

# ARBITRATION OF DISTRIBUTION DISPUTES REVISITED

## A COMMENT ON *SEBASTIAN INTERNATIONAL INC. v COMMON MARKET COSMETICS NV*

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If there has been a contribution of Belgium to the practice of international arbitration, beyond that of its renowned arbitrators,<sup>2</sup> it is probably by the lessons which may be drawn from the infamous Distribution Act of 1961.<sup>3</sup> As is well-known, this Act creates a very favorable legal regime for distributors who are granted the right to represent a foreign manufacturer in Belgium<sup>4</sup> – at least for those who have concluded a contract for an indefinite period of time. In a nutshell, the distributor enjoys, if the contract is terminated by the manufacturer, the right to claim compensation provided it demonstrates that the notice period is not sufficient in light of the duration of the relationship between parties.<sup>5</sup> On top of this, the distributor may also claim an indemnity covering, among other elements, the value of the clients generated by the distributor, which remains with the manufacturer after the termination, and the various costs and investments which the distributor incurred for the purpose of exploiting the distributorship.<sup>6</sup>

Due in part to the very generous amounts courts have granted on the basis of these two provisions, this Act has stirred up much debate. Its impact on arbitration of distribution agreement disputes has been explored at length countless times, not the least by Professor van Houtte. This contribution seeks to draw lessons from the rich case law of the Belgian Supreme Court in this field, focusing on the latest development in the case of *Sebastian International*.<sup>7</sup> It will first offer some considerations on the process whereby a court looks at arbitrability before turning to the consequences, for the parties at hand, of the uncertainty surrounding arbitrability.

Before doing so, it is worth recalling briefly the various steps in the case law of the Supreme Court which have led to the recent ruling in the *Sebastian International* case. In a first ruling,

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<sup>2</sup> And of some notable efforts by legislator in 1985 to attract more arbitration. In 1985, Parliament modified the arbitration act to provide that an application for setting aside an award could not be introduced before a Belgian court if none of the parties to the dispute was a Belgian national, a person residing in Belgium or a company formed under Belgian law or having its seat in Belgium. See *H. van Houtte*, 'La loi belge sur l'arbitrage international', *REV. ARBITRAGE* (1986), 29-42. As it stands today, the text of Art. 1717 para. 4 Judicial Code reads as follows : “Parties may, by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award, in case none of them is a physical person of Belgian nationality or a physical person having his normal residence in Belgium or a legal person having its principal seat or a branch office in Belgium.”

<sup>3</sup> Act of July 27, 1961.

<sup>4</sup> Whether the territory granted to the distributor is limited to Belgium or also includes other territories.

<sup>5</sup> Article 2 provides that the distributor may claim an “equitable” indemnity in lieu of a reasonable notice period. Courts have proven very generous in granting such indemnity, which is calculated on periods of up to 36 months. This rule does not apply if the distribution agreement is terminated following a serious fault committed by the distributor.

<sup>6</sup> Article 3.

<sup>7</sup> *Sebastian International Inc. v Common Markets Cosmetics NV* (Court of Cassation, 14 Jan. 2010), *RECHTSKUNDIG WEEKBLAD*. (2010-11) at p. 1087, with comments by *D. Mertens*.

the Supreme Court held in 1979 that an award issued by an arbitral tribunal with its seat in Switzerland, could not be recognized in Belgium if it appeared that the arbitrators had not applied Belgian law.<sup>8</sup> In the case at hand, the award has been issued on the basis of German law, which had been chosen by the parties in their contract.<sup>9</sup> The Supreme Court relied chiefly on Art. 5(2) of the 1958 New York Convention.<sup>10</sup>

In a later ruling, the Court explored the consequences of the 1961 Act on motions seeking to have Belgian courts declining jurisdiction in favor of arbitration. It held that a dispute relating to the termination of a distribution agreement could not be referred to arbitration when it appeared that arbitrators were not bound to apply Belgian law.<sup>11</sup>

If the Court had shed some light on the impact of the 1961 Act, the picture was, however, far from complete. After this first series of rulings, it indeed remained unclear which law should be applicable to the arbitrability issue. This provoked much debate in the literature and in court practice : while it was argued that the question should be decided on the basis of the law governing the contract,<sup>12</sup> this view was challenged by others who pleaded for the possibility for the court to take into account the *lex fori*.<sup>13</sup>

The Supreme Court had the opportunity to rule again on this issue starting in 2004. In a first decision, the Supreme Court quashed the decision whereby a Court of appeal had referred exclusively to Swiss law, the law governing the contract, to determine whether a dispute could be referred to arbitration.<sup>14</sup> However, the reasoning did not firmly indicate that the arbitrability issue should be examined solely on the basis of Belgian law. The Court's ruling rather seemed to indicate that it was unacceptable to exclude altogether the application of the *lex fori*.<sup>15</sup> Further, there was an untimely reference to public policy, which obscured the reasoning.<sup>16</sup>

<sup>8</sup> *Audi-NSU Auto Union AG v SA Adelin Petit & Cie* (Court of cassation, June 28, 1979), 5 YEARB. COMM. ARB. 257 (1980).

<sup>9</sup> The case has been discussed by *H. van Houtte*, 'L'arbitrabilité de la résiliation des concessions de vente exclusive', in *MÉLANGES OFFERTS À R. VANDER ELST* (Nemesis 1987), pp. 821-833.

<sup>10</sup> The reasoning of the court was also tied to the issue of fraud, as it had been alleged that the German manufacturer had fraudulently attempted to avoid the application of Belgian law by choosing Swiss law to govern the contract signed with the distributor. The issue of fraud did not come back in later rulings.

<sup>11</sup> *Gutrob Werke GmbH v Usinorp de Saint-Hubert and Saint Hubert Gardening* (Court of cassation, Dec. 22, 1988). In that case, parties to the distribution agreement had not specified which law governed their contract.

<sup>12</sup> See *e.g. Company M v. M. S.A.* (Brussels Court of Appeal 4 Oct. 1985), 14 YEARB. COMM. ARB. 618 (1989) (holding that “when the arbitrability of the dispute is considered from the point of view of the validity of the arbitration agreement, i.e. when the issue arises ... before a court requested to decide only on this issue ... it will be sufficient .... to ascertain whether the law of autonomy authorizes the submission of the dispute to arbitration”); and *Société van Hopplynus v. Coherent Inc.* (Commercial Court of Brussels, Oct. 5, 1994) 22 YEARB. COMM. ARB. 637 (1997) (holding that the non-arbitrability must be governed by the law applicable to the contract and in particular by the law chosen by the parties, because “submitting the issue of the validity of the arbitral clause to the same law as the law governing the recognition or enforcement of the award does not lead to any coherent solution” (at p. 641)).

<sup>13</sup> See *e.g. Matermaco SA v PPM Cranes Inc et al.* (Commercial Court of Brussels, Sept. 20, 1999) 25 YEARB. COMM. ARB. 673 (2000) (refusing to stay litigation in favor of arbitration although the contract included an arbitration agreement calling for disputes to be arbitrated with the application of the laws of Wisconsin; the court held that “The similarity between Art. II(1) and Art. V(2)(a) and a consistent interpretation of the convention require that the arbitrable nature of a dispute be determined, under the said Arts. II and V, under the same law, that is, the *lex fori*”).

