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**ARBITRABILITY OF COMPETITION DISPUTES:
POSITIONS OF ENGLAND, FRANCE AND KAZAKHSTAN**

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ABSTRACT

This paper addresses positions of England, France and Kazakhstan in the complex issues of subject-matter arbitrability of competition disputes that courts and legal practitioners continue to encounter in practice of private enforcement of competition law, focussing specifically on definition of arbitrability in accordance with the national laws and the established case law, and whether the disputes under the merger control regulations, general rules on competition and norms granting exceptions to those entities that otherwise would be considered in violation of law are arbitrable in the selected jurisdictions. By means of descriptive analysis it will be shown how arbitrability of antitrust disputes is viewed in England and France, and, with help of the comparative analysis, position of Kazakhstan will be explained and revealed of its shortcomings. The goal of this paper is to detach, where possible, English and French legal arbitration systems from the European approach in understanding of the subject-matter arbitrability and evolve lessons for Kazakhstan based on the study of them.

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INTRODUCTION

Arbitration is a concept based on the private agreement of two or more parties that decided to submit any disputes between them for settlement by independent arbitrators. Yet every state has at some point expressed its concern over whether there should be any limits on arbitrability of certain types of disputes, especially when it entails application of mandatory provisions of law by arbitrators. As competition law predominantly contains legal norms of mandatory nature, it was for a long time feared that arbitrators would not be able to properly apply it and reach a decision in correspondence with the established public policy of state.

Arbitrability of competition disputes circles around the characteristics of the subject matter that is to be submitted to arbitration, and, generally, it collides with the provisions of law that may set restrictions or prohibitions on solving these disputes in arbitration. Positions of England, France and Kazakhstan in respect to this matter are substantially different from each other, yet the first two directly acknowledge arbitrators' competence to settle these disputes, whereas Kazakhstani legislator and courts do not always agree on whether there should be any limits set to the notion of arbitrability that would protect interests of the state or its public policy, or arbitrators should be given green light. For instance, Suleimenov¹ states that limitations set on the jurisdiction of the arbitral tribunals, as regulated by the “domestic” arbitration law², significantly restrains development of these tribunals.

The European approach to the arbitrability in general and to the subject-matter arbitrability of competition disputes in particular, has become a research object for many

¹ M.K. Suleimenov, “Arbitration as a Remedy Mechanism for Civil Rights. Alternative Dispute Resolution Mechanisms”, available at the official website of the International Commercial Institution of Kazakhstan http://www.arbitrage.kz/download_462.

² Distinction between the domestic and international commercial arbitration regulations is addressed throughout this thesis and constitutes one of the central factors for analysis of the arbitrability of competition disputes.

legal scholars³, who tried to evaluate all possible questions that may arise in relation to arbitrating competition disputes and who combined and commented on the established case-law. Those Kazakhstani scholars⁴ that focus on the development of national arbitration law mainly criticize provisions of law and how they put obstacles to further promotion of arbitration in Kazakhstan, yet there has been no research on arbitrability of competition disputes in international commercial arbitration under the laws of Kazakhstan at all. This thesis situates Kazakhstan with respect to the arbitrability of antitrust disputes, and analyzes what further directions in the development of arbitration law the country might take and which of them should be avoided.

This thesis addresses questions that arise in connection with the subject-matter arbitrability of competition disputes under the laws of England, France and Kazakhstan. It will focus specifically on the definition of arbitrability in statutes, case law, and arbitrators' competence to solve disputes pertaining to different rules of competition law. By comparing Kazakhstani laws to the English and French rules; the analysis in the thesis will be how, and to what extent these laws limit objective arbitrability in both domestic and international arbitration, as well as note that today's national courts are reluctant to refer parties with competition disputes to arbitration; a number of recommendations to Kazakhstan based on the model of England and France will be given in Chapter II and III.

In relation to the English and French statutory regulations and case-law on the subject-matter arbitrability of antitrust disputes, a descriptive analysis is applied, whereas in respect of the Kazakhstani position a comparative analysis of laws and courts' decisions with rules and principles developed by England and France, as well as with the established European

³ See Gordon Blanke and Renato Nazzini, "Arbitration and ADR of Global Antitrust Disputes: Taking Stock: Part I", G.C.L.R. 2008, 1(1) 46-56, Sotiris I. Dempegiotis, "EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003: Conceptual Conflicts, Common Ground, and Corresponding Legal Issues", Journal of International Arbitration 2008, 25(3) (2008) 365-395, Georgios I. Zekos, "Antitrust/Competition Arbitration in EU versus US Law", Journal of International Arbitration 2008, 25(1) 1-29, Luca G. Radicati Di Brozolo, "Arbitration in EC Merger Control: Old Wine in a New Bottle", E.B.L.R. 2008, 19(1) 7-15, etc.

⁴ See I.P. Greshnikov, "International, Foreign and Domestic Arbitration", Treteiskij Sud 2005, (2), 85.

approach to the arbitrability is applied. This thesis does not address issues of applicable law, and the whole analysis is based on the presumption that the applicable law is the one of England, France or Kazakhstan⁵.

The first chapter of the thesis discusses the matter of arbitrating competition dispute and how it has evolved for the past fifty years. It also addresses the questions why, and to what extent national courts have been unwilling to enforce arbitration agreements or arbitral awards on competition disputes, as well as that in Kazakhstan, as the practice shows, they continue to be reluctant to refer the parties to arbitration when issues of competition law are concerned. This chapter defines stages on when an issue of competition law can be raised in the dispute and how it may affect arbitrability of the dispute in whole.

The second chapter addresses the notion of arbitrability of competition disputes as the subject-matter arbitrability, its different interpretations and definitions in legal theory and under the statutory provisions of England, France and Kazakhstan. Development of the “Second Look” doctrine is also covered herein, since it defines the limits created by the national courts when confirming arbitrability and arbitrators’ competence in settling competition disputes.

The last chapter concerns arbitrability of rules and exceptions of competition law, dividing them for that purpose into the merger control rules, rules on competition and abuse of dominant position and block exemption regulation. It will be shown that whereas the latter is existent under European law only, there is a concern whether disputes involving Kazakhstani mandatory legal provisions falling under the competence of state authorities to grant exceptions may be submitted to arbitration at all; in this thesis a position of arbitrability of the exception granting rules is taken, with recommendations how to surpass any uncertainty regarding their arbitrability.

⁵ For the purpose of this thesis reference to “England” should imply England, Wales and Northern Ireland.

Competition Disputes and Commercial Arbitration

For the past few decades, international commercial arbitration has become a leader in the alternative dispute resolution mechanisms, outpacing popularity of mediation and conciliation, as well as leaving far behind the civil litigation, especially when it comes to disputes with international element. According to W. Park⁶ these last fifty years have brought “*embarrass de richesse* in the evolution procedural architecture”, which made its contribution into “enhancing” of the reliability of the arbitral process. Parties to international contracts are now more willing to submit their possible or existing disputes to arbitration, as it offers them a great list of advantages over the risks and costs that would have been borne by them having they decided to go to the national courts.

Arbitrability of a particular type of disputes, especially competition disputes, has for some time been debatable, and was based on concerns of the state over protection of its public policy and distrust towards independent arbitrators in application of mandatory provisions of law. However, throughout the development of arbitration law, the importance of competition disputes’ arbitrability has become recognized and confirmed by the courts of various states and fixed in national laws, following the push from adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁷ (hereinafter referred to as “New York Convention”).

In this Chapter legal grounds for arbitrating disputes will be discussed in short, with further analysis of them in details been conducted in Chapter II of this thesis. Stages of dispute settlement at which an issue of arbitrability may be raised are also covered by the second part of this Chapter.

⁶ William W. Park, *Arbitration of International Business Disputes* (New York: Oxford University Press, 2006), 5.

⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, available at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/1958_NYC_CTC-e.pdf.

Grounds for Arbitrating Competition Disputes

This subchapter addresses question of legal backgrounds for arbitrating competition disputes in England, France and Kazakhstan, covering both national legislation and ratified international documents, such as the New York Convention or Geneva Convention⁸.

Nowadays a majority of international commercial agreements that may be giving rise to antitrust concern set arbitration as the alternative dispute resolution forum for any disputes and claims the parties may have arising out or in connection with these agreements⁹. It is also maintained by Blanke and Nazzini who state that competition law issues will, most frequently, arise from “an ordinary contractual dispute submitted to arbitration”¹⁰. But before adoption of the New York Convention arbitration of competition disputes has been considered as something strongly undesirable as it could endanger the established public policy of the state by either improper application of law by arbitrators, the latter’s possible dependence on the parties of the arbitration agreement and probable neglect towards the third parties’ interests that are not covered by arbitration agreement. It has been not so long ago since the co-existence of competition law and international arbitration has ceased to be a “taboo subject”, leaving other questions open as to whether, when and how to arbitrate disputes concerning antitrust regulations¹¹. However, in jurisdictions of post-soviet countries, as well as developing countries and countries with transitional economies, the question regarding whether competition disputes may be arbitrated at all remains open and, in case of Kazakhstan, not much discussed in the literature.

⁸ European (Geneva) Convention on International Commercial Arbitration, 21 April 1961, available at: <http://www.jus.uio.no/Im/europe.international.commercial.arbitration.convention.geneva.1961>.

⁹ See G. Blanke and R. Nazzini, “Arbitration and ADR of Global Antitrust Disputes: Taking Stock: Part I”, *Global Competition Litigation Review* 1(1) (2008): 47.

¹⁰ *Ibid.*, at 48.

¹¹ Sotiris I. Dempegiotis, “EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003: Conceptual Conflicts, Common Ground, and Corresponding Legal Issues”, *Journal of International Arbitration* 2008, 25(3), 365.

New York Convention has distinguished subject-matter arbitrability and public policy as two different grounds for refusal of recognition and enforcement of arbitral awards¹², thus enabling its member states to adopt provisions that would regulate what disputes can be submitted to arbitration, leaving public policy violation as a ground that can be taken into consideration by national courts when deciding whether to enforce an arbitral award or not.

Concerns over the arbitrability of competition disputes were active and very common before the landmark *Mitsubishi*¹³ and *Eco Swiss*¹⁴ cases, which at their time lifted the curtain of doubt and hesitancy and opened arbitration for disputes involving competition law issues. For England the role of this “icebreaker” was played by the *ET Plus SA*¹⁵ case, where The English High Court noted:

... There is no realistic doubt that such “competition” or “antitrust” claims are arbitrable; the matter is whether they come within the scope of the arbitration clause, as a matter of its true construction¹⁶.

French courts have expressly confirmed arbitrability of EC competition law in *Ganz*¹⁷ and *Labinal*¹⁸ cases. In Kazakhstan, unfortunately, there is no established precedent that would indicate its position towards promotion of arbitration or, vice versa, its willingness to preserve exclusive jurisdiction of national courts in question competition law. It is for this reason why this paper will mainly address statutory provisions of the RoK regarding arbitration with analysis of their correlation and narrow insight in the available, yet limited, judicial history of application of those norms.

¹² Article V(2)(a)-(b) of the New York Convention.

¹³ *Mitsubishi Motor Corporation (Japan) v. Soler Chrysler Plymouth Inc.*, US Supreme Court, 2 July 1985, Yearbook Commercial Arbitration 1986, 833.

¹⁴ *Eco Swiss China Time Ltd. V. Benetton International NV*, Case C-126/97, [1999] ECR I-3055, June 01, 1999.

¹⁵ *ET Plus SA & Ors v Welter & Ors* [2005] EWHC 2115 (Comm).

¹⁶ *Ibid*, at 51.

¹⁷ *Ganz v. Nationale des Chemins de Fer Tunisiens (SNCFT)*, CA Paris, 29 March 1991, Rev. Arb., (1991) 478.

¹⁸ *Labinal v. Mors*, CA Paris, 19 May 1993, Rev. Arb., (1993) 645.

National laws of England, France and Kazakhstan on international commercial arbitration are based on the UNCITRAL Model Law¹⁹. This law does not directly deal with the subject-matter arbitrability, leaving it up to the states to determine what would constitute such and whether they would like to exclude from it any particular type of disputes, such as divorce disputes in France²⁰.

