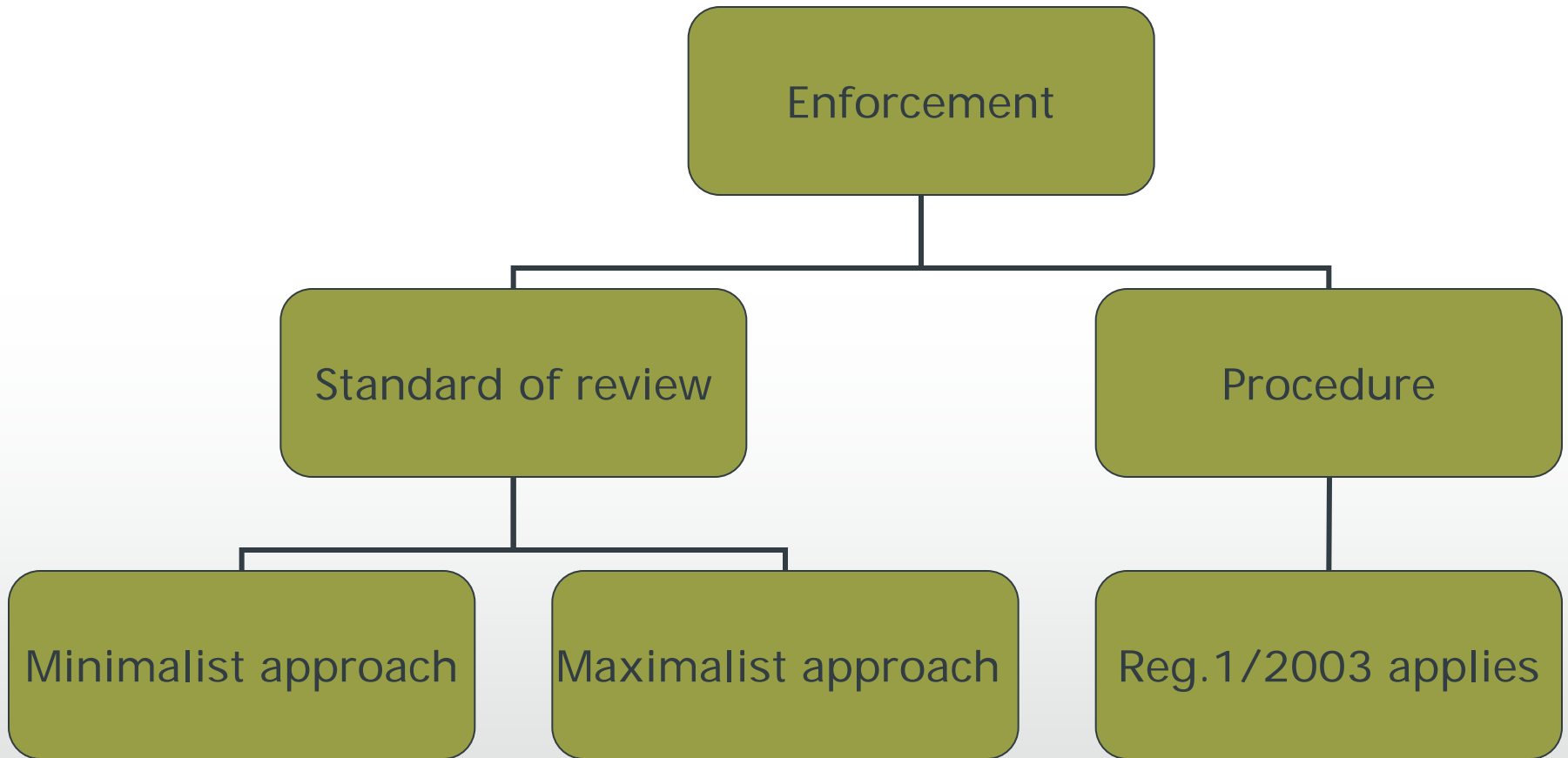
Structure of the Presentation

- Litigation and arbitration compared
- Enforcement of arbitral awards
 - Minimalist and maximalist approaches
 - Enforcement proceedings and EU law
- The tribunal's best endeavours duty to make an enforceable award
- Conclusion

Litigation and Arbitration Compared

Litigation	Arbitration
Power/duty to make a reference under Art 267 TFEU	<i>Nordsee v Rederei Mond</i>
Intervention of EU Commission/NCAs under Art 15(3) Reg. 1/2003	Not applicable but may be in the discretion of the tribunal or at the parties' joint request
Binding effect of decisions of the EU Commission under Art 16(2) Reg. 1/2003	Art 288 TFEU?
Power to request information or opinion of the EU Commission under Art 15(1) Reg. 1/2003	Not applicable but may be in the discretion of the tribunal or at the parties' joint request
Stays under Art 16(1) Reg. 1.2003	Not applicable but may be in the discretion of the tribunal or at the parties' joint request
Duty to raise issues <i>ex officio</i> between effectiveness and equivalence	Party autonomy?

Enforcement of Arbitral Awards



Minimalist or Maximalist Approach?

- *Thalès c/ Euromissile*, CA Paris, 18 November 2004
 - public policy no exception to the ‘interdiction d’une révision au fond’
 - refusal of enforcement justified only if the violation of public policy is ‘flagrante, effective et concrète’
 - followed/applied by *SNF SAS c/ Cytec Industries BV*, CA Paris, 23 marzo 2006 e *Cour de Cassation*, 4 June 2008, n 680; *Jean-Louis Jacquetin c/ La Société Intercaves SA*, CA Paris, 22 January 2009
- *La SNF SAS c/ La CYTEC Industrie*, Tribunal de Première Instance de Bruxelles, 8 March 2007, appeal allowed in *La SNF SAS c/ La CYTEC Industrie*, CA Brussels, 22 June 2009
- A third way: *Terra Armata S.r.l. c/ Tensacciai Spa*, CA Milan, 5 July 2006

Enforcement Proceedings and EU Law

- Enforcement courts in the EU are subject to Reg. 1/2003 and Art 267 TFEU
- Effect of a previous decisions of the EU Commission
 - stays
- Intervention of the EU Commission?
- Implications
 - risk of the award being set aside
 - duties of the arbitrators in the arbitral proceedings

Duties and Powers of the Tribunal

- Tribunal's best endeavours duty to make an enforceable award as a prospective test
- Procedural consequences
 - effect of a previous decisions of the EU Commission
 - stays
 - intervention of the EU Commission
 - application of EU competition law *ex officio*

Conclusions

- Are the private nature and dispute resolution function of arbitration suited to dealing with competition law disputes?
- Minimalist or maximalist approaches at the enforcement
 - which approach is right?
 - why does it matter?
- Is ‘judicialisation’ of arbitration a solution?
- Application of Reg. 1/2003 in enforcement proceedings
- Does the existence of a public enforcement mechanism make a difference?

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