<sup>14</sup> *Colvi v Interdica*, (Court of Cassation, Oct. 15, 2004) 31 YEARB. COMM. ARB. 587 (2006).

<sup>15</sup> The Court stressed that Art. 2(3) of the Convention “allows the state court seized with this question to consider the matter under its own law”.

<sup>16</sup> The Court noted that a court in Belgium could exclude arbitrability “if the public policy of its legal system would otherwise be violated” – this was considered with some puzzlement as it is accepted that the 1961 Act does not belong to public policy.

In 2006, the Supreme Court had again the opportunity to shed some light on the relationship between arbitration and the 1961 Distribution Act.<sup>17</sup> The Court went further and decided that when the agreement is governed by a foreign law,<sup>18</sup> the court should refuse to refer parties to arbitration if “in application of its own law, the jurisdiction of its own courts may not be ousted”.

In its *Sebastian International* ruling of 2010, the Court confirmed its previous decision. The case opposed a distributor doing business in Belgium and a manufacturer established in California. Although this has not been mentioned in the ruling, it appears that the agreement called for the application of the laws of California. When the manufacturer terminated the agreement, the distributor initiated proceedings before the courts in Belgium. Parties took their quarrel all the way up to the Supreme Court. After recalling that Art. II of the New York Convention does not determine which law applies to the arbitrability of a dispute, the Supreme Court noted that this provision did not prevent a court from examining the issue of arbitrability according to its own law. The Court added that when the arbitration agreement is governed by a foreign law, “the court which is seized of a motion to decline jurisdiction in favor of arbitration, must deny the possibility to arbitrate the dispute when according to all relevant rules of the *lex fori*, the dispute cannot be withdrawn from the jurisdiction of the national court”.

Does this case signal the end of a guerrilla which extended over the last thirty years between Belgian distributors and their foreign contract partners? At first sight, the ruling of the Supreme Court brings an end to a long discussion : Belgian courts should from now on resort to their own law when deciding upon the arbitrability of disputes, at least when the underlying agreement is governed by a foreign law. When doing so, these courts should in particular pay attention to Belgian mandatory rules.

The end of a long standing controversy does not, however, bring us closer to the end of history. It may well be that Belgian courts now have firmer ground on which to approach disputes arising out of the termination of distribution agreements. If these agreements include an arbitration clause, account must also be taken of the other side of the story, i.e. the reaction of the arbitral tribunal which could also be seized of the dispute. Before exploring the dire consequences which could arise out of such parallel proceedings (2), some comments will be offered on the position adopted by the Supreme Court in respect of the law applicable to the arbitrability of disputes (1).

## 1. Arbitrability and the law

If it was once at the center of discussion in the arbitration community, the issue of arbitrability has today lost much of its acuteness.<sup>19</sup> When it is mentioned, the analysis focuses on a few selected fields, such as disputes involving securities, intellectual property law or competition law. Leaving these specific categories aside, there seems to be a consensus, at least on the

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<sup>17</sup> *Van Hopplynus Instruments v. Coherent Inc.* (Supreme Court, 16 Nov. 2006) TIJDSCHRIFT VOOR BELGISCH HANDELSRECHT (2007) at p. 889.

<sup>18</sup> In that case the contract included a choice for the laws of California and an AAA arbitration agreement.

<sup>19</sup> According to Born, “The non-arbitrability limits that exist under national law have evolved materially over time, with historic skepticism about the arbitral process's ability to resolve particular categories of disputes eroding substantially in recent decades” - *G.B. Born*, *International Commercial Arbitration* (Kluwer, 2009), vol. I, at p. 775.

general level : commercial disputes may safely be referred to arbitration, while criminal and family law disputes are, broadly speaking, said to be inarbitrable. It has even been said that “in principle, any dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a national court”.<sup>20</sup>

This broad brush approach is, however, insufficient. Practice indeed reveals that the opinions of States on the possibility to submit disputes to arbitration continue to differ, even if the differences are not as substantial as they used to be. As there are differences of opinions on what disputes may be referred to arbitration,<sup>21</sup> there is room for a conflict of laws approach.<sup>22</sup>

The answer to the conflict of laws conundrum may be to bypass the classical analysis and seek the help of a substantive rule, without referring to a specific conflict of laws rule or even to a national law in order to decide an arbitrability issue. Arbitrators certainly have the possibility to use this type of reasoning.<sup>23</sup> Given the consensus on arbitrability in certain fields, resort to a substantive method would not be revolutionary – it is necessary for example to refer to the applicable law when determining whether a dispute relating to the sale of shares of a company may be referred to arbitration? Experience has, however, shown that arbitrators do not systematically resort to the application of a substantive approach when analysing the arbitrability of the dispute.<sup>24</sup>

For courts, matters are different. As the issue of arbitrability is linked with their own jurisdiction, there is much less room to resort to a substantive approach and neglect the choices made by national legislators. This begs therefore the question of what law applies to the arbitrability of the dispute. As is well known, the 1958 New York Convention does not provide a final answer to this issue. There is a clear distinction between Art. V(2)(a) of the Convention, which provides that the enforcing court should look at its own law in order to examine whether the dispute was not capable of settlement by arbitration, and Art. II(3), which is silent on what law governs the issue of arbitrability at the pre-award stage.<sup>25</sup>

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<sup>20</sup> N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration*, (OUP, 2009), p. 123, § 2.112.

<sup>21</sup> The fact that the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) remains silent on the issue of arbitrability may also be taken as a sign that a consensus on this issue is difficult to reach. See art. 1(5) of the Model Law : “This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law”.

<sup>22</sup> The conflict of laws reasoning is obviously out of place for purely domestic disputes. For these disputes, the national views on the limits of arbitrability are the only one relevant. When one has determined the applicable law in relation to an international dispute, the question arises whether the limitations set by that law for domestic disputes should be applied without more or whether the international nature of the dispute calls for another, more restrained view on arbitrability. The latter view has been adopted by the US Supreme Court which held in 1985 that it is “necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration” (*Mitsubishi v. Soler Chrysler-Plymouth Motors* 473 US 614, at 639 (1985)).

<sup>23</sup> On the existence and limits of this approach, see E. Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (Nijhoff, 2008), pp. 60-82.

<sup>24</sup> For an analysis of the practice of arbitrators in the field of distribution agreements, see C. Truong, *Les différends liés à la rupture des contrats internationaux de distribution dans les sentences arbitrales CCI*, (Litec, 2002), 66 ff.

<sup>25</sup> Article VI(2) of the Geneva Convention is more precise. It provides that the courts may refuse recognition of the arbitration agreement “if under the law of their country the dispute is not capable of settlement by arbitration”. See also art. 36(1)(b)(i) of the Model Law, which provides that “Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only ... if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State”.