United Kingdom has enacted Arbitration Act in 1996 that became applicable to England, Wales and Northern Ireland, with Scotland adopting its own Arbitration Act in 2010. Development of an arbitration-friendly environment in England is well justified by the operation of the London Court of International Arbitration (hereinafter referred to as “LCIA”), one of the top three arbitration institutions chosen for the alternative dispute resolution. For instance, a great percentage of international contracts executed on the territory of the RoK include an arbitral clause referring the parties to the LCIA, and not to the local arbitration institutions²¹. Issues of arbitrability under the English Arbitration Act are covered in Section 6, however, it sets arbitrability based on the scope of the arbitration agreement only, leaving it to the case-law to establish the limits of the subject-matter arbitrability and to define whether competition disputes may be arbitrated at all in England. Provisions of this Act and case-law are analyzed in details in the Subchapter 2.1.2 of this Thesis.

It is rather expected that the French legal system regulating international commercial arbitration would be the most developed, as it hosts the world’s most popular arbitration institution, yet, in my opinion, it continues to be the most extraordinary example of the

¹⁹ UNCITRAL Model Law on International Commercial Arbitration of 1985, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

²⁰ Article 2060 of the Civil Code of France, available at: <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=610>.

²¹ Nowadays Kazakhstani entrepreneurs tend to submit their disputes with international or local investors either to foreign arbitration institutions or to the national courts. See interview with the Deputy Chairman of the International Commercial Arbitration at the Chamber of Commerce of Kazakhstan, Ajdarkhan Abikejev. “*Arbitration is More Advantageous*”, Business i Vlast, 30 May 2008, accessed on 12 March 2011, <http://www.and.kz/175/arbitrazh>.

continental law, with collaboration of solid practice established by national courts confirming the subject-matter arbitrability of antitrust disputes and rather peculiar definition of what disputes may be sent to arbitration. Arbitration laws of France are directed at the promotion of arbitration and attraction of international contracts parties to dispute resolution in the International Chamber of Commerce Arbitration (hereinafter referred to as “ICC”). Recent reform of arbitration law²² in January 2011 introduced significant changes into the system amongst which, for example, exclusion of the form requirements to the arbitration agreements, and is directed at further support and advertising of ICC, but the issue of arbitrability is not affected by this reform as it does not introduce any amendments into articles governing such. Currently, laws on Arbitration include Articles 2059-2061 of the Civil Code and articles 1442-1507 of the Code of Civil Procedure²³, out of which provisions of the Civil Code are directly applicable to the arbitrability.

In order to fully answer whether competition disputes are arbitrable on the territory of Kazakhstan, the analysis of both, domestic and international arbitration laws’ provisions will be carried out in Chapter II of the thesis; it will be shown that there is a significant difference in respect to the antitrust arbitrability under the norms of these laws. Nowadays, one may come to the opinion that Kazakhstan is on its way to introduce the more favorable environment for business disputes resolution through alternative means. Two laws on arbitration are now in force, one for domestic²⁴ and one for international arbitration²⁵. In

²² “It clarifies and enhances an already arbitration-friendly law by codifying case-law and including innovative provisions in the Code of Civil Procedure (Articles 1442 to 1527)”. See Christophe von Krause, “New French Arbitration Law Clarifies Role of National Courts and Reinforces Recognition and Enforcement of Arbitration Awards”, Kluwer Arbitration Blog, 25 February 2011, accessed on 12 March 2011, <http://kluwerarbitrationblog.com/blog/2011/02/25/new-french-arbitration-law-clarifies-role-of-national-courts-and-reinforces-recognition-and-enforcement-of-arbitration-awards/>.

²³ Both these acts can be found at <http://www.legifrance.gouv.fr>.

²⁴ Law of the RoK on Arbitral Tribunals (*Treteiskij Sud*) No. 22-3 of 28.12.2004 (as amended on 05.02.2010), available at <http://www.pavlodar.com/zakon/?dok=03080&ogl=all>.

²⁵ Law of the RoK on International Commercial Arbitration (*Mezhdunarodnyj Kommercheskij Arbitrazh*) No. 23-III of 28.12.2004 (as amended on 05.02.2010), available at <http://www.pavlodar.com/zakon/?dok=03081&ogl=all>.

August 2011 a new law on mediation²⁶ will come in force bringing Kazakhstan yet another step closer to positioning itself as an attractive ADR-friendly country. However, as it will be shown further in Chapter II, domestic arbitration law is more restrictive towards arbitrability of competition disputes, providing for the direct exclusion of some of these disputes from the arbitrators' jurisdiction and maintaining indirectly exclusive powers of state authorities over aspects of competition law.

Statutory provisions do not always answer the question of arbitrability, leaving it up to the national courts to fill in possible gaps and controversies of law by adopting precedents. For common-law England case-law constitutes the main body of rules deciding whether antitrust disputes may be submitted to arbitration and whether there exist any limitation to that. In case of France, which is a country of continental legal system, precedents mainly indicate the tendency of national courts in deciding whether to refer the parties to arbitration or to enforce an arbitral award concerning antitrust. For both, England and France, another body of case-law, adopted by the European Court of Justice (hereinafter referred to as "ECJ"), contains rules on interpretation of the European supranational legislation, among which there is the Treaty on Functioning of European Union²⁷ (hereinafter referred to as "TFEU") providing a legal framework for the EC competition law²⁸, and Regulation 1/2003²⁹ on implementation of Articles 101 and 102 of the TFEU. In England and France it has been long established that arbitration and competition disputes do not stand on opposite sides of the river and may be interconnected³⁰.

²⁶ Law of the RoK on Mediation No. 401-IV of 28.01.2011.

²⁷ The Treaty on the Functioning of the European Union, O.J., 9 May 2008, C115/47.

²⁸ Articles 101 – 106 of the TFEU.

²⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:HTML>.

³⁰ See, for England: *ET Plus SA & Ors v Welter & Ors* [2005] EWHC 2115 (Comm), *Premium Nafta Products Limited (20th Defendant) and others (Respondents) v. Fili Shipping Company Limited (14th Claimant) and others* (Appellants) [2007] UKHL 40, *Fiona Trust & Holding Corp. v Privalov* [2006] APP.L.R. 10/20, etc.; for France: *Coveme v. Compagnie Francaise des Isolants*, Court of First Instance, Bologna July 18, 1987,

There is no case-law in Kazakhstan, and any decision made by the Supreme Court does not necessarily mean that it will be further upheld in the practice of law application, thus meaning that even if one decision forbids arbitrability, the next one, regardless of whether the facts are the same or similar to the previous case, can be decided contrariwise. Arbitrating of competition disputes in Kazakhstan has not been fully covered by the previously conducted legal researches, however, one case³¹ ruled by the Supreme Court of the country shows a rather unique position when deciding whether to refer parties to arbitration or not. It will be discussed in more details in Chapter III(2)(2).

In order to understand the essence of arbitrating competition disputes and to comprehend the effect the issue of arbitrability may have, one needs to distinguish when issues of arbitrability of competition law may arise within the process of the dispute settlement.

Stages When Issues of Arbitrability May Be Raised

An issue of arbitrability may be raised by either of the parties or sometimes by the court on its own motion at a number of stages throughout the course of the dispute settlement; and depending on the stage, different considerations to arbitrability may be given. These stages mainly reflect the major phases of dispute settlement in arbitration, followed by the process of enforcement of awards.

Varady defines four stages when arbitrability issue can arise:

before a national court deliberating whether to enforce an arbitration agreement; before the arbitrators themselves as they try to decide the scope of their competence; before a court, generally in the country where the arbitration has taken place, in an action to set aside the award; and, finally, before a court asked to recognize and enforce the award³².

Yearbook Commercial Arbitration, 1992, *SNF v. Cytec*, Cour de Cassation, chamber civil 1, 4 June 2008 No. 06-15320, etc.

[2007] UKHL 40,

³¹ Regulation No. 3a-148/2-03/03-04, <http://www.supcourt.kz/acts/>. This case will be used as a central in showing Kazakhstan current position in the question of arbitrability of competition disputes.

³² Tibor Varady and John J. Barcelo III, et al., *International Commercial Arbitration: A Transnational Perspective*, 4th ed., (USA: West, 2009), 234.

In accordance with the New York Convention³³ national courts should refer parties to arbitration provided that they have an arbitration agreement, however, if the court finds that, after the request of one of the parties, that arbitration agreement is null and void, inoperative or incapable of being performed, it should refuse enforcement of such agreement. Finding that any dispute in question forms an antitrust concern when the national laws expressly prohibit its submission to arbitration may constitute a ground specified above for refusing enforcement.

Arbitrability of competition disputes at the stage of enforcement of arbitration agreement has been explicitly recognized by English and French courts, holding that antitrust disputes should be capable of settlement by arbitrators with courts' been able to further review arbitral awards to ensure that EC competition law has been properly applied, without going into merits of the case. In Kazakhstan earlier noted *AES Santri Power* case an issue of arbitrability arose at this stage with the court deciding that arbitration agreement was incapable of been performed. Nonetheless, there is no direct prohibition in the Kazakhstani law governing international commercial arbitration to refer parties to arbitration with disputes involving antitrust; opposite is provided for in the domestic arbitration law. This will be further addressed in Chapter II of this thesis.

The stage when arbitrators have to determine their competence to settle a particular dispute is not different from the stage of enforcement of arbitration agreement, since the arbitrators would have to examine whether under the applicable law they were or were not deprived of powers to arbitrate competition disputes. Thus, subject-matter arbitrability of competition disputes at this stage entails the same analysis of national law provisions by arbitrators that courts would have to carry out in the first stage.

³³ Article II(3) of the New York Convention.

At the stage of setting aside an arbitral award an issue of arbitrability, as a general rule, is raised as a defense by the losing party to annul the award by invoking of public policy principle and stating that under the applicable law competition disputes are non-arbitrable. This defense in the EU is called “Euro-defense”³⁴. Here, arbitrability of competition disputes is closely interrelated with the “Second Look” doctrine, that is discussed in details in Chapter II(1)(3) of this thesis.

The final stage of recognition and enforcement of arbitral award is governed, first of all, by provisions of Article V of the New York Convention, with Article V(2)(a) dealing with an issue of arbitrability of the disputes specifically. At this phase, arbitrability becomes “independent” from requests of the parties, and may be applied as a ground for refusing enforcement of an award by the court should it find that competition dispute in question is not capable of settlement by arbitration.

All these four stages also vary from each other in relation to the applicable law, meaning that at different stages different law should be applied. This thesis does not cover issues of applicable law and constructs the whole analysis and reasoning on the presumption that the applicable law is one of either England, France or Kazakhstan.

³⁴ For further discussion on the Euro-defence within the matter of arbitrability of competition disputes, see Gordon Blanke and Renato Nazzini, “*Arbitration and ADR of Global Antitrust Disputes: Taking Stock: Part I*”, *Global Competition Litigation Review* 1(1) (2008): 46-56.

NOTION OF ARBITRABILITY OF COMPETITION DISPUTES

In order to fully comprehend the essence of arbitrability of competition disputes one needs to go into the basis of this notion, starting from the definition given to arbitrability by different legal scholars. This will facilitate the analysis of what forms arbitrability itself and how competition disputes specification of this conception is affected by the terminology. Proceeding with the statutory provisions that define arbitrability and set, in some cases, limitations on it, gives an insight into the positions of England, France and Kazakhstan as to whether competition disputes should be capable of settlement by arbitration or not. An established case-law in respect of the arbitrability of antitrust disputes also composes an important and essential aspect of national rules pertaining to the arbitrability, especially in case of England and France. The “Second Look” doctrine is included in this Chapter in order to analyze the rule set by the *Eco Swiss* case, and to further explain how at the stage of enforcement of arbitral awards national courts may indirectly limit the arbitrability of competition disputes.

Defining Arbitrability

There have been numerous attempts to define arbitrability by scholars and practitioners³⁵ both within the jurisdiction of the European Union and on the territory of the post-Soviet countries, including Kazakhstan. As Brekoulakis³⁶ emphasizes, an issue of arbitrability is at the crossroads between contractual and jurisdictional natures of international arbitration. Following this remark, it is important to note that regardless of the contractual origin of the

³⁵ A number of suggested definitions will be given in Chapter II(2).

³⁶ L.A. Mistelis and S.L. Brekoulakis eds., *Arbitrability: International and Comparative Perspectives* (Hague: Kluwer Law International, 2009), 3.

arbitrators' powers, they have been acknowledged to be able to apply mandatory provisions of competition law as national courts would.