The lack of uniform international regime has led to a mixed approach both in court practice and in scholarly comment.<sup>26</sup> Many courts have resorted to the *lex fori* to decide whether to refer parties to arbitration.<sup>27</sup> So it is that French courts have used an inarbitrability provision found in French law to reject a motion to decline jurisdiction in favor of arbitration notwithstanding the presence of an arbitration agreement in an individual contract of employment.<sup>28</sup> Italian courts have similarly used Italian law when reviewing the possibility to refer to arbitration a dispute concerning the consequences of the UN embargo against Iraq.<sup>29</sup>

The *lex fori* approach is, however, far from universally accepted. In the famous *Meadow Indemnity* case, a US District Court refused to approach the question based solely on one single national law. The court held instead that “reference to the domestic laws of only one country, even the country where enforcement of the arbitral award will be sought, does not resolve whether a claim is 'capable of settlement by arbitration'”. The court added that “the determination of whether a type of claim is 'not capable of settlement by arbitration' ... must be made on an international scale, with reference to the laws of the countries party to the Convention”.<sup>30</sup>

Faced with this lack of agreement, views of scholars have also diverged.<sup>31</sup> Beyond a consensus on the need to resort to a reasoning still firmly coined in terms of classical private international law,<sup>32</sup> opinions indeed vary. It has been suggested that the question should be governed by the law applicable to the agreement.<sup>33</sup> According to Hanotiau,<sup>34</sup> this would ensure that courts and arbitrators apply the same rules. This seems to constitute a notable extension

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<sup>26</sup> One may add that the issue of the law applicable to the arbitrability is generally not addressed in national arbitration statutes – see *e.g.* Art. 81(1)(a) of the 1996 UK Arbitration Act.

<sup>27</sup> According to Lew, Mistelis and Kröll, “in the majority of cases courts have determined the question of arbitrability at the pre-award stage according to their own national law” (*J. Lew, L. Mistelis and S. Kröll, Comparative International Commercial Arbitration* (Kluwer, 2003), at pp. 191, § 9-13. See to the same effect *G.B. Born, International Commercial Arbitration* (Kluwer, 2009), vol. I, at p. 521).

<sup>28</sup> *Société Château Tour Saint Christophe et al v Aström* (Court of cassation (ch. soc.), 16 Feb. 1999, *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* (1999) 745, with comments *F. Jault-Seseke* – in this case, the dispute concerned an employment contract signed by a Swedish national, which included an arbitration agreement calling for disputes to be settled by an arbitral tribunal under the Stockholm Chamber of Commerce rules. The Court held that “*la clause compromissoire insérée dans un contrat de travail international n'est pas opposable au salarié qui a saisi régulièrement la juridiction française compétente en vertu des règles applicables, peu imporant la loi régissant le contrat de travail*”.

<sup>29</sup> *Fincantieri – Cantieri Navali Italiani SpA and Oto Melara SpA v Ministry of Defence, Armament and Supply Directorate of Iraq and Republic of Iraq* (Court of Appeal of Genua, May 7, 1994), 21 *YEARB. COMM. ARB.* 594 (1996) – the Court referred to the “jurisprudential principle that, when an objection for foreign arbitration is raised in court proceedings concerning a contractual dispute, the arbitrability of the dispute must be ascertained according to Italian law as this question directly affects jurisdiction, and the court seized of the action can only deny jurisdiction on the basis of its own legal system” (at pp. 599-600).

<sup>30</sup> *Meadows Indemnity v Baccala & Shoop Insurance Services*, 760 F. Supp 1036 (EDNY 1991).

<sup>31</sup> The lack of consensus also appears in how scholars rely on precedents. The US Supreme Court ruling in the famous *Mitsubishi v Soler Chrysler Plymouth* case has been heralded both as evidence of application by courts of the *lex fori* (*J.-F. Poudret and S. Besson, Comparative Law of International Arbitration*, (Thomson/Schulthess, 2<sup>nd</sup> ed. 2007) at p. 286, § 335 and *G.B. Born, International Commercial Arbitration* (Kluwer, 2009), vol. I, at p. 521) and as a sign of an evolution towards the application of a substantive norm (*B. Hanotiau, “L'arbitrabilité”, 296 Coll. Courses Hague Academy* (2003) 87, § 98).

<sup>32</sup> It has, however, been suggested that the application of the *lex fori* does not rest on a conflict of laws rule, but rather on the principle of international law that allows each State full competence to regulate the jurisdiction of its courts (*N. Coipel-Cordonnier, Les conventions d'arbitrage et d'élection de for en droit international privé* (LGDJ, 1999), at p. 246, para. 239).

<sup>33</sup> See *e.g. Ph. Fouchard, L'arbitrage commercial international* (Daloz, 1965), para. 186.

<sup>34</sup> *B. Hanotiau, “What Law Governs the Issue of Arbitrability?”* (1996) 12 *ARB. INT.* 391, 393-5.

of the scope of the *lex contractus*. As it usually understood,<sup>35</sup> the *lex contractus* does not include issues of dispute settlement and certainly not the possibility for parties to avail themselves of a given dispute resolution method.<sup>36</sup>

A radically different approach dictates the application of the *lex fori* to the issue of arbitrability. The application of this law which has received much support,<sup>37</sup> comports with the idea that the issue of arbitrability is intimately tied up with the division of work between courts and arbitral tribunals. Arbitrability is a legal restriction on the freedom enjoyed by parties to design their favored dispute resolution method. Further, application of the *lex fori* guarantees that the issue of arbitrability is determined in a similar fashion by a national court, whether the question is raised pre- or post-award.

Yet another approach has been suggested, which would submit arbitrability to the law of the seat of the arbitration.<sup>38</sup> The application of the *lex arbitrii* may be justified in light of the fact that the issue of arbitrability is also a question of whether arbitration is possible at the seat chosen by the parties. Noting that “none of the choice-of-law analyses is capable of producing coherent or satisfactory results”,<sup>39</sup> Born has also offered to concentrate not so much on which law applies in general to the question, but rather on the applicability of non-arbitrability rules adopted by the various jurisdictions. According to Born, a State would be allowed to apply its own mandatory rules if the dispute involves a claim substantially connected to the State. Application of foreign mandatory rules should, in his view, be considered with caution.<sup>40</sup>

Faced with the difficulty of identifying a single law to govern arbitrability, it has sometimes been suggested to refer to a multiplicity of law and verify under various laws whether the dispute may be referred to arbitration. This is apparently what Redfern and Hunter suggests, when they write that if the issue of arbitrability arises, “it is necessary to have regard to the relevant laws of the different States that are or may be concerned”.<sup>41</sup> And these authors to mention the law governing the arbitration agreement, the law of the seat of arbitration and the law of the ultimate place of enforcement of the award.

In the light of this wealth of opinions, is it possible to adopt a clear cut solution? The uncertainty surrounding the issue of the law applicable to the arbitrability of a dispute, is apparently as old as the New York Convention itself.<sup>42</sup> There are certainly good reasons why a

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<sup>35</sup> See e.g. Art. 12(1) of the Rome I Regulation.

<sup>36</sup> Application of the *lex contractus* has been challenged on another ground, i.e. that it could lead to attempts by parties to select a law which makes it possible to arbitrate a dispute. Poudret and Besson concludes on this basis that “the law chosen by the parties to govern the arbitration agreement is in any case not applicable” (J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration*, (Thomson/Schulthess, 2<sup>nd</sup> ed. 2007) p. 289, § 336).