Defining arbitrability comes down to comprehending privacy of the arbitration origin. Being based on the parties' will it cannot go beyond it, yet it should remain within the established legal provisions and prohibitions. The consent of the parties needs to be valid and "lawful" to make it enforceable, and this is evaluated from two points: whether the agreement relates to "subject-matter ... capable of being resolved by arbitration" and whether it has been concluded by the parties "entitled to submit their dispute to arbitration"³⁷. Therefore, notion of arbitrability *per se* can be divided into objective (subject-matter) and subjective arbitrability, meaning that objective arbitrability will deal with whether the dispute in fact can be submitted to arbitration without violating strict limitations or prohibitions imposed either by law or practice of particular jurisdiction, and subjective – whether the parties' legal capability allows them to submit any or particular disputes to arbitrability. For the purpose of this paper subject-matter arbitrability will be discussed in details, as the subjective arbitrability does not concern disputes raised by the undertakings involving issues of competition law.

Brekoulakis offers the following definition of arbitrability focusing on its functions:

arbitrability is ... a specific condition pertaining to the jurisdictional aspect of arbitration agreements ... a condition precedent for the tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), rather than a condition of validity of an arbitration agreement (a contractual requirement)³⁸.

Another point of view is taken by Youssef in defining arbitrability:

an objective notion, arbitrability is ... the fundamental expression of the freedom to arbitrate. It defines the scope of the parties' power of reference or the boundaries of the right to go to arbitration in the first place³⁹.

³⁷ P. Fouchard, E. Gaillard, B. Goldman, *International Commercial Arbitration*, E. Gaillard, J. Savage eds. (Hague: Kluwer Law International, 1999), 312.

³⁸ S. Brekoulakis, *supra* note 36, at 39, para. 2-63.

³⁹ Karim Youssef, "The Death of Inarbitrability", in *Arbitrability: International and Comparative Perspectives*, L.A. Mistelis, S.L. Brekoulakis eds. (Hague: Kluwer Law International, 2009), 49, at para. 3-6.

Shore states that:

[i]nternationally, arbitrability refers to whether specific classes of disputes are barred from arbitration either because of public policy or because they are outside of the scope of the arbitration agreement ... arbitrability refers to whether the specific claims raised are of [a] subject matter capable of settlement by arbitration, and are not subject to the exclusive jurisdiction of ... courts⁴⁰.

As Carboneau highlights, arbitrability is “the essential dividing line between public and private justice”⁴¹. This statement is of importance as it maintains the fact that however vast private power of arbitration may grow, countries will always tend to protect the weakest and the most strategically important for their own jurisdiction⁴².

Personally I find Shore’s definition the most appropriate and practical one as it indicates exactly the issues one encounters when willing to arbitrate competition disputes, the scope of regulation that needs to be taken into account when deciding whether to submit disputes between the parties to arbitration or not, and whether arbitral award might face any problems at the enforcement stage.

In the light of almost universal application of the New York Convention of 1958, issue of arbitrability has become less of an obstacle at the stage of recognition and enforcement of arbitral awards. Furthermore, in a way it ensured the notion of arbitrability that can be raised at the very first stage of arbitration, when deciding the competence of arbitral tribunal and whether the dispute at hand falls under the subject-matter capable of been submitted to arbitration. Here, Di Pietro⁴³ distinguishes the objective or subject-matter arbitrability from

⁴⁰ Laurence Shore, “*The United States’ Perspective on “Arbitrability”*”, in *Arbitrability: International and Comparative Perspectives*, L.A. Mistelis, S.L. Brekoulakis eds, (Hague: Kluwer Law International, 2009), 69-70, at para. 4-2.

⁴¹ Thomas E. Carboneau, “*Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States*”, in *Arbitrability: International and Comparative Perspectives*, L.A. Mistelis, S.L. Brekoulakis eds, (Hague: Kluwer Law International, 2009), 143, at para. 8-1.

⁴² This is, however, of more relevance for post-soviet countries, where arbitration has only begun to gain speed. Kazakhstani legislation on arbitration is less than 6 years old.

⁴³ Domenico Di Pietro, “*Arbitrability under the New York Convention*”, in *Arbitrability: International and Comparative Perspectives*, L.A. Mistelis, S.L. Brekoulakis eds, (Hague: Kluwer Law International, 2009), 91, at para. 5-18.

the “quality of the parties or their will”, and stresses that it is a “*ratione materiae*”, thus it should be differentiated from “*ratione personae*” under the Convention.

Subject Matter Arbitrability

As it was pointed out earlier, subject-matter arbitrability answers whether the dispute in question can be submitted to arbitration so that it does not break any legal limitations or prohibitions imposed by national laws of the state, which govern the main agreement including arbitral clause or arbitration agreement. Sometimes international contracts’ parties may also want to ensure that in case of the dispute the national laws will not preclude them from enforcing either arbitration agreement or arbitral award, meaning that they acknowledge arbitrability of particular disputes. Arbitrability of competition disputes is an issue of subject-matter arbitrability that can be analyzed by reference to the statutory requirements and established practice.

Under the New York Convention provisions an issue of arbitrability remains unclear, since it is not directly provided for, yet is covered indirectly in articles I, II and V. Under art. I(3) it is stated:

... State ... may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

As Di Pietro maintains⁴⁴, by allowing the States to put limitations to differences that may arise out of commercial legal relationships this provision becomes “indicative of the arbitrability “thread”. He claims that otherwise some countries with continental legal system that differentiate commercial transactions from non-commercial would not hold on to the Convention. Arbitrability under Article I(3) of the Convention thus clearly may be limited by the States, on their own accord, when they decide to allow contractual disputes out of the

⁴⁴ *Ibid.*, at 88, para. 5-10.

jurisdiction of national courts. In case with the competition disputes it is of importance due to the fact that at the enforcement of arbitral award stage national courts may turn to Article V(2)(a) defense and refuse enforcement. And this can be strongly supported by such provisions of national laws, as the one of Kazakhstani Law⁴⁵, permitting referral of parties to arbitration with disputes arising out of civil contracts only. As it was mentioned earlier in Chapter I *ET Plus SA*⁴⁶ case and *Coveme SpA* and *SNF/Cytec* cases⁴⁷ have confirmed arbitrability of competition disputes in England and France respectively⁴⁸. According to *Zekos*⁴⁹ the European Commission, notwithstanding its silence in respect of its position towards arbitrability of competition disputes, has not been trying to promote arbitration of these disputes, “although it has not excluded the possibility to arbitrate” them⁵⁰.

Under Article II(1) and (3) of the New York Convention a question of arbitrability is considered within the notion of arbitration agreement. Reference to the disputes “concerning a subject matter capable of settlement by arbitration”⁵¹ is the essence of the conventional identification of “arbitrability”, as it refers to the subject matter of the dispute and not subjective capacity of parties to refer with such to arbitration. Here an indication on link between the subject-matter arbitrability and arbitrability that follows from the scope of arbitration agreement reflects an important insight into the discussion about the correlation of two notions: arbitrability and severability. Although severability is not covered by this thesis, it is important to mention that accordingly to the established practice of arbitrating

⁴⁵ Art. 6(4) of Kazakhstani law on the International Commercial Arbitration.

⁴⁶ *ET Plus SA* case, supra note 15.

⁴⁷ *Coveme v. Compagnie Francaise des Isolants*, Court of First Instance, Bologna July 18, 1987, Yearbook Commercial Arbitration, 1992, *SNF v. Cytec*, Cour de Cassation, chamber civil 1, 4 June 2008 No. 06-15320.

⁴⁸ Although under both, English and French, jurisdictions arbitrability of competition disputes has been confirmed, it was decided differently, with French courts setting certain limits. For instance, in the *English ET Plus SA* in 2005 arbitrability was confirmed regardless of anything, and in the following cases it was further enshrined. In the recent French *SNF/Cytec* case the court ruled that an arbitral award would, as a rule, be enforced unless there is a *flagrant* violation of EU competition law.

⁴⁹ Georgios I. Zekos, “*Antitrust/Competition Arbitration in EU versus US Law*”, Journal of International Arbitration 2008, 25(1), 20.

⁵⁰ See Commission Decision 89/467, proceedings pursuant to Article 85 [now 101] of the Treaty IV/30.566, UIP, 1989 O.J. (L 226) 25.

⁵¹ Article I(1) of the New York Convention.

competition disputes, alleged invalidity of the main contract does not entail invalidity of arbitration agreement.

Without doubt, it is the national legislation that determines what disputes are to be considered non-arbitrable and what can be submitted by the parties to arbitration at the drop of a hat, whenever the arbitration clause or agreement are present. As was remarked by Rubino-Sammartano⁵² all arbitration rules principally state that it is the applicable law that decides whether disputes are capable of settlement by arbitration or not. In two world's most popular arbitration institutions⁵³, ICC and LCIA, the Rules on Arbitration⁵⁴ do not content any specific reference to arbitrability, however they maintain the rule of the scope of arbitration agreement, when any dispute arising out of or in relation to the agreement may be submitted to the institution. Same can be said with respect to the Regulations of the International Commercial Arbitration institution located in Almaty, Kazakhstan. However, the latter has also a direct instruction to what disputes may become subject to the domestic or international arbitral proceedings⁵⁵. These are nothing more than a copy-paste version of the statutory provisions of Laws on Arbitral Tribunal and International Commercial Arbitration.

Whereas provisions of the New York Convention provide for the legal framework in accordance with which member states are to adopt their national laws, including those that govern what disputes may be submitted to arbitration, and whereas Regulations of known arbitration institutions may provide for the basis for the arbitrators' competence, the main point of reference when deciding in a particular situation whether the subject-matter of the dispute in question may be settled by arbitration is the national law.

⁵² Mauro Rubino-Sammartano, *International Arbitration: Law and Practice*, 2nd ed. (Hague: Kluwer Law Arbitration, 2001), 172.

⁵³ See 2010 International Arbitration Survey: Choices in International Arbitration carried out by the White&Case, available at <http://choices.whitecase.com/news/newsdetail.aspx?news=3788>.

⁵⁴ Tibor Varady, et al. eds, *Document supplement to International Commercial Arbitration: A Transnational Perspective* (United States of America: West, 2009), at 236 and 289.

⁵⁵ Article 1(2) of the Rules of the International Arbitration Institution of Kazakhstan, as approved by the decision of the general meeting of participants of 9 March 2010; available at: <http://www.arbitrage.kz/92>.

Statutory Definitions of Arbitrability in Selected Countries

The question whether disputes may be submitted to arbitration is not answered exclusively by the case-law and in both, civil and common law systems, refers to the provisions of national laws, that serve as a core for all the precedents on when, why and on what grounds arbitrability of particular disputes is confirmed or denied. Notion of arbitrability of competition disputes per se is existent in the domestic arbitration law of Kazakhstan, and is absent from any other statutes of England and France that will be analyzed in details in the following sections.

England

It was said previously in Chapter I of this thesis that English arbitration law has been based on the UNCITRAL Model Law on International Commercial Arbitration, copying its provisions regarding arbitrability from word to word, thus introducing no specification as to what disputes may be refused arbitrability or not. Rubino-Sammartano⁵⁶ places an interesting idea that English law has not been able to create a clear dividing line between those disputes that are arbitrable and those that are not, and that instead it “rather proceeds in accordance with its traditions on a case by case basis”. Indeed, it is practically impossible to find any distinguishing norms on what disputes can be submitted to arbitration.

Previously existing legislation⁵⁷ provided for a number of exceptions with regard to the disputes that may be sent to arbitration; those included disputes arising out of admiralty, commodity market, and insurance contracts governed by English law. Then, accordingly to Park it was not only the question of public enforcement of these issues through litigation, but of establishing of “broader behavioral rules to guide business conduct outside the particular

⁵⁶ Rubino-Sammartano, *supra* note 52, 174.

⁵⁷ Arbitration Act 1979, available at http://www.legislation.gov.uk/ukpga/1979/42/pdfs/ukpga_19790042_en.pdf.

dispute”⁵⁸. The very essence of the common-law system was put into the basis of arbitrability conception. However, even then competition disputes did not themselves constitute a set statutory exclusion from arbitration scope, but there rather were concerns about the public policy and an impact arbitrating of these disputes could have on it.

Nowadays, under Section 6(1) Arbitration Act of 1996 a very general definition of the permissible scope of arbitration agreement stipulates that parties may submit to arbitration any “present or future disputes (whether they are contractual or not)”⁵⁹. No further specification as to whether any of such disputes may be viewed as contrary to the public policy and thus directly non-arbitrable is present. However, agreeing with Rubino-Sammartano’s suggestion, mentioned above, it would be necessary to go into the case-law of England to understand its position towards the arbitrability of competition disputes.