<sup>37</sup> E.g. A. J. van den Berg, *The New York Arbitration Convention of 1958* (Kluwer, 1981), at p. 152; J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003), at pp. 193, § 9-18 : these authors not only note that this is the common approach, they also advocate it : “the better view is that the law applicable to the question of arbitrability in court proceedings should be governed exclusively by the provisions of the law of the national court which determines the case”; H. Arfazadeh, 'Arbitrability under the New York Convention : the Lex Fori Revisited', (2001) 17 *ARB. INT.* 73, 80-83.

<sup>38</sup> J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (Thomson/Schulthess, 2<sup>nd</sup> ed. 2007) at p. 288, § 336; M. Danov, 'The law governing arbitrability under the Arbitration Act 1996' [2008] *LMCLQ* 536, 537-541.

<sup>39</sup> G. B. Born, *International Commercial Arbitration* (Kluwer 2009), vol. I, at p. 523.

<sup>40</sup> G. B. Born, *International Commercial Arbitration* (Kluwer 2009), vol. I, at p. 525-526.

<sup>41</sup> N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration*, (OUP, 2009), at p. 124, § 2.115.

<sup>42</sup> For an account of the various defended by early commentators of the 1958 Convention, see A. J. van den

court could resort to its own law when it determines whether to refer parties to arbitration or to conclude that a dispute is not capable of settlement by arbitration. Arbitration may well be a very adequate method of settling international commercial disputes. The *favor arbitrandum* is a principle worth taking into account, as is the need to respect the agreements made by parties. From the perspective of States however, it represents a departure from the process of settling disputes by courts. In this sense, application of the *lex fori* allows a State to determine how far parties are allowed to go in ousting the jurisdiction of courts. It does seem therefore a natural reaction for a court to pay attention to the limitations contained in its national laws when determining whether a dispute may validly be referred to arbitration.<sup>43</sup>

The application of the *lex fori* is, however, not without difficulties. According to Poudret and Besson, the application of the *lex fori* could lead to negative conflicts.<sup>44</sup> Born has further argued that application of the *lex fori* could lead to absurd results when the dispute is not connected or at least not substantially connected with the State whose courts are seized.<sup>45</sup> This presumes, however, that a party could bring the underlying dispute before a court which has no substantial connection with the dispute. Take the example of a distribution dispute between a distributor operating in Belgium and a German manufacturer, with the contract calling for disputes to be submitted to an arbitral tribunal with its seat in Switzerland. If the distributor brings proceedings in Belgium, in violation of the agreement, the application by a Belgian court of its own law, does not seem out of place or resemble the type of parochial reflex often denounced by commentators. It would be different if the dispute concerned a distribution agreement between the same German manufacturer and a distributor operating in France, with the agreement calling for disputes to be submitted to an arbitral tribunal with its seat in Belgium. In that situation, it is more difficult to justify why a court sitting in Belgium<sup>46</sup> would resort to its own law.

Does the application of the *lex fori* necessarily denote a mistrust of the arbitral process? It would be ludicrous to deny that arbitrators are perfectly capable of deciding a dispute between a distributor and the manufacturer. When it insists that a rule of inarbitrability is duly taken into account, a State does not necessarily repudiate the arbitration mechanism. It only requires that one of its laws, which it rightly or wrongly believes is important, should be applied. In fact, the practice of Belgian courts has never been one of outright refusal to let distribution disputes be settled by arbitration.<sup>47</sup> The refusal is indeed conditional upon the refusal by arbitrators to apply Belgian law.<sup>48</sup>

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*Berg*, The New York Arbitration Convention of 1958 (Kluwer, 1981), at p. 153-154, notes 98 to 100.

<sup>43</sup> As van den Berg wrote, “the main effect of the arbitration agreement is the exclusion of the competence of the courts in favour of arbitration. As a court derives its competence as a rule from its own law, it should inquire under its own law whether the competence has lawfully been excluded in favour of arbitration” - *A. J. van den Berg*, The New York Arbitration Convention of 1958 (Kluwer, 1981), at p. 152.

<sup>44</sup> *J.-F. Poudret and S. Besson*, Comparative Law of International Arbitration, (Thomson/Schulthess, 2<sup>nd</sup> ed. 2007) at p. 288, § 336 – although they have been hard pressed to come up with an example of such a situation.

<sup>45</sup> *G. B. Born*, International Commercial Arbitration (Kluwer, 2009), vol. I, at p. 519.

<sup>46</sup> The court would have jurisdiction as the seat of the arbitration is located in Belgium (Art. 1717 Belgian Judicial Code).

<sup>47</sup> Save for a limited number of cases which predate the *NSU-Audi* ruling of the Supreme Court. These cases are discussed by *O. Caprasse*, Arbitrage et sociétés (Bruyant/LGDJ, 2002), at pp. 67-69, §§ 73-74. The outright refusal to allow disputes in relation to termination of distribution agreements to be arbitrated has been defended in the past - see e.g. *R. Vander Elst*, 'Arbitrabilité des litiges et fraude à la loi en droit international privé', *Revue critique de jurisprudence belge* 354 (1981). This position is no longer defended today.

<sup>48</sup> This has given rise to some discussion. It may indeed be difficult for the court to determine what law the arbitral tribunal will apply when this tribunal has not yet been formed. When it has been formed, the difficulty may be that the question of the applicable law may be disputed before the tribunal. See the

Application of the *lex fori* will inevitably result in surprise for parties who had entered into an agreement including an arbitration clause, in the belief that this agreement would be honored by courts. A possible solution for this problem would be to leave intact the application of the *lex fori*, but to attempt to persuade national legislators to abandon – even if only gradually – the limitations they impose on the arbitrability of selected disputes. One may indeed not like the position adopted by the Belgian legislator in 1961, especially as it seems to be biased against any other form of dispute resolution than by Belgian courts – a position which is untenable today.<sup>49</sup> The best way to challenge this position is, however, to plead for a revision of the 1961 Act.

This being said, there are very good reasons to argue in favor of the *lex contractus* or of any other approach. As is often the case, the process of selecting the applicable law also rests upon the personal inclination of the court or arbitrator. It would certainly be wise to further the unification process initiated in 1958 and to adopt a single, uniform choice of law rule dealing with arbitrability – provided this is done in a very general way, without focusing on one type of dispute. There is indeed probably no worse way to approach this issue than by looking at the arbitrability of distribution disputes, at least from a Belgian perspective. Even though it may not be unique, the position of Belgium remains fairly isolated. It is therefore suggested that this position can hardly be a good starting point for a general discussion on arbitrability of disputes.

Harmonization of the conflict of laws standard would, however, not solve all problems. Whatever law is chosen by the court seized of the dispute, this court must pay attention to its mandatory rules. If the inarbitrability provision is framed as a mandatory rule, the court seized of the dispute is required to apply it over and above the normally applicable law – be it the *lex fori*, *lex arbitrii* or *lex contractus*.

One may question the wisdom for a State to elevate one of its provisions to the status of mandatory provisions – especially when the same State has accepted that parties may validly grant jurisdiction to courts of another State.<sup>50</sup> The future could in fact bring more limitation to the application of such rules – through the impact of EU law which restricts the possibility for Member States to rely on their mandatory rules when this constitutes an impediment for the

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comments on the various possible scenarios by *A. Nuyts*, 'La loi belge du 27 juillet 1961 relative à la résiliation unilatérale des concessions de vente exclusive à durée indéterminée et l'arbitrage', 112 *JOURNAL DES TRIBUNAUX*, 349, at p. 351 (1993). One of the questions which remains open is what is the effect of an undertaking by the manufacturer that the agreement is governed by Belgian law – should a court seized of the dispute be satisfied on this basis that the dispute may safely be referred to the arbitral tribunal? See the comments by *H. van Houtte*, case note Commercial Court of Hasselt Dec. 24, 1996, *TJDSCHRIFT VOOR BELGISCH HANDELSRECHT*, 1997 at p. 270.

<sup>49</sup> Although not as a matter of international law. It cannot be argued that by adhering to the 1958 New York Convention or another international instrument dealing with arbitration, Belgium has waived its right to exclude some disputes from arbitration and hence to refuse to recognise and enforce agreements to arbitrate such disputes. For a discussion of the limitations that the New York Convention impose on the possibility for Contracting States to rely on the non-arbitrability of certain disputes, see *G. B. Born*, *International Commercial Arbitration* (Kluwer 2009), vol. I, at pp. 530-535. According to Born, "Contracting States should be permitted to adopt non-arbitrability exceptions only when narrowly tailored to achieve specifically-defined, articulated public policies which are non inconsistent with state practice under the Convention" (*G. B. Born*, *International Commercial Arbitration* (Kluwer 2009), vol. I, at p. 775).

<sup>50</sup> Choice of court clauses in distribution agreement must be upheld by courts under Art. 23 of the Brussels I Regulation. See e.g. *S.A. Etablissement C. Verswijver & S.A. Eurodiesel v. MTU Friedrichshafen GmbH*, (Commercial Court of Liège, Dec. 30, 2004).

internal market.<sup>51</sup>

It remains, however, difficult to challenge the existence of such a mandatory provision. At the end of the day, it is highly unlikely that States will accept to abandon all limitations on the possibility to refer disputes to arbitration. The suggestion that a State should only adopt a rule of inarbitrability if there is a consensus among States that the disputes concerned should indeed be reserved to courts, is laudable.<sup>52</sup> It misses, however, the point of domestic mandatory rules, which are the perfect instrument for local policies.<sup>53</sup> The position of Belgium is in fact not unique. Other countries have indeed from time to time decided to prohibit arbitration in relation to some commercial distribution relationships.<sup>54</sup> As long as a State refrains from prohibiting arbitration altogether and keeps its inarbitrability provisions restrained to a few, narrowly defined categories of disputes, there is not much one can bring against this practice.<sup>55</sup>

It therefore seems that in some situations, arbitral tribunals and courts will adopt diverging analysis of the validity and enforceability of an arbitration agreement. This is even more so since it seems accepted, at least by some, that the courts will not necessarily apply the same rules when reviewing an award than when deciding whether to refer parties to arbitration.<sup>56</sup> One should therefore enquire about the practical consequences of this divergence.

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<sup>51</sup> The milestone case is *Arblade* : ECJ, 23 nov. 1999, *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL*, joined cases C-369/96 and 376/96, ECR [1999] I-8453.

<sup>52</sup> See *G. B. Born*, *International Commercial Arbitration* (Kluwer 2009), vol. I, at p. 534. Although one may question the idea that if Contracting States are not permitted “to adopt idiosyncratic non-arbitrability rules, out of step with those in other jurisdiction”, this would enhance “the Convention's constitutional status” - it is far from certain that States which have acceded to the 1958 Convention had the intention to concede such a special status to the Convention.

<sup>53</sup> As has been noted, “The legislators and courts in each country must balance the domestic importance of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and the settlement of disputes” - *N. Blackaby and C. Partasides*, *Redfern and Hunter on International Arbitration*, (OUP, 2009), p. 124, § 2.114.

<sup>54</sup> See *e.g.* with regard to certain franchise disputes, 15 U.S.C. § 1226(a)(2), under which “motor vehicle franchise contract” disputes are non arbitrable, save when there is an agreement post-dispute to refer to arbitration. See also the position under Lebanese law, where the Decree-Law N° 34/67 of 5<sup>th</sup> August 1967 prohibits to a certain extent the possibility to submit disputes to arbitration, although this is disputed.

<sup>55</sup> Save denouncing the “application of idiosyncratic rules designed to favor local parties at the expense of foreign entities” (*G. B. Born*, *International Commercial Arbitration* (Kluwer 2009), vol. I, at p. 840). One should note that foreign manufacturers have in the meantime had ample time to learn about the peculiarities of Belgian law and about the easy way out offered by choice of court agreements.

<sup>56</sup> See *Company M v. M. S.A.* (Brussels Court of Appeal 4 Oct. 1985), 14 *YEARB. COMM. ARB.* 618 (1989) : the Court held that the arbitrability of disputes should be ascertained “according to different criteria depending on whether the question arises when deciding on the validity of the arbitration agreement or when deciding on the recognition and enforcement of the arbitral award” (at p. 619). Poudret and Besson also accept that the reaction of the court could be different depending on whether the question of the arbitrability is raised pre- or post-award (*J.-F. Poudret and S. Besson*, *Comparative Law of International Arbitration*, (Thomson/Schulthess, 2<sup>nd</sup> ed. 2007) at p. 288, § 336). Hanotiau, however, disagrees : he notes that “The concern for concordance between Article II(3) and Article V is rather illusory to the extent that the national court which will have to apply Art. II of the NY Convention will not necessarily sit at the place of probable enforcement of the award” (*B. Hanotiau*, ‘The Law Applicable to The Issue of Arbitrability’, *INT'L. BUS. L. J.* (755), 771-772 (1998/7) – with reference to the *Meadows* case).

## 2. Arbitrability and the parties : an unseemingly battle?

It is not enough to conclude that the issue of arbitrability of disputes in relation to distribution agreements, may be subject to divergent analysis when submitted to Belgian courts and arbitral tribunals. True to Professor van Houtte's keen interest for how the law is applied, one must also contemplate the practical consequences of this situation. In a nutshell, the result is far from satisfactory.