The breakthrough for arbitrating of antitrust disputes was made by the English High Court in *ET Plus SA* case⁶⁰ in 2005, where it confirmed that competition disputes themselves are not non-arbitrable. However, it also stated that whenever such dispute is to be submitted to arbitration, it should be construed within the exact wording of the arbitration clause as to whether it is indeed covered by agreement to arbitrate. As Nazzini and Blanke⁶¹ comment, the “anachronistic approach to the “true constriction” of the arbitration clause *a l’anglaise*” has ceased to be applicable after the House of Lords’ judgment in *Fiona Trust*⁶² and *Premium Nafta* case⁶³.

In *Fiona Trust* case Court of Appeals ruled that competition disputes would be implied to be falling under any arbitration clause that provides for submission of “any dispute” to

⁵⁸ William W. Park, “Private Adjudicators and the Public Interest”, in *Arbitration of International Business Disputes: Studies in Law and Practice* (New York: Oxford University Press, 2006), 211.

⁵⁹ Arbitration Act 1996, available in Tibor Varady, et al. eds., *Document supplement to International Commercial Arbitration: A Transnational Perspective* (United States of America: West, 2009), 122.

⁶⁰ *ET Plus SA* case, *supra* note 15.

⁶¹ G. Blanke and R. Nazzini, *supra* note 9, at 50.

⁶² *Fiona Trust & Holding Corp. v Privalov* [2006] APP.L.R. 10/20.

⁶³ *Premium Nafta Products Limited (20th Defendant) and others (Respondents) v. Fili Shipping Company Limited (14th Claimant) and others* (Appellants) [2007] UKHL 40.

arbitration, unless directly excluded from the scope. This decision was confirmed by the *Premium Nafta* case decided by the House of Lords. These two cases together formed even a broader interpretation of arbitrability of competition disputes as they introduced a new insight into the intended scope of the agreement to arbitrate. It was held that antitrust disputes would be falling outside of such scope only when directly excluded. Thus, if parties to, e.g. international distribution agreement, are willing to submit their cases to arbitration, they are protected so that no Euro-defense can be raised by the party opposing arbitration.

When dealing with arbitrating of competition disputes it is important to note the co-existence of two concepts: arbitrability and severability. As in the majority of cases arbitrability as a defense is raised by the opponent in an attempt to claim that the main agreement is in violation of EC competition rules, and, therefore, the arbitral clause in the agreement should be considered invalid as well.

Arbitration Act of 1996 provides that “an arbitration agreement which forms or was intended to form part of another agreement ... shall not be regarded as invalid, non-existent or ineffective because that other agreement is ..., and it shall be treated for that purpose as a distinct agreement”⁶⁴. In *Fiona Trust* case this rule was upheld in respect to the antitrust disputes, confirming “the arbitrability of those competition law infringements that go to the validity of the main contract, thus enabling the arbitrator to hear arguments on the validity and voidness of that contract”⁶⁵. Lord Mustill puts forward that the principle of severability under section 7 of the Arbitration Act assumes that the arbitration clause remains in force even if the effect of an adverse decision under Articles 101 and 102 is to void the main agreement⁶⁶.

⁶⁴ Section 7 of the Arbitration Act of 1996.

⁶⁵ G.Blanke and R.Nazzini, *supra* note 9, at 51.

⁶⁶ Lord Mustill and S.C. Boyd Q.C., *Commercial Arbitration: 2001 Companion*, 2nd ed. (London: Butterworths, 2001), 79.

Thus, it may be concluded that even though the statutory definitions of the subject-matter arbitrability of competition disputes under the English law remain very abstract and do not contain any specific requirements, being a common-law country, England has fixed its position in respect to this issue through the precedents. From 2005, after *ET Plus SA* case, it became confirmed that antitrust disputes are arbitrable and there should be “no realistic doubt”⁶⁷ about that.

France

Some scholars⁶⁸ identify three stages of evolution of the arbitration law of France, starting from control of national courts over any disputes that could have include an issue of public policy, through the hybrid stage of excluding disputes under which only one party allegedly breached rules of public policy, to the stage of admitting arbitrators to the public policy disputes. At the second stage, for instance, severability of an arbitration agreement was disputable, as should one of the parties claim that the main contract was in violation of antitrust laws, arbitrators would be deprived of their jurisdiction.

French law underwent two major arbitration law reforms, one in 1981⁶⁹ and one in 2011⁷⁰. The latter did not bring in any significant changes into the regime of arbitrability regulation, thus articles dated 1981 remain in force. Article 2059 of the Civil Code states that “[a]ll persons may make arbitration agreements relating to rights of which they have the free disposal”, and in accordance with Article 2060 of the same Code “[o]ne may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to

⁶⁷ *ET Plus SA* case, *supra* note 15, at 51.

⁶⁸ P.Fouchard, E.Gaillard and B.Goldman, *supra* note 37, at 332.

⁶⁹ New Code of Civil Procedure articles 1492-1507 were enacted in 1981 for the international arbitration, with domestic arbitration reform taking place in 1980 (articles 1442-1491 of the New Civil Procedure Code).

⁷⁰ Décret No. 2011-48 du 13 Janvier 2011 Portant Réforme de L'arbitrage, which amended then existing legislation on arbitration for the first time since 1981.

divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned”.

By analyzing the wording of article 2059, which refers to the rights that the parties may freely dispose of, in relation to the arbitrability concept applied to competition disputes, it is deducible that all the disputes that may arise between the parties and as covered by the arbitration clause or agreement in order to be arbitrable need to be of commercial nature. The latter presumes contractual ability of the parties to decide the legal destiny of their rights, therefore, one can assume that arbitrability of competition disputes that originate from the administrative act is not supported by the legal provisions of the French law.

In the beginning the French notion of *arbitrabilité* was based on the public policy, as was stipulated by Article 2060-1 of the Civil Code of 1972⁷¹, which presented a big obstacle in the way of introducing an arbitration-friendly atmosphere in the country, where ICC has been an Arbitration Institution from 1923. This, as can be seen from the stated quote of the Article 2060 above, continued to exist even after the reforms. Before the 1981 reform arbitrability has been construed in a very restrictive manner, denying arbitration whenever the dispute would touch the aspect of public policy⁷².

France has a unique continental legal system, especially in relation to the arbitration regulation; from the 1950s French court started ignoring the public policy prohibition and applying a more logical solution instead. In *Labinal*⁷³ case it was clearly held that the “arbitrability of a dispute is not excluded by the mere fact that rules pertaining to public policy are applicable to the disputed rapport”. According to Youssef⁷⁴, after this decision of the Court of Appeals Article 2060 of the Civil Code has been “emptied ... of its substance, and left ... lettre morte”.

⁷¹ K.Youssef, *supra* note 39, at 59, para. 3-32.

⁷² *Ibid.*, at 59, footnote 59.

⁷³ *Labinal* case, *supra* note 18.

⁷⁴ K.Youssef, *supra* note 39, at 59, para. 3-33.

French courts have also envisaged the more flexible and less restraining international substitute for the public policy. “French courts were the first to explicitly define arbitrability in international matters by reference to international public policy”⁷⁵; they held that only those matters that are “of the closest interest to international public policy”⁷⁶ are deemed to be non-arbitrable. The principle of autonomy of international arbitration agreements of national law was also first adopted in France⁷⁷.

A remarkable standpoint in respect to the application of EC competition law by arbitrators was voiced by the Cour de Cassation in *Gallay* case⁷⁸, where a request for setting aside an arbitral award based on the alleged breach of EC competition law was rejected, reasoning it by merely stating that “the arbitrators had addressed the issue and had decided that there was no violation”⁷⁹.

In *Société Aplix v. Société Velcro CA* case⁸⁰ the Court of Appeal stated that “arbitrators may apply EC competition law provisions and, where appropriate, draw the consequences of a wrongful conduct”⁸¹. In *Coveme* and *SNF v. Cytec*⁸² cases the arbitrability of competition disputes was finally upheld by the French courts, leaving, however, one new, French-specific rule for the enforcement of an arbitral award: in *SNF* case it was ruled that the arbitral award on competition dispute would be enforced unless there is a “flagrant” violation of EU competition law. It remains unclear what is the meaning of the “flagrant” and how it should be evaluated and applied.

⁷⁵ *Ibid.*, at 59, para. 3-34.

⁷⁶ CA Paris, 29 March, 1991, Rev. Arb. (1991) 478.

⁷⁷ This innovative principle meant that whenever the question regarding the validity of arbitration agreement arose, the national courts would have to apply mandatory rules of French laws and international public policy only, without going into the analysis of the agreement’s compliance with national laws in whole.

⁷⁸ CA Paris, April 16, 1996, *Gallay v. Fabricated Metals*, Cass. Fr., January 5, 1999, Rev. Arb. 805 (2001).

⁷⁹ B.Hanotiau and O.Caprasse, “Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention: Belgian and French Perspectives”, Journal of International Arbitration 2008, 25(6), 721.

⁸⁰ CA Paris, October 14, 1993, *Societe Aplix v. Societe Velcro CA*, 1994 Rev. Arb. 165.

⁸¹ G.I. Zekos, *supra* note 49, at 21.

⁸² *Coveme* and *SNF/Cytec* cases, *supra* note 47.

France is a host of the most popular Arbitration Institution in the world, and has been such from 1923, thus its willingness and eagerness to introduce the most arbitration-friendly legal environment is justified by the popularity of ICC. However, for a long time, France included a very restricting provisions regarding capacity of various disputes to be settled in arbitration, and free disposal requirement would constantly stumble at the public policy notion. However, as it was shown above, this practice came to ceasing to exist when the French courts started applying a new principle of international public policy, allowing competition disputes to be submitted to arbitration.

On the other hand, notwithstanding confirmation of arbitrability of competition disputes by the French national courts, the national provisions remain in controversy with the courts' practice. By admitting arbitrability of the EC competition law it is implied that the courts admitted arbitrability of those articles that do not require the presence of contract, e.g. under Article 102 of the TFEU where abuse of the dominant position may be declared not in comparison with treating of the third parties in a disadvantageous manner for the claimant. National law of France, by accepting arbitrability of those disputable rights, of which the parties may freely dispose of, restricts de jure courts from referring parties to arbitration with arbitration agreement that submits a dispute of non-commercial nature under the competence of arbitrators. Despite of the fact that this does not currently puts an obstacle into admitting of arbitrability of competition disputes under the French laws, English flexibility allowing non-contractual disputes to be arbitrated may be considered as an example for introducing respective amendments into the Civil Procedure Code.

Kazakhstan

The first international commercial arbitration was founded in Kazakhstan in 1993, when the Arbitration Commission at the Chamber of Commerce of the Republic of Kazakhstan

was established⁸³. The earlier mentioned distinction between domestic and international arbitration⁸⁴ under the Kazakhstani law is viewed by some scholars as meaningless as they both represent identical things⁸⁵, and that the main distinguishing line should be not between the institutions but between the disputes submitted to them. The application of either domestic arbitration law or international arbitration law therefore should depend on the character of the dispute in question. This distinction is also set in Article 6(4) of the Law on International Commercial Arbitration⁸⁶.

Both laws agree on the point that only disputes arising out of commercial contracts, i.e. those that are concluded in written form may be submitted to arbitration⁸⁷. An additional complication is imposed by the requirement of the Civil Code of Kazakhstan⁸⁸ to have all contracts to be concluded in the course of entrepreneurial activities in the written form. Thus, it would be highly questionable whether disputes about violation of competition law that is not apparently arising out of the contract or cannot be directly considered as covered by the arbitration clause or agreement may be submitted to international commercial arbitration. Article 6(4) of the Law on International Arbitration also provides for the residential requirement, which is absent from the Law on Arbitral Tribunals⁸⁹; this falls out of the notion of the subject-matter arbitrability, but should be marked, according to some scholars, as the dividing line between the two laws.

There is a remarkable limitation on the arbitrators' competence since by imposing the rule that only the contract based disputes may be settled in arbitration Kazakhstani law deprives disputes, e.g. in respect to the abuse of dominant position that does not necessarily

⁸³ M.K. Suleimenov, *supra* note 1.

⁸⁴ Третьейское разбирательство и международный арбитраж.

⁸⁵ M.K. Suleimenov, *supra* note 1.

⁸⁶ Law No. 23-III of 28 December 2004, as amended on 05.02.2010.

⁸⁷ Article 6(4) of the Law on International Commercial Arbitration and Article 5(3) of the Law on Arbitral Tribunals.

⁸⁸ Article 152(1)(1) of the Civil Code of Kazakhstan (General Part) of 27 December 2004 (as amended on 18.02.2011).

⁸⁹ Law No. 22-3 of 28 December 2004, as amended on 05.02.2010.

originate in the contract and may be a result of activities of one undertaking only, of the possibility to be submitted to arbitration.

The biggest limitation on the jurisdiction of arbitral tribunals is within the Article 7(5) of the domestic arbitration law⁹⁰, under which it explicitly stated that

[d]isputes under which interests of the state, state enterprises, ... third parties that are not parties to arbitration agreement, are affected, or disputes arising out of contracts on service rendering, works performance, goods production by natural monopoly entities, or entities with a dominant position on the market, unless otherwise is provided by the laws of Kazakhstan, do not fall under the jurisdiction of Arbitral Tribunals⁹¹.

As can be seen from the quotation given above, the Kazakhstani legislation reserves exclusive jurisdiction of national courts and state competition authorities in cases with contracts of natural monopolies and entities of dominant position. This requirement is absent from the Law on international arbitration, where it is provided that “arbitration agreement may be concluded by the parties in respect of disputes that arose or may arise between the parties in relation to the particular civil contracts”⁹².

This division into two main legislative acts governing essentially the same aspects of arbitration has brought many inconveniences into their interpretation. As Suleimenov⁹³ maintains, it is very likely that in future they will collide in one, however at the present time, it is highly recommendable to exclude the unreasonable restrictions on the arbitral tribunals’ competence under the Law on Arbitral Tribunals. Otherwise, this may be viewed as discrimination towards domestic arbitral tribunals in comparison with international arbitration. For instance, in the competition dispute with a national company a local investor will be deprived of the chance to go to arbitration for the dispute settlement when its foreign competitor may easily include an arbitration clause into the contract with the national

⁹⁰ Article 7(5) of the Law on Arbitral Tribunals.

⁹¹ *Ibid.*

⁹² Article 6(2) of the Law on International Commercial Arbitration.

⁹³ M.K. Suleimanov, “Perspectives of Development for Civil Legislation, Civil Procedure Legislation and Arbitration Legislation in the Republic of Kazakhstan”, 30 June 2009, available at: http://www.arbitrage.kz/download_463.

company and submit all disputes to arbitration. Local investor's interests thus may be endangered as the national court may at the stage of enforcement of arbitration agreement hold that since both of the parties are residents of Kazakhstan and the applicable law is the one of Kazakhstan arbitrating competition disputes will not be possible and thus will be refused.

In *AES Santri Power Limited*⁹⁴ dispute between energy producing company and the state Committee under the sale-and-purchase agreement of 100% voting shares of 4 energy producing companies and concession of assets of 2 hydroelectric companies, arbitration clause in which would refer them to LCIA, it was held that should the court allow the parties to refer to arbitration under the arbitration clause it would create basis for transfer of prices and tariffs regulation from the field of public relationships into the field of private relationships. Settlement of tariff disputes in arbitration could entail an award granted in favour of the defendant, an electric company, thus creating privileges for such against other energy producing companies of the Republic. Therefore, the court ruled that by allowing arbitration in case of the latter's decision against the state, activities of the defendant, which is a natural monopolist, will fall beyond the control of the Republic of Kazakhstan⁹⁵ and will exclude the possibility of regulation of its activities involving tariffs and prices for its services, adoption of measures on precluding of unfair competition, abuse of dominant (monopolistic) position at the energy market.

The court applied the law in force at the moment of signing of arbitration clause (within the agreement) and stated that regulation of natural monopolists' activities and tariff setting for their services would lie within an exceptional competence of state authority.

⁹⁴ *AES Santri Power Limited v. State Property and Privatization Committee at the Ministry of Finance of Kazakhstan*, Decree of Civil Action Panel of the Supreme Court No. 3a-148/2-03/03-04.

⁹⁵ Under Article 14(1)(13) of the Law of Kazakhstan on Natural Monopolies and Regulated Markets No. 272-I of 09.07.1998 control over the compliance with the tariff estimation by the monopolists is placed within the rights of the state authority.

... Tariff disputes resolution in arbitration may result in award in the defendants' favour [Irish and Dutch companies] and thus creating privileges for them before other energy companies of the Republic of Kazakhstan⁹⁶.

Although Kazakhstan does not have a case-law and is based on the civil legal system, *AES Santri Power Limited* is a landmark case for the arbitrability of competition disputes in Kazakhstan. Decision of the court in this case could be construed as a display of the public policy control as applied by the French courts, when judges may review superficially an arbitral award issued in favour of one of the parties and then state whether it contradicts domestic or international public order; in the case in question no arbitration proceedings were commenced in the first place. The parties never referred to LCIA that was provided for by the arbitration clause in the main agreement under dispute. The court presumed an outcome for the arbitration and based on its own presumption prohibited the parties from going to arbitration.

Another interesting note about this case is that although it involves regulation of the international commercial arbitration, it goes into the analysis as if the law on Arbitral Tribunals was applicable. One can recall that the law on domestic arbitration in Kazakhstan includes provisions excluding monopolists' disputes from the arbitrators' jurisdiction, but the law on international arbitration does not have any of such restrictions.

Therefore, arbitrability under the laws of Kazakhstan is defined as a capacity of disputes arising out of the written contracts to be submitted to arbitration, provided that there a valid arbitration agreement or clause; and limitations set by the law on Arbitral Tribunals cover disputes with natural monopolies or entities with dominant position at the market only, however excluding the latter completely from the scope of arbitration. Apart from these exclusions, there is no solid rule that would deny arbitrability of competition disputes under

⁹⁶ *AES Santri Power* case, *supra* note 94.

Kazakhstani national laws in the context of international commercial arbitration: as long as they arise out of a contract.

The “Second Look” Doctrine as Alternative to Non-Arbitrability

In order to ensure that having allowed arbitrators to decide competition disputes the national courts did not fully excluded themselves from providing of protection to those who can be adversely affected by the wrong application of competition law by arbitrators, they reserved a right to judicial review of arbitral awards. Zekos also maintains that whereas antitrust claims have become arbitrable, arbitral awards on these claims remain subject to review by national courts, even though the degree of review remains uncertain and unequal⁹⁷.

So called “Second Look” doctrine was introduced by the American court in *Mitsubishi*⁹⁸ case, where in dicta of the majority opinion it is read that:

the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of antitrust has been addressed claims ... [and] to ascertain that the [arbitral] tribunal took cognizance of the anti-trust claims and actually decided them⁹⁹.

In Europe this doctrine evolved in *Nordsee*¹⁰⁰ and *Eco Swiss* cases. Dempegiotis defines the function of this doctrine as

a legal duty on national courts reviewing arbitral awards to ensure the uniform and consistent application of EC competition law entails a de facto duty on arbitrators to take EC competition law seriously and to preserve its effective application and enforcement in order to protect the status of their award and to ensure its enforceability¹⁰¹.

The doctrine became an alternative to the complete non-arbitrability of disputes, including competition disputes, by virtue of the fact that when national statutes may prohibit some aspects from been considered either by arbitration or through the means of private

⁹⁷ G.I. Zekos, *supra* note 49, at 21.

⁹⁸ *Mitsubishi* case, *supra* note 13.

⁹⁹ W.W. Park, *supra* note 58, at 124, footnote 38.

¹⁰⁰ *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* (102/81) [1982] E.C.R. 1095.

¹⁰¹ S.I. Dempegiotis, *supra* note 11, at 391.

enforcement in whole, most of them nowadays are considered arbitrable subject to the public policy. In fact, a division of disputes into two main categories was suggested by Erik Werlauff¹⁰²: those that are non-arbitrable and those, which in principal are arbitrable, but “at the risk that the substantive decision may be contrary to public policy”.

It is strongly interrelated with the notion of arbitrability, thus cannot be missed out of the scope of this thesis. It enables the non-arbitrability alternative in the form of simple arbitrability of disputes, provided that at the stage of either enforcement or annulment of arbitral awards the courts will be able to look into the award and execute their judicial control by stating that, e.g. applicable competition law was invoked wrongly by the arbitrators. The scope of such judicial control remains to be a highly disputable question, since by allowing the courts to look into the merits of awards would make arbitrability of any disputes meaningless and simply causing parties to the dispute to spend more money and time.

Having been firstly recognized by the American courts, this doctrine began to gather momentum and was later implemented in the laws and courts of European countries, and later was entrenched in international conventions, such as the New York Convention and Geneva Convention.

The history of this doctrine’ evolvement had a “significant impact on the vitality”¹⁰³ of the New York Convention. Article III fixes the general rule that all contracting states will “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon”¹⁰⁴, thus establishing the background requirement for the national courts to apply their own legislation when dealing with arbitral awards at the enforcement stage. This international document lists grounds based on which the national courts may refuse to recognize or enforce arbitral awards, and

¹⁰² Erik Werlauff, “*Private Arbitration of Incidental Public Law Issues*”, E.B.L.R. 2009, 20(4), 565.

¹⁰³ W.W. Park, *supra* note 58, at 125.

¹⁰⁴ Article III of the New York Convention.

with their help allow the courts to go into procedural aspects of award¹⁰⁵. These five defenses may be applied by the court at the motion of either of the parties, which in its turn bear the burden of proof. Nonetheless, there are two additional defenses available for the national courts that they can use at their own initiative without the parties having to prove anything, and they both are pinpointing the notion of arbitrability: subject matter of the dispute and public policy should correspond with the law of the national court. In the opinion of W. Park¹⁰⁶, these last two defenses refer “explicitly to the forum’s public policy”, even though the other five defenses also relate in some way to the public policy.

The scope of public policy defense in this respect can be narrowed down to the “domestic public policy (*ordre public interne*) and international public policy (*ordre public international*)”¹⁰⁷.

The adjectives “domestic” and “international” apply not to the source of the policy but rather to their field of application. Both are creatures of the forum’s national legal system. For example, an award without reasons might violate French ... public policy in a domestic context but not in an international context¹⁰⁸.

France and Kazakhstan are also signatories¹⁰⁹ to the Geneva Convention on International Commercial Arbitration of 1961, which in respect to the notion of arbitrability provides that “the courts may also refuse recognition and enforcement of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration”¹¹⁰. While this Convention has a limited scope of application that covers only “arbitration agreements concluded for the purpose of settling disputes arising from international trade between ...

¹⁰⁵ Article V(1)(a) of the New York Convention.

¹⁰⁶ W.W. Park, *supra* note 58, at 127.

¹⁰⁷ *Ibid.*, at 128.

¹⁰⁸ *Ibid.*

¹⁰⁹ France signed this Convention in 1961 and ratified in 1966, and Kazakhstan ratified it on 20 November 1995. See “List of the parties to the Geneva Convention” in T.Varady, et al. eds., *Document supplement to International Commercial Arbitration: A Transnational Perspective* (United States of America: West, 2009), 19.

¹¹⁰ D. Di Pietro, *supra* note 43, at 93, para. 5-27.

persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States”¹¹¹, in situations when arbitration agreement is concluded between Kazakhstani and French parties, the courts would be eligible to invoke their national legislation when deciding whether to uphold arbitral award or not. As both these states are known for their complex view towards invocation of “public policy” defense¹¹², Geneva Convention brings in certainty regarding the applicable law at the stage of enforcement of award. However, not only the Geneva Convention grants this clearness towards the issue of arbitrability, but it is a long-present rules that while it is up to the parties to determine in their agreement what dispute they would like to submit to arbitration, it is within the competence of national courts to determine the lawfulness of that submission.

In the *Eco Swiss* case¹¹³ ECJ held that national courts’ review of arbitral awards

may be more or less extensive depending on the circumstances ... to grant an application for annulment founded on failure to observe national rules of public policy... It is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize and award should be possible only in exceptional circumstances¹¹⁴.

In one of the French cases the Court of Appeals held that the scope of the national court’s review should include “significant facts” and “points of law”, so that it would be in compliance with the requirements of the public policy¹¹⁵. In other words, the court here simply allowed judicial scrutiny of the award in merits. Having permission to go into the details of the case without mere superficial examination of award is rather extraordinary for the European community, and that marks French legal system as probably the most extraordinary amongst the continental Europe. Further section on the Public Policy Aspect of the paper will expand this statement to the French interpretation of public order.

¹¹¹ Article I(1)(a) of the Geneva Convention.

¹¹² *SNF/Cytec* case in France and *AES Santri Power Limited* case in Kazakhstan are indicative of this trend.

¹¹³ *Eco Swiss* case, *supra* note 14.

¹¹⁴ G.I. Zekos, *supra* note 49, at 21, footnote 94.

¹¹⁵ *European Gas Turbine*, Rev. Arb. 359 (1994), CA Paris, September 30, 1993.