It is indeed not uncommon for parties involved in a dispute in relation to the termination of the distribution agreement to start parallel proceedings. When the agreement is terminated by the manufacturer, the distributor will file proceedings before a court in Belgium, seeking payment of the various compensations awarded by the Act. As a reaction to these proceedings or even before they are started, the manufacturer will start arbitration proceedings, as contemplated by the contract. Although there is not much to be gained from shooting first,<sup>57</sup> there will often be a 'race' to start proceedings. It is not uncommon to see the manufacturer file an arbitration request before a court is seized.<sup>58</sup>

The existence of parallel proceedings imposes a substantial burden on the parties. It may also lead to various skirmishes – occasionally, the distributor may for example refuse to appoint an arbitrator, hoping to derail or at least frustrate the arbitration proceedings. It could lead to a full blown war when one of the parties seeks an antisuit injunction in order to stop the concurrent proceedings.<sup>59</sup>

In order to take the exact measure of the complexities involved in such parallel proceedings, it is worth addressing the progress and the consequences of the two proceedings. The debate before the Belgian court on the arbitrability of the dispute will be short.<sup>60</sup> Applying the case law of the Supreme Court, the commercial court will most probably refuse to decline jurisdiction,<sup>61</sup> as least when it is convinced that the arbitral tribunal will not decide the dispute

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<sup>57</sup> Indeed, the *lis alibi pendens* principle has no bearing on parallel proceedings before state courts and arbitral tribunals - although some courts have in the past thought otherwise. See in general *H. van Houtte*, 'Parallel proceedings before State Courts and Arbitration Tribunals. Is there a transnational *lis pendens* –exception in arbitration or jurisdiction conventions ?' in *Arbitral Tribunal or State Courts – Who must defer to Whom?* (ASA Special Series N° 15 – 2001), pp. 35-54.

<sup>58</sup> This is what happened in the *NSU-Audi* case, where the German manufacturer filed an arbitration request in Switzerland after terminating the contract. The manufacturer sought declaratory relief to the effect that the agreement had been properly terminated and that no compensation was due to the distributor.

<sup>59</sup> This is what happened in the *Philip Alexander* case, where a German consumer attempted to avoid the application of an arbitration clause included in a contract for investment in futures and options concluded with a British brokerage firm. The consumer started proceedings in Germany to obtain compensation for the losses incurred on the future market. The English brokerage firm simultaneously started arbitration proceedings in England and requested that the English court issue an antisuit injunction to forbid the investor to continue proceedings before German courts – *Philip Alexander Securities and Futures Ltd. v. Bamberger*, [1997] ILPr 73, discussed in *H. van Houtte*, 'Misrepresentation in Securities Transactions in Europe : Jurisdiction and Applicable Law', in *The Law of Cross-Border Securities Transactions* (Sweet & Maxwell, 1999), pp. 215-220.

<sup>60</sup> By contrast with the situation in other countries, Belgian arbitration law does not include a principle of '*effet négatif de la compétence-compétence*' which would limit the examination by the court of the possibility to refer parties to arbitration. *Comp.* with art. 1448 of the French Code of Civil Procedure, which provides that "*Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable*".

<sup>61</sup> It is worth noting that the court is not required, under Belgian procedural law, to rule first on the motion to decline jurisdiction. Unless it is convinced to do so, the court will deal with both the motion to decline

based on the 1961 Act. This is precisely the situation which sought to be avoided by Article II of the New York Convention, which imposes an obligation to Contracting States to give effect to arbitration agreement. The proceedings will then exclusively turn on the application of the various provisions of the 1961 Act,<sup>62</sup> with the foreign manufacturer attempting to limit as much as possible the various amounts claimed by the distributor.

Turning to the arbitration proceedings, a key question will be whether the arbitrators will make reference to the 1961 Act. In most cases, the agreement will be expressly subject to a foreign law, i.e. that of the manufacturer's main place of business.<sup>63</sup> Although the distributor may attempt to convince the arbitrators to do so, experience has shown that when the contract indeed includes a choice for another law than Belgian law,<sup>64</sup> the arbitrators will not be inclined to apply to provisions of the 1961 Act.<sup>65</sup> The refusal by the arbitrators to let the 1961 Act dictate their analysis of the arbitrability issue,<sup>67</sup> is also unlikely to lead to a successful attempt to set the award aside once it is issued.<sup>68</sup>

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jurisdiction and the merits of the case in one and single ruling, which will considerably increase the burden on the manufacturer.

<sup>62</sup> At least in so far as the distribution agreement granted the distributor the right to represent the manufacturer in Belgium. The 1961 Act is not applicable in so far as the agreement also applies to other territories. This has given rise to some controversy when a distribution agreement concerns another territory than Belgium, but is expressly governed by Belgian law. The Supreme Court has made it clear that in such a case, the 1961 Act does not apply, save when parties have expressly referred to the Act in their agreement – *Nuclear Laser Medicine Srl v. Innogenetics* (Supreme Court, April 4, 2006), RECHTSKUNDIG WEEKBLAD 446 (2006-07).

<sup>63</sup> The distributor may attempt to argue that he did not freely accept the choice for a foreign law but was forced to do so by the manufacturer, who enjoys an economically much stronger position. This line of defense is bound to fail as arbitrators will not lightly accept to depart from an express choice of law.

<sup>64</sup> On the other hand, when the contract is silent on the applicable law, analysis of ICC arbitration practice has shown that arbitrators tend to select the law of the country where the distributor operates – see the analysis by C. *Truong*, Les différends liés à la rupture des contrats internationaux de distribution dans les sentences arbitrales CCI, (Litec, 2002), pp. 157 ff.

<sup>65</sup> Drawing on the works of Sperduti and Gothot, an arbitral tribunal has refused to apply the provisions of the 1961 Act even if it recognized that these provisions constituted internationally mandatory rules : ICC award No 6379 (1990) 17 YEAR. COMM. ARB. 212 (1992). The tribunal underlined that the Belgian act was mandatory but that this mandatory nature was only relevant for Belgian authorities. It could be argued that the arbitral tribunal has a duty to ensure that its award is enforceable and that it should as such take into account mandatory provisions of the place of enforcement (see art. 41 of the 2012 ICC Rules) – see e.g. *J.-F. Poudret and S. Besson*, Comparative Law of International Arbitration, (Thomson/Schulthess, 2<sup>nd</sup> ed. 2007) at p. 285, § 333. This argument is, however, far from decisive : first because it assumes that the award will need to be enforced in Belgium – while Belgium could prove irrelevant for the enforcement. Further, the argument probably gives too much weight to the duty imposed on arbitrators to ensure that the award is enforceable. This duty only seeks to “serve the much more limited purpose of guiding the Court's and arbitrators' actions in relation to the arbitration procedure whenever there may be a *lacuna* in the Rules... [It does not require] the Arbitral Tribunal to ensure that the Award would be subject to execution in any particular country” : *Y. Derains and E. A. Schwartz*, A Guide to ICC Rules of Arbitration, (Kluwer, 2<sup>nd</sup> ed., 2005) at p. 385).

<sup>66</sup> Foreign courts have likewise refrained from applying the 1961 Act even though the European scheme on cross-border contracts makes it possible for a court to take into consideration foreign mandatory rules (formerly Art. 7(1) of the 1980 Rome Convention, now Art. 9(3) of the Rome I Regulation). There is no precedent known of a foreign court giving effect to the 1961 Act as foreign mandatory rule (as noted recently by *P. Kileste, P. Hollander and C. Staudt*, La résiliation des concessions de vente. 50 ans d'évolution de la loi du 27 juillet 1961 (Anthemis 2011) at p. 203, § 370).