It is true that international arbitration remains “a relatively novel phenomenon” in the legal systems of countries like Kazakhstan, which, on a par with other Asian countries of the post-soviet territory, “remains in many ways authoritarian”, and the “level of executive control over courts varies from pragmatic to severe”¹¹⁶. Unlike in France and England, the situation in Kazakhstan, is rather different since, as it was earlier, there two major arbitration laws in force: one presumably dealing with the domestic arbitration¹¹⁷ and the other one with international arbitration¹¹⁸. The law on Arbitral Tribunals does not include any residency requirements, although these were present earlier and constituted a topic for discussions for Kazakhstani scholars¹¹⁹. It is still believed and resumed that domestic arbitration in this context and under this law may be between the residents of Kazakhstan only. Its “domestic nature” follows from Article 6(1) under which it is provided that this kind of arbitration will be carried out in compliance with the Kazakhstani legislation only. This requirement is absent from the law on international arbitration. Nonetheless, the domestic arbitration law provides for the principle of “lawfulness” of arbitration proceedings, which also is a ground for appeal from arbitration award on a par with the public order. It has been heavily criticized by the national scholars¹²⁰ as it represents the aspect of civil litigation and contradicts ratified conventions and national legislation on enforcement of arbitral awards. Nonetheless, however heated the argumentations were, even the most recent amendments of 2010 to the domestic arbitration law have not excluded this ground. Therefore, one may come to a conclusion that even in those cases where two Kazakhstani companies conclude an agreement, execution of which is to take place exceptionally abroad, that is governed by

¹¹⁶ N.Rubins and G.Sur, “*Application of Article V of the New York Convention: A Central Asian Perspective*”, *Journal of International Arbitration* 2008, 25(6), 809.

¹¹⁷ Law of Kazakhstan on Arbitral Tribunals.

¹¹⁸ Law of Kazakhstan on International Commercial Arbitration.

¹¹⁹ See M.K. Suleimenov, “*Arbitration as a Remedy Mechanism for Civil Rights. Alternative Dispute Resolution Mechanisms*”, “*Perspectives of development for civil legislation, civil procedure legislation and arbitration legislation in the Republic of Kazakhstan*”, A.E. Duisenova, “*Arbitral Clause*”, *Adiletin Gylymi Enbekteri* 2010, 3(33), I.P. Greshnikov, “*International, Foreign and Domestic Arbitration*”, *Treteiskij Sud* 2005, (2), etc.

¹²⁰ I.P. Greshnikov, “*International, Foreign and Domestic Arbitration*”, *Treteiskij Sud* 2005, (2), 85.

another state's law, and decide to submit any disputes to arbitration in Kazakhstan, they will fall under the scope of application of law on arbitral tribunals. This will lead to the potential danger of the national court annulling the arbitral award should the losing party claim that it goes against the laws of Kazakhstan, not the public order. To the best knowledge of the author of this paper, no such claims were brought to the courts of Kazakhstan during the periods from 2005 to 2011¹²¹, nonetheless, provisions of the law in question remain unclear. Its law on international commercial arbitration limits the judicial scrutiny and excludes review of award in merits, allowing setting aside the arbitral award in a limited number of cases, amongst which there is a public policy subject-matter non-arbitrability defenses¹²².

When a party to a dispute involving non-arbitrable subject refuses to honor his, her, or its commitment to arbitrate, courts have permitted different claims arising out of the same facts to be decided by parallel proceedings: arbitration for the arbitrable subject matter issues, and litigation in courts for the non-arbitrable subject matter issues¹²³.

Under the notions of both, "Second Look" doctrine and arbitrability of competition disputes, it is sometimes possible to separate issues emerging under the dispute, meaning that those questions that are deemed to be non-arbitrable will be left for the national courts to decide, whereas such questions as to whether there is a causal relation between the infringement and damages and the amount of the damages are may be submitted to arbitration. It was especially the case before 2004, when application of the Block Exemption Regulation under Article 101(3) of the TFEU was within the exclusive competence of the Commission¹²⁴.

¹²¹ Availability of courts' decisions in Kazakhstan on the official website of the Supreme Court (<http://www.supcourt.kz/acts/>) is limited to this period.

¹²² Article 31(2) of the Law on International Commercial Arbitration.

¹²³ W.W. Park, *supra* note 58, at 120.

¹²⁴ See Chapter III section 3.3 on Arbitrability of the Block Exemptions for further analysis.

Arbitrability of Different Issues of Competition Law

By accepting arbitrability of antitrust disputes in general a question of capability of certain competition disputes involving different aspects of either EC or Kazakhstani competition law remains open and sometimes decided negatively confirming exclusive jurisdiction of state authorities or national courts. Competition law issues are touched when dealing with mergers of entities, claimed violation of rules on competition, such as prohibition on prevention, restriction or distortion of competition within the market, and when applying exceptions to the application of general rules on competition. The latter mainly refers to the application of the Block Exemption Regulation¹²⁵ by arbitrators as provided for by European supranational legislation. There is no equivalent to that rule under the Kazakhstani law, yet there exist provisions that may be raised as a similar defence or a claim under its laws, which than will open the question of arbitrability of such.

This Chapter, unlike the previous two, will not differentiate England from France, since their position towards arbitrability of competition disputes under national laws has been addressed in the Chapter II. Here under all of the subchapters' topics the issue of arbitrability has been upheld on the supranational level, by the ECJ, and the governing law is the Treaty and Regulations, not national laws. Kazakhstani national provisions of competition law, however, remain under scrutiny and are generally compared with the ones of the European Union, including England and France.

In respect to the Merger Disputes, as it will be shown in the first part of the Chapter, arbitration in the European Union has been put to a new level, where the dispute does not exist between two parties to the arbitration agreement only, but between third parties as well. Second part of this Chapter will deal with arbitrability of antitrust disputes that arise in

¹²⁵ Article 101(3) of the TFEU.

connection with the alleged prevention, distortion or restriction of competition by means of the agreement that includes arbitration agreement (or in respect to which an ex-post agreement to arbitrate is entered into), as protected under Article 101 and 102 of the TFEU, covering also abuse of the dominant position. The last subchapter deals with arbitrability of the Article 101(3) of TFEU, and whether arbitrators at all may apply this exclusion since it was earlier reserved under the exclusive jurisdiction of the Commission.

Arbitrability of Merger Control Disputes

Disputes that may arise in the context of merger of two or more entities may involve not only the parties to the merger agreement, but third parties, such as creditors or clients of the merging company and others, as well, thus expanding the scope of applicability of arbitration agreement to those who are not signatories to it in the beginning. This, however, is more applicable to the merger control under the European law, where under the Kazakhstani law, as it will be shown, arbitrating these disputes itself is very arguable, without even going into the analysis of the scope of agreement.

The European Approach

In 2004 new EC Merger Control Regulation¹²⁶ was enacted, introducing new modified system in the area of control over concentrations that became in correspondence with then recently adopted Regulation 1/2003. Under Merger Control Regulation merging undertakings are to receive a clearance from the European Commission. Under the merger control conception arbitrability of merger control disputes in Europe becomes seemingly answered, as one may conclude by seeing the Commission's practice to impose in its decisions on mergers provisions for arbitration in "behavioural commitments as conditions for clearance

¹²⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:HTML>.

of mergers”¹²⁷. Exceptionality of merger control disputes lies within the understanding that protection of fair trade and competition, as well as the third parties’ interests in this context turns to arbitration instead of exclusive jurisdiction of national courts or state authorities. Said commitments’ limit the anti-competitive effects of the augmentation of the undertaking’s market power, and protect third parties and the market from the merger repercussions and from the conduct aimed at the prevention or distortion of competition¹²⁸.

Arbitration here may be viewed as the most favourable means of settling disputes between the third parties and undertaking, opposing it to procedures within the European Commission that will not go into any other details of the dispute apart from the regulation of the concentrations and civil litigation that is rather costly and takes time. Blanke underlines that starting from 1992 to date Commission has accepted about 50 arbitration commitments¹²⁹ for “monitoring purposes of behavioural merger remedies”¹³⁰, thus confirming preference towards arbitrability of any disputes that may arise under these commitments.

This type of arbitration is not different from any other private arbitration proceedings, however, in the context of merger control it undergoes one substantial change by allowing the third party beneficiaries of the commitments refer to arbitration for “enforcement of ... rights in case of violation by the merging party”¹³¹. Therefore, the dispute may be based not on the contract but on the administrative act, making it a unique yet fast developing mechanism.

¹²⁷ Luca G. Radicati Di Brozolo, “*Arbitration in EC Merger Control: Old Wine in a New Bottle*”, E.B.L.R. 2008, 19(1), 7.

¹²⁸ *Ibid.*, at 10.

¹²⁹ See Comp./M.3680 – *Alcatel/Finmeccanical/Alcatel Alenia Space & Telespazio*, Commission decision of 28 April 2005 (OJ C139, 8.6.2005, at p. 37), Comp./M.3906 – *T-Mobile Austria/Tele.ring*, Commission decision of 23 April 2006, Comp./M.3280 – *Air France/KLM*, Commission decision of 11 February 2004 (OJ 060, 9.3.2004, at p. 5), Comp./M.3225 – *Alcan/Pechiney (II)*, Commission decision of 29 September 2003 (OJ C299, 10.12.2003, at p. 19), Comp./M.3083 – *GE/Instrumentarium*, Commission decision of 2 September 2003 (OJ L109, 16.04.2004, at p.1), Comp./M.2903 – *DaimlerChrysler/Deutsche Telekom/JV*, Commission decision of 30 April 2003 (OJ L300, 18.11.2003, at p.62), Comp./M.3570 – *Piaggio/Aprilia*, Commission decision of 22 November 2004 (OJ C7, 11.1.2005, at p. 5), etc.

¹³⁰ Gordon Blanke, “*Comments on Draft Revised Commission Notice on remedies acceptable under the Merger Regulation*”, available at: http://ec.europa.eu/competition/mergers/legislation/files_remedies/berwin.pdf.

¹³¹ L.G. Radicati Di Brozolo, *supra* note 127, at 8.

The arbitration under these commitments may be of disputes between the merging company that may undertake to, e.g. “not to use a trademark for a certain period, or to make part of the production capacity of the entity arising out from the concentration available to third-party competitors”¹³² and the third party beneficiary. Therefore, it is not an issue of objective (subject-matter arbitrability), but of the subjective arbitrability. It is allowed for the third parties to file claims to arbitration against merging parties even when they are initially not a party to the arbitration agreement. However, the situation changes radically when the dispute that arises in connection with the merger between the mentioned parties is submitted to arbitration by the merging undertaking. As Radicati Di Brozolo fairly notes a merging party will not have a right to refer to arbitration against third parties due to the fact that there is no arbitration agreement, either preliminary or ex post, accepted by the third party with the merging company¹³³.

Whereas the general trend in merger disputes is to allow their arbitrability, the Commission may yet decide not to approve the arbitration under the said commitments. It has rejected a number of “offers of packages including arbitration commitments in *GE/Honeywell*, where the Commission feared that the package and the commitment would “give rise to endless litigation” and in *Bertelsmann/Kirch/Premiere* and *Deutsche Telekom/Beta Research*”¹³⁴.

It can be concluded that whenever a merger dispute involves the Merger Regulation and falls under the arbitration clause provided in the commitments, specified above, the established practice makes it arbitrable, with Commission’s power to reject arbitration packages. The latter is justified by the broad application of the arbitration agreement, should it be approved by the Commission, including the third parties. However, whenever the dispute arises out of the merger agreement itself, not the commitment, general rules on

¹³² James Bridgeman, “*The Arbitrability of Competition Law Disputes*”, E.B.L.R. 2008, (19), 163.

¹³³ L.G. Radicati Di Brozolo, *supra* note 127, at 11.

¹³⁴ J.Bridgeman, *supra* note 132, at 165.

arbitrability of competition disputes, as described in Chapter II, in respect to the English or French position, should apply, meaning in fact that they will be deemed arbitrable, unless directly excluded from the clause or constituting flagrant violation of EU competition law.

Kazakhstan

In comparison with the European approach to the regulation of mergers (concentrations) of companies and of its impact on the market and its other participants, Kazakhstan has also developed a notion of clearance, through means of which companies have to obtain an approval from the state competition authorities before the merger can be carried out¹³⁵. Economic concentrations under Article 50 of the law on competition¹³⁶ provides for the criteria under which an undertaking has to either apply for permission to the antimonopoly body or not. It is remarkable that under this law only the right of the antimonopoly body to go to court is mentioned. Therefore, one needs to apply general provisions of the Civil Procedure Code of the Republic of Kazakhstan, which states that everyone has a right to judicial protection¹³⁷. However, it is highly disputable whether any dispute concerning merger control regulation may be submitted to arbitration.

In accordance with article 6(4) of the Law on International Commercial Arbitration, only those disputes that arise out of the civil contracts may be submitted by the parties to arbitration. Article of the Law on Competition on economic concentrations¹³⁸ forms an imperative norm that stipulate a due order of approval with the state authority of any merger that meets the set criteria. Because it forms part of the exclusive competence of the state authority, it will most probably be viewed as covered by the fundamental principles of state and social order, with the only difference that the latter will not be used a public-policy

¹³⁵ Article 50(3) of the Law of Kazakhstan on Competition No. 112-3 of 25.12.2008 (as amended on 19.03.2010).

¹³⁶ Law on Competition No. 112-3 of 25.12.2008.

¹³⁷ Article 8(1) of the Civil Procedure Code of Kazakhstan.

¹³⁸ Article 50 of the Law of Kazakhstan on Competition.

defence at the enforcement of award stage but as a reason for declaring a principal non-arbitrability of disputes on merger control.

A lesson from *AES Santri Power Limited* case¹³⁹ showed the national court's reluctance to refer parties to arbitration with the dispute, essence of which was within the powers of the state authority; arbitrating or even litigating disputes arising out of the imperative norms establishing a strict procedural order would be practically impossible. Under the domestic arbitration law, which excludes natural monopolists and dominant participants from ability to file a petition to arbitration¹⁴⁰, it becomes gradually more difficult to imagine that national courts of Kazakhstan would either enforce arbitration agreement or later arbitral award acknowledging by that arbitrability of merger control disputes subject to public policy and avoiding establishment of non-arbitrability of such. Merger control disputes may be based on the administrative acts, not any contracts concluded between the antimonopoly authority and undertaking. Thus arbitrability of them is excluded as a possibility.

European example of allowing arbitration with the third party beneficiaries falls beyond any understanding of arbitration law at this stage of the Kazakhstani legislation development. Requirement of contractual nature of the dispute has been criticised by many scholars¹⁴¹, and is utterly sustained by the author of this paper. Only after amending our laws so as to allow non-contractual disputes to be submitted to arbitration, we may switch to the question of allowing persons or entities that are not parties to the arbitration agreement to step into the arbitration proceedings or initiate them regardless.

Arbitrability of Disputes Concerning Rules on Competition

¹³⁹ *AES Santri Power* case, *supra* note 94.

¹⁴⁰ Article 7(5) of the Law on Arbitral Tribunals.

¹⁴¹ See M.K. Suleimenov, "Arbitration as a Remedy Mechanism for Civil Rights. Alternative Dispute Resolution Mechanisms", "Perspectives of development for civil legislation, civil procedure legislation and arbitration legislation in the Republic of Kazakhstan", A.E. Duisenova, "Arbitral Clause", Adiletin Gylymi Enbekteri 2010, 3(33), I.P. Greshnikov, "International, Foreign and Domestic Arbitration", Treteiskij Sud 2005, (2), etc.

This block of rules forms the general body of competition law, violation of which is raised as a claim or a defence in the majority of cases when a willingness to arbitrate antitrust disputes is expressed either before emerging of the dispute or after. In the European Union these Rules are contained in Article 101 and 102 of the TFEU, with further implementation in national laws of member states of their specific characteristics. For the purpose of this Chapter only arbitrability of Articles 101, 102 will be considered, as they represent position of all the member states, including England and France in protection of due competition at the internal market, without deterring mandatory norms of the Treaty from application. In Kazakhstan these rules are contained in two national laws¹⁴² that are applicable on the territory of the whole country and place the same objective as the TFEU does: protection of the market from prevention, restriction or distortion of competition.

For the purpose of this subchapter positions of England and France will not be distinguished and will be united under the “European Approach” notion, since they have already been explained in Chapter II of the thesis, making an objective of this subchapter to show the supranational fixing of principle of competition disputes arbitrability by rulings of ECJ and provisions of Regulation 1/2003. In case of Kazakhstan a set of recommendations will be proposed based on comparison of its provisions with the ones adopted in the EU.

Arbitrability of Art. 101, 102 TFEU

I agree with Dempegiotis¹⁴³ who marked the importance of the enforcement of competition rules and defining them as a “*sine qua non*” in realization of the EC competition law objectives. Modernisation of the EC competition law¹⁴⁴ has brought a new understanding of application of these mandatory norms, allowing private enforcement by the courts. There continue to be many discussions and arguments about whether arbitrators are covered by the

¹⁴² Law on Competition No.112-3 of 25.12.2008 and Law on Natural Monopolies and Regulated Markets No. 272-I of 09.07.1998.

¹⁴³ S.I. Dempegiotis, *supra* note 11, at 375.

¹⁴⁴ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

Regulation 1/2003 or not, as the latter refers to the direct applicability of its provisions to the national courts. Old Regulation 17/62¹⁴⁵ compelled almost entirely exclusive jurisdiction of the Commission on application of articles 101 and 102, especially the regime of block exemption, arbitrability of which will be discussed in the “Block Exemption Regulation” subchapter.

Main rules on competition on the territory of the European Union are written in Articles 101 and 102 of the TFEU. As Dempegiotis states, all disputes that arise out of any vertical or horizontal agreements that fall under the Articles 101, 102 of the TFEU, in principle should be arbitrable, provided that there is a valid agreement to arbitrate them¹⁴⁶. Unfair competition and damages are the most popular claims filed under the perspective of these articles. On a par with the acknowledged arbitrability there remains an issue of protecting of third parties that are sometimes almost inevitably affected by the anticompetitive conduct of undertakings or their abuse of dominant position.

Following the ruling of the ECJ in *Eco Swiss* case:

... 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 public policy, it must also grant such application where it is founded on failure to comply with the prohibitions laid down in Article 81(1) [now 101(1)] EC¹⁴⁷.

An interesting summary to this issue was given by van Houtte:

National courts have to apply Articles 101 and 102 as rules of public policy nature. It means that arbitrability of disputes based on these articles is subjected to public policy, but cannot be held non-arbitrable in principal. Furthermore, in compliance with the Notice on co-operation of courts with the Commission¹⁴⁸ “national courts must even apply on their own motion (*ex officio*) Article 81 and 82 [101 and 102], if not raised by the parties, when they have an obligation or discretion under domestic law to raise points of mandatory law¹⁴⁹”.

¹⁴⁵ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty.

¹⁴⁶ S.I. Dempegiotis, *supra* note 11, at 380.

¹⁴⁷ *Eco Swiss* case, *supra* note 14, at para.37.

¹⁴⁸ Commission Notice on the co-operation between the Commission and the courts of the EU member states in the application of Articles 81 and 82 EC, OJ 2004 C101, 54, no.3.

¹⁴⁹ Hans van Houtte, “*The Application by Arbitrators of Articles 81 & 82*”, E.B.L.R 2008, 19(1), 64.

Eco Swiss case ruling does not in itself confirm the arbitrability of competition disputes under TFEU Rules on Competition, and focuses on the public nature of them only, preserving the right for national courts to dig into the review of application of these public policy rules by the arbitrators, whether they in fact applied them or not. However, Blanke and Nazzini state that none of the EU Member States have rejected arbitrability of articles 101 and 102¹⁵⁰.

As was earlier pointed out under the English law, in its landmark decision in *ET Plus SA* case¹⁵¹ in 2005 Mr. Justice Gross confirmed arbitrability of both, articles 81 and 82, now 101 and 102 of the TFEU¹⁵². In France the most recent case confirming arbitrability of competition disputes was *SNF/Cytec* case¹⁵³.

Arbitrability of Disputes Concerning Kazakhstani Rules on Competition

In the beginning of this Subchapter it was stated that the Rules on Competition in Kazakhstan are included into two main legislative acts: Law on Competition and Law on Natural Monopolies and Regulated Markets. Both of them provide for the right to relief in the court against the state authority, with the first law regulating mainly imperative procedural orders for approval of concentrations, inclusion or exclusion from the list of the market dominant participants, and other, without giving any express possibilities for the entities to refer to the court not in order to appeal against the acts of the State authority declaring such entity in violation of law, but to raise this issue as a defence between two independent business partners. However, this does not in itself form an extraordinary practice, and under the presumption that by being a part of national law either of these laws can be applied by both the court and arbitral tribunals. The main concern in this case is the

¹⁵⁰ G.Blanke and R.Nazzini, *supra* note 9, at 53.

¹⁵¹ *ET Plus SA* case, *supra* note 15, at para 51.

¹⁵² See also *Premium Nafta Products Limited (20th Defendant) and others (Respondents) v. Fili Shipping Company Limited (14th Claimant) and others* (Appellants) [2007] UKHL 40, *Fiona Trust & Holding Corp. v Privalov* [2006] APP.L.R. 10/20, etc.

¹⁵³ *SNF v. Cytec* case, *supra* note 47.

imperative nature of provisions of laws, which generally form jurisdiction of the state authority and the court may show reluctance to allow the parties to submit the dispute concerning application of any of these norms to arbitration, e.g. at the stage of enforcement of arbitration agreement.

Provisions of the Law on Competition are similar to those of Article 101 TFEU and the Regulation 1/2003; arbitrating disputes arising in light of these provisions is not precluded by national law per se, although they leave very little space to what issues of competition law may be raised as a claim in the arbitrated dispute. By the method of exclusion it may be concluded that, e.g. disputes between monopolies (not natural monopolies) and foreign investors can be submitted to arbitration without any hesitation, however should the dispute be about the alleged abuse of the dominant position as based on the service contract or other, it will not be considered arbitrable under the Law on Arbitral Tribunals. The reason why the law on Arbitral Tribunals specifies that the claimed abuse of dominance is excluded when it is based on the service agreement does not entail in itself that whenever it is based on the administrative act it can become arbitrable¹⁵⁴.

The general rule of both of the laws regulating arbitration in Kazakhstan state that where there is an existing agreement in written form that includes arbitration clause, national courts of Kazakhstan have to allow disputes arising out of this clause to be submitted to arbitration. Yet, as this concern has already been expressed in the previous subchapter, whenever the dispute that involves competition law issues between the business partners, who have an arbitration agreement, is deemed by national courts, at either of enforcement stages, as not based on the contract itself but on the mandatory provisions of law, application of which follows the agreement, this dispute will not be arbitrable.

¹⁵⁴ For this purpose one needs to keep in mind the requirement of the Law on Arbitral Tribunals to have the dispute based on the civil contract concluded in the written form.

The main lesson that needs to be taken into consideration by Kazakhstan from example of the European approach, and both, English and French law separately, is to enable a more flexible system governing what dispute may or may not be submitted to arbitration. The division of national laws into those regulating domestic and international arbitration is used in the French system as well, yet there is no substitutability between two when it comes to the notion of arbitrability. Both of them agree on what disputes can be arbitrated. Distinction between two laws of Kazakhstan on arbitration is vague and bases itself on the only provision of the Law on International Commercial Arbitration that provides for the residential requirements, stating that at least one of the parties should be a non-resident of the country¹⁵⁵ to make the Law applicable. In respect to the arbitrability of competition disputes this places a difficult question, which emerges out of the controversy as to what law should be applicable, thus varying from the direct non-arbitrability of the most of competition disputes on the territory of Kazakhstan to admissible arbitrability of these disputes provided that there is a contract, out of which the dispute arises.

Written form requirement for the contract mentioned in the previous paragraph, also represent an indirect obstacle in the subject-matter arbitrability of competition disputes. By allowing only those disputes that arise out of the civil contract, the Law on International Commercial Arbitration restricts the disputes that may arise between the parties of the arbitration clause or agreement but not directly out of the main agreement. For instance, if party A concludes a distribution agreement with party B and later finds out that B applies dissimilar and more favourable conditions to party C under the similar distribution agreement, thereby placing A at a competitive disadvantage, party A probably would not be able to arbitrate its claims to party B even if the initial distribution agreement between A and B contained a valid arbitration clause. Therefore, I am of opinion that Kazakhstan might

¹⁵⁵ Article 6(4) of the Law on International Commercial Arbitration.

consider an example of the English law in respect to understanding of the arbitrability, including arbitrability of competition disputes, which covers contractual and non-contractual disputes¹⁵⁶, as a model for introducing of amendments into Article 6(4) of the Law on International Commercial Arbitration.