<sup>67</sup> See e.g. ICC Award N° 12193 (2004), published in JOURNAL DU DROIT INTERNATIONAL (2007), 1276, with comments by E. SILVA-ROMERO (in this case, the arbitrator refused to take into account the provisions of Lebanese law which restricted the possibility to submit to arbitration disputes in relation to distribution agreements. The arbitral tribunal first attempted to narrow down the obligations imposed by the Lebanese Act. It also held that since the arbitration took place in Switzerland, the issue of arbitrability should be decided on the basis of Swiss law, without taking into account the Lebanese act).

<sup>68</sup> If the seat of the arbitration is located in Switzerland, the arbitrators will feel vindicated by the *Fincantieri* case law of the Swiss Supreme Court. In that case, which concerned a request for payment of commissions

It is not uncommon that the arbitrators conclude their proceedings before the court comes to a ruling. The manufacturer may seek to have the award enforced in Belgium. Unless the arbitrators have applied Belgian law to the dispute, this attempt will, however, prove fruitless. Could the manufacturer argue that enforcement of the arbitral award is prescribed by a specific enforcement regime – Belgium has concluded a number of bilateral arrangements which aim to facilitate reciprocal enforcement of judgments and awards? Under these arrangements, the arbitrability of the dispute is not mentioned as a requirement for recognition or enforcement of the award.<sup>69</sup> It is, however, unclear whether enforcement will be granted, as the court could be tempted to read in these conventions a general principle denying enforcement when the dispute is deemed not to be arbitrable.<sup>70</sup>

A more central concern is what happens to the court judgment issued by the Belgian court. If the court decides in favor of the distributor and awards substantial damages, the question arises whether this ruling will be enforced in other countries. Experience has indeed shown that the manufacturer often does not have assets in Belgium which could be used to satisfy the ruling. This question takes a particular relevance within the EU, since the Member States are bound by a very pro-enforcement regime.<sup>71</sup>

For a long time, the question remained unanswered. Case law did not allow a firm answer.<sup>72</sup> This was in particular true for the position of the ECJ, which had held in the *Marc Rich* case that the mere existence of an arbitration agreement did not take the dispute outside the scope of the Brussels I Regulation.<sup>73</sup> The Court required that attention be paid to the subject matter of the initial claim and not to the objection to the jurisdiction of the court seized of that claim. It could be argued on the basis of this ruling that when a court is seized of a dispute in relation to a distribution agreement, the subject matter of the dispute falls within the scope of application of the Regulation, even though there is a preliminary question arising out of the existence of an arbitration agreement.<sup>74</sup> Discussing the impact of this case Professor van Houtte argued that if one accepted to apply the Brussels I enforcement regime to the judgment

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due to an agent for sales of war material to Iraq, one party opposing arbitration argued that the commercial embargo decided by the international community against Iraq made it impossible to submit to arbitration claims arising out of contracts concluded with Iraq. The Swiss Supreme Court that the arbitrability of a dispute “cannot be denied for the only reason that mandatory provisions of law or a given material public policy make the claim null and void or its execution impossible” (*Fincantieri-Cantieri navai italiani SpA and Oto Melara SpA v M.* (Swiss Supreme Court, June 23, 1992) 20 *YEARB. COMM. ARB.* 766 (1995).

<sup>69</sup> The application of the bilateral agreements raises the question of the relationship with the 1958 New York Convention.

<sup>70</sup> As has been done by the Supreme Court in the *Audi-NSU* ruling : *Audi-NSU Auto Union AG v SA Adelin Petit & Cie* (Court of cassation, June 28, 1979), 5 *YEARB. COMM. ARB.* 257 (1980) – the Court referred to the 1959 Swiss-Belgian bilateral agreement and held that even though this convention did not refer to the arbitrability of the dispute as a condition for enforcement, this requirement could nonetheless be read in the treaty. This reading has been challenged - see e.g. *H. van Houtte* 'L'arbitrabilité de la résiliation des concessions de vente exclusive', in *MÉLANGES OFFERTS À R. VANDER ELST* (Nemesis 1987), at p. 824.

<sup>71</sup> If enforcement is sought in a country outside the EU where disputes relating to distribution agreements are freely arbitrable, it is not excluded that enforcement will be denied. The court addressed could indeed be inclined to think that the side-stepping of the arbitration agreement constitutes a violation of its public policy, which could include the *favor arbitrandum* principle.

<sup>72</sup> See *Assurances générales de France v. Göttgens* (Court of Cassation, Nov. 14, 2000), *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 172 (2001), with comments by *H. Muir Watt*.

<sup>73</sup> *Marc Rich & Co AG v Societa Italiana Impianti PA* (ECJ, July 25, 1991), case C-190/89, ECR [1991] I-3855.

<sup>74</sup> Although another reading could be adopted, to the effect that where a party appears in court proceedings to argue that the case should be stayed for arbitration, “arbitration is the subject-matter of the proceedings in the claim” and the Regulation should therefore not apply – a reading defended among others by Briggs and Rees (*A. Briggs and P. Rees*, *Civil Jurisdiction and Judgments* (Informa, 5<sup>th</sup> ed., 2009), at pp. 678-680, para. 7.08.

issued by the court, a case could be made that enforcement could be denied on public policy ground, as the international obligation to apply the New York Convention is a matter of public policy.<sup>75</sup>

Since the *West Tankers* ruling, there is more certainty on this disputed issue.<sup>76</sup> As is well known, the ECJ decided in this case that if a dispute comes within the scope of the Brussels I Regulation because of the nature of the rights to be protected in the proceedings, then “*a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application*”.<sup>77</sup> As a result, when a Member State court decides incidentally on the existence or validity of an arbitration agreement, its decision appears to fall within the ambit of the Brussels I Regulation when the actual subject matter of the dispute concerns civil or commercial rights.<sup>78</sup> As there is no doubt that disputes concerning the termination of distribution agreements do fall within the scope of application of the Brussels I Regulation, the decision of a Belgian court should therefore enjoy the benefit of the free circulation regime – unless recognition or enforcement may be denied on the basis of a specific ground of refusal.

Parties will therefore be faced with an arbitral award, which may be enforced in all States parties to the 1958 Convention and a judgment issued by a Belgian court, which could be enforced in other EU Member States. Needless to say, this situation is hardly what parties contemplated when they agreed that disputes arising out of their distribution agreement would be arbitrated. Nor can it be said that this situation comports with ideal of justice.

Unless one of the parties gives in and abandons the fight, the battle will move to a new field : after the concurrent proceedings, counsels for the parties will have to deal with conflicting rulings. Let's imagine that the distributor seeks enforcement of the judgment in a country where the manufacturer has assets. If this is a EU Member State, the local court will face a difficult choice : stay true to the European ideal of free circulation of judgments or give priority to the arbitral award in the name of the need to hold parties to their agreement. One key question in this respect will be the role which could be played by the public policy exception. Could it be said that the existence of an arbitration agreement, which is valid and enforceable according to the court addressed, is a ground for refusing recognition/enforcement? Inevitably, opinions may vary on the possibility to rely on the public policy exception to deny recognition or enforcement. Given the international obligations assumed by all Member States when they acceded to the 1958 New York Convention and the legitimate concern to hold parties to their agreement, reliance on the

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<sup>75</sup> *H. van Houtte*, “May Court Judgments that Disregard Arbitration Clauses and Awards be enforced under the Brussels and Lugano Conventions ?” 13 *ARB. INTL.* 1997, 85-92, at p. 88.