Direct prohibition of competition disputes that involve natural monopolies and entities with the dominant position at the market, regardless of the fact that it is contained in the law governing domestic arbitration, presents an unjustifiable restriction imposed on the arbitrators' competence to settle disputes that may arise out of the contract with a valid arbitration clause. By excluding disputes based on the service contracts concluded with these entities this law goes into the contradiction with the general provisions of the Civil Procedure Code, which stipulates that whenever there is a valid arbitration clause parties to such clause should be referred by the national court to arbitration¹⁵⁷; and this provision refers to both, domestic and international arbitration. Thus, provision on restriction of arbitrability under the law on Arbitral Tribunals should be brought into compliance with provisions of the Civil Procedure Code and in correspondence with the requirements of International Commercial Arbitration.

Block Exemption Regulation

In a number of cases legal norms that void contracts, decisions or practices of business entities, may be declared inapplicable if they meet an established criteria that justifies prevention, restriction or distortion of competition at the market. These exclusions bear a significant impact on the way competition is distributed and maintained at the market; therefore are dealt with additional care and accuracy. It mainly reflects legal practice in the European Union, as there is no such notion as the "Block Exemption" under the rules of

¹⁵⁶ Section 6(1) of the English Arbitration Act of 1996.

¹⁵⁷ Article 249(5) of the Civil Procedure Code of Kazakhstan.

Kazakhstan. It will be shown that arbitrability of disputes concerning this particular set of rules has been rejected for a very long time until recent amendments introduced by the Regulation 1/2003 initiating modernization of enforcement of the EC competition law. Subchapter on the position of Kazakhstan will address those possible equivalents to the block exemption regulation that national laws of the country may have, as well as the analyze their arbitrability and lessons for Kazakhstan as compared with the European approach.

Application of Art. 101(3) of TFEU by Arbitrators

Under the Regulation No. 17/62, regulating application of article 101 and 102 of the TFEU the Commission was granted with an exclusive power to apply article 101(3), with neither the national courts nor arbitral tribunals been able to go into the analysis of this provision and grant exceptions to the undertakings. The Commission could by the means of this approval monitor the observance by the entities of “conditions and obligations” imposed within the meaning of the Regulation. By complying with these conditions and obligations an entity could have proven to fall under the exception provided for in Article 101(3). According to Blanke and Nazzini¹⁵⁸ those companies or group of companies would often choose to submit any disputes arising from the realization of the conditions specified above to arbitration. Because provisions of the TFEU were given direct effect, national courts and arbitral tribunals applied Article 101(3) as any other articles, circumventing restrictions of the Commission’s exclusive jurisdiction.

After enactment of the Regulation 1/2003 national courts have been given the powers to apply provisions of Articles 101 and 102 directly¹⁵⁹, including those that formed the Block Exception, but no notion of arbitral tribunals was made in its provisions, leaving the discussion as to whether this Article 101(3) may be applied by arbitrators directly as well.

¹⁵⁸ G.Blanke and R.Nazzini, *supra* note 9, at 52.

¹⁵⁹ Article 6 of the Regulation 1/2003.

Blanke and Nazzini¹⁶⁰ refute that if the block exemption was not arbitrable, than the arbitral tribunals would have to examine Articles 101(1) and 101(2) separately from Article 101(3), referring the parties in case of the latter to the national court, which in its turn would involve “considerable delay ... and put arbitration at an unjustified disadvantage” in comparison with the civil litigation. Therefore, the majority of legal scholars¹⁶¹ agree that after the ECJ ruling in the *Eco Swiss* case, regardless of the absence of arbitral tribunals in Article 6 of the Regulation 1/2003, article 101(3) should be deemed applicable by arbitrators and disputes arising out of it arbitrable.

Idot maintains that:

[i]f the parties decide to go to arbitration rather than go before a national judge, the maintenance of the parties’ rights – which is at the basis of the recognition of the direct effect – requires that the arbitrators have the same powers as the national judge. To some extent, there has to be equal treatment. The arbitrator must also be able to reach a decision based on Article 81(3) [101(3)] EC as far as the legality of the contract is concerned¹⁶².

Having been confirmed by a number of scholars¹⁶³, arbitrability of disputes under Article 101(3) mainly depends on the direct effect of the Article itself, but is also subject to the laws regulating arbitrability in the Member State of the EU. Those who oppose objective arbitrability of competition disputes concerning the block exemption justify their position by the complexity of the Article 101(3) and by stating that the Commission is the only authority that is capable of examining and taking into account of all the economic impacts and compilation of facts of a particular agreement, decision or practice allegedly constituting a breach under the EC competition law, not the arbitral tribunals or even national courts.

¹⁶⁰ G. Blanke and R. Nazzini, *supra* note 9, at 52.

¹⁶¹ See M. Bowsher, “Arbitration and Competition”, in Competition Litigation in the UK, T. Ward and K. Smith eds., (London: Sweet & Maxwell, 2005), Gordon Blanke and Renato Nazzini, “*Arbitration and ADR of Global Antitrust Disputes: Taking Stock: Part I*”, Global Competition Litigation Review 1(1) (2008), etc.

¹⁶² L. Idot, “*Arbitration and the Reform of Regulation 17/62*”, European Competition Law Annual 2001 (2003).

¹⁶³ See Hans van Houtte, “*Arbitration and Art. 81 and 82 EC Treaty*”, ASA Bulletin 23(3) (2005), 431, 436, C. Baundenbacher, “*Enforcement of EC and EEA Competition Rules by Arbitral Tribunals Inside and Outside EU*”, European Competition Law Annual 2001, 341-361, Roth Q.C. and Rose eds., *Bellamy & Child: European Community Law of Competition*, 6th edn., Dolmans and Frierson, “*Arbitration and the Modernization of EC Antitrust Law*”, (Fall, 2003) 14(2) ICC International Court of Arbitration Bulletin, 37, etc.

However, there is no profound proof that arbitrators are less competent than judges in national courts, and that there should be any distinction between the two when analyzing Article 6 of the Regulation 1/2003.

To summarize, arbitrability of disputes under Article 101(3) is the most debatable aspect of arbitrability of competition disputes under the European law, closely connected with previously existing exclusive jurisdiction of the Commission to grant exemptions and affected by the absence of mentioning of arbitral tribunals in Regulation 1/2003. Nonetheless, under the laws of England and France there has been no rule that would prove the non-arbitrability of the block exemption based disputes, neither there has been a ruling adopted by the ECJ that would preclude arbitrators from applying article 101(3) of the TFEU. Under the general rule, the arbitrability of disputes concerning the block exemption regulation has been confirmed and upheld.

Exemptions under Kazakhstani law

The Law of Kazakhstan on Competition provides for an exception from the contracts, which will be considered to have an anti-competitive affect, and practices that abuse dominant position in a number of cases¹⁶⁴, amongst which some equivalents to the provisions of Article 101(3) of the TFEU can be found. There is no explicit provision of this law that would reserve a state authority with exclusive jurisdiction in determination whether this or that practice or agreement fall under the exception. Therefore, it may be argued that in the absence of such power of the authority, these exceptions are to be applied as default conditions in consideration of the breach of competition law by the entity as conducted by the state authority.

As it was earlier stated in Chapter II, this Law does not contain any direct reference to the right of the business entity to go to the court with the claimed violation of competition

¹⁶⁴ Article 10(3)-(4) and 11(4) of the Law on Competition of Kazakhstan No. 112-3 of 25.12.2008

law against the other independent entity. Article 73 of the Law provides for the judicial appeal of the state authority's decisions only, so it falls out of the scope of arbitration agreement and is not covered by the notion of arbitrability of competition disputes. Where jurisdiction of the court remains indirect, and is based on the provisions of the civil procedure legislation of the country, one may conclude that arbitrating of any competition disputes, as not directly or indirectly supported by the national provisions, may become impossible. *AES Santri Power Limited* case, discussed in the previous Chapter, shows that indirect jurisdiction of the state authority and the interests of Kazakhstan to maintain competition at the market may surpass provision of the agreement to arbitrate.

On the other hand, arbitrability of disputes concerning these provisions of the Law on Competition may also be opposed by the written form requirement of the Law on International Commercial Arbitration. Since exceptions granted under Articles 10(3)-(4) and 11(4) of the Law on Competition do not necessarily imply that the dispute concerning them will be based on the civil contract, arbitral tribunal may be deprived of its competence, as the parties will not be able to refer to arbitration with claims that are based on the administrative act.

In relation to consideration of arbitrability of disputes concerning exceptions granted under the national legal provisions regulating competition, and taking into account the European Approach enabling arbitrators to settle these disputes, it is recommendable that Kazakhstani legislator introduces amendments into the national laws that eliminate the written requirement of the contract, on which the dispute to be arbitrated is based. Having allowed disputes based on the administrative acts or other non-contractual relationships, national law governing competition will go in the closer interrelation with the law on international commercial arbitration by making any disputes originated on the newly admitted basis arbitrable. It is a good practice to allow arbitrating of competition disputes by

putting a clear distinct line between the state's concerns over protection of its public policy and allowing objective arbitrability of disputes that may involve application of mandatory norms of national laws.

Furthermore, having ratified the New York Convention and having implemented its provisions in the legal norms of the state's laws, Kazakhstan undertook the obligation to distinguish two different grounds for refusing recognition and enforcement of arbitral awards that can be used by the courts on their own motion. Law on the International Commercial Arbitration of Kazakhstan provides for these grounds, and the limitation to the contractual relationships based disputes that may become arbitrable, though not recommended, does not fall into the contradiction with the Convention. But, as it was previously reasoned in Chapter II and Chapter III(2) of this thesis, the distinction between the Law on the International Arbitration and the Law on Arbitral Tribunals remains so vague, that application of the latter to the disputes between business partners with a foreign element cannot be fully excluded as a possibility; thus making this so called "domestic" arbitration law, which is not entirely in compliance with the New York Convention, a weak point in the legislation of Kazakhstan. It may be concluded that the Law on Arbitral Tribunals provides for the protection of the established public policy not only by fixing a requirement for national courts to go into the merits of the case at the stage of enforcement of arbitral awards, but also by excluding competition disputes from the scope of arbitrability.

CONCLUSION

This paper has examined positions of England, France and Kazakhstan in respect to the issue of subject-matter arbitrability of competition disputes that has now for decades been discussed by legal practitioners and theorists. The thesis analyzed the established notion of arbitrability under the English and French legal systems, and, by comparing and opposing its statutory provisions to the European legal norms, particularly those of England and France, and revealed shortcomings of the Kazakhstani legislation regulating objective arbitrability of competition disputes.

The study of the English statutory and case law showed that at any stage of the arbitrated dispute's life English courts would recognize the capability of the dispute that may concern application of the EC competition law to be arbitrated. This may constitute the most arbitration-friendly position that enables business partners to submit their controversies and claims under the competence of arbitrators even when such claims entail application of the block exemption regulation or other rules on competition. Despite the French courts' similar confirmation of arbitrability of these disputes, English law provides for the explicitly specified legal framework that allows the parties at dispute to arbitrate claims originated from the non-contractual relationships. The research carried out under the topic of this thesis lead me to conclusion that, although contained in the case law, English view of arbitrability of competition disputes may be considered as one of the best models of arbitration law, which might be partly adopted by the Kazakhstani legislator.

Whereas French legal norms provide for a less specific description of arbitrable disputes, leaving it to the arbitrators and national courts to determine whether the disputable rights may be disposed of freely by the parties, the French national courts have nonetheless expressly confirmed arbitrability of competition disputes at the stage of enforcement of

arbitral awards with implied recognition of such at other stages, by setting a rather narrow corridor for refusing recognition and enforcement in the form of “flagrant” violation of the EC competition law. Notable novelties introduced by France, such as the notion of “international public policy” and “autonomy of arbitration agreement” have also been analyzed by this thesis, leading it to the conclusion that although the French law may remain technically complex in the area of arbitrability, this complexity in fact enables more advantageous arbitration process without anyhow limiting the arbitrability of competition disputes itself.

Kazakhstani legislation has received the thorough analysis not only within its own established legal framework but in comparison with the legal provisions regulating objective arbitrability in England and France. This thesis indicates one of the main obstacles, from which major discussions originate in relation to the capability of disputes to be arbitrated, and that is unclear distinction between the laws governing domestic and international arbitration. Express prohibition to submit disputes under the contracts with natural monopolies and dominant participants of the market, as well as an explicit requirement of the written form of agreement on which the dispute is based constitute the main weakness points of arbitration laws of Kazakhstan. Suggestions of adopting the English legal provision extending arbitrability to non-contractual disputes are