<sup>76</sup> See in general *S. Besson*, 'Le statut au sein de l'Espace judiciaire européen d'un jugement écartant une exception d'arbitrage et statuant sur le fond' in *Mélanges de procédure et d'arbitrage en l'honneur de Jean-François Poudret* 329 (Faculté de droit de Lausanne, 1999).

<sup>77</sup> *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers* (ECJ, Grand Chamber, Feb. 10, 2009), case C-185/07, ECR [2009], I-663, at para. 26. The Court was concerned about the application of the Brussels I Regulation to proceedings brought before an Italian court, which concerned a claim for damages for damage done to a jetty by a ship. The question of the application of the Regulation was highly relevant : if the Regulation did not apply to those proceedings, nothing would have prevented the English court from issuing an anti-suit injunction.

<sup>78</sup> This conclusion is not shared by everyone. Briggs and Rees consider that there is still room to argue that a judgment given by the court of a Member State “is not simply a judgment on the merits of the case”, but that “it is a judgment (i) that there is not binding and enforceable obligation to arbitrate”... so that it remains “a decision on arbitration which must fall within Article 1(2)(d) and so outside Article 1” (*A. Briggs and P. Rees*, *Civil Jurisdiction and Judgments* (Informa, 5<sup>th</sup> ed., 2009), at pp. 680, para. 7.08).

public policy exception seems a perfectly reasonable solution.<sup>79</sup> On the other hand, the public policy exception must be construed strictly. One should therefore proceed with caution. There could be room for a distinction on the basis of the reason which justified the refusal by the court of origin to uphold the arbitration agreement. That a court decides that a dispute is not capable of settlement by arbitration because of a well established but also narrowly defined policy of inarbitrability, may deserve more consideration than the judgment of a court which has ignored altogether the arbitration agreement without apparent reason, or which has held, because of a traditional policy of narrow reading of such agreements, that the dispute fell outside the arbitration agreement.

Yet another question could arise, if one of the parties has sought judicial back up for the arbitration agreement or the arbitral proceedings. This could be the case if the party seeking to rely on the arbitration agreement, has sought a declaration from the courts of a Member State that the agreement is valid and enforceable. Enforcement of the judgment which has been issued on the basis that the arbitration agreement was not enforceable, could be denied in that Member State under Article 34(3) of the Regulation.<sup>80</sup>

### **By way of conclusion**

As Hans van Houtte used to say, a whole generation of commercial practitioners has build up a cottage industry on the Belgian Distribution Agreements Act. This practice has received additional importance following the adoption of similar provisions for agency agreements and franchise agreements.

The ruling of the Supreme Court in the *Sebastian International* case has brought some welcome clarification. It does not, however, allow to turn the page and close this long chapter of the history of Belgian arbitration law. The process of determining whether a dispute is indeed arbitrable may be easier to handle for a court sitting in Belgium. It remains obscured on a more general level by a long-standing debate on the relevant law.

In addition, the net effect of *Sebastian International* is to enhance the risk of both conflicting proceedings and conflicting outcomes, as the court and the arbitral tribunal each wrestle with the dispute on their own terms. *West Tankers* has even increased the room for conflict,<sup>81</sup> which will turn on the use of the public policy mechanism.

It is now time to reconsider the position? Certainly, it is very difficult to accept that disputes regarding the termination of distribution agreements may not be referred to arbitration – or only when Belgian law applies – while at the same time, these disputes could validly be

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<sup>79</sup> Unsurprisingly this solution has been advocated by Briggs and Rees - *A. Briggs and P. Rees*, *Civil Jurisdiction and Judgments* (Informa, 5<sup>th</sup> ed., 2009), at pp. 681-682, para. 7.08).

<sup>80</sup> Another question is whether a judgment could be denied recognition under Article 34(3) of the Regulation on the basis that it is irreconcilable with an arbitral award. See the observations of *H. van Houtte*, “May Court Judgments that Disregard Arbitration Clauses and Awards be enforced under the Brussels and Lugano Conventions ?” 13 *ARB. INTL.* 1997, 85-92, at p. 89-90 and the negative answer in *Republic of Congo v. Groupe Antoine Tabet* (Cour de cassation, July 4, 2007), *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 822 (2007).

<sup>81</sup> As acknowledged by AG Kokott in her opinion in the *West Tankers* case, where she concluded that until “a solution by way of law” is adopted, “divergent decisions must be accepted” (*Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers* (ECJ, Grand Chamber, Feb. 10, 2009), case C-185/07, ECR [2009], I-663, at para. 73).

contracted out to all courts of fellow Member States.<sup>82</sup> Even if one accepts that the inarbitrability of such disputes does not denote a general mistrust of arbitration, the comparison reveals that the current position is not tenable.

It is probably not for courts in Belgium to suggest new solution. Although another reading of the 1961 is not entirely excluded,<sup>83</sup> the weight of precedents is so overwhelming that it is very unlikely that courts will one day accept that disputes relating to termination of distribution agreements could validly be referred to arbitration, whatever law the arbitral tribunal will apply.

While some solution may come out of the current process of revision of the Brussels I Regulation, one should above all keep Professor van Houtte's advice in mind : when the sea is rough and the waves are breaking, you should set yourself a well defined goal not too far away in the night and keep sailing. While bracing for some heavy storm, arbitration practitioners should do the utmost to steer the ship to calmer waters. Whether the storm will lie is another question.

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<sup>82</sup> See *Société van Hopplynus v. Coherent Inc.* (Commercial Court of Brussels, Oct. 5, 1994) 22 YEARB. COMM. ARB. 637 (1997) (noting that the mandatory nature of the 1961 Act “does not preclude, for instance that a dispute concerning the termination of a distributorship be submitted to a foreign court applying its national law, under the provisions of an international convention such as [the Brussels I Regulation]”. Hanotiau has argued that “we find it difficult [in light of Article 23 of the Brussels I Regulation] for Belgian courts to persist in contending that the Belgian Statute of 1961 is promoting a policy of the Belgian State which is so strong that it “cannot be circumvented by any means' and should be classified in the very narrow category of international public policy” : *B. Hanotiau*, 'The Law Applicable to The Issue of Arbitrability', INT'L. BUS. L. J. (755), 774 (1998/7).

<sup>83</sup> Compare with the reading given by Lebanese courts of the provision included in the Lebanese Act 34/67, article 5 of which grants jurisdiction to the courts of the place where the distributor is established “notwithstanding any agreement to the contrary”. Lebanese courts have apparently ruled that this provision does not stand in the way of arbitration agreements, but only prohibits agreements granting jurisdiction to another court (see the case law quoted by *C. Truong*, *Les différends liés à la rupture des contrats internationaux de distribution dans les sentences arbitrales CCI*, (Litec, 2002), at p. 94-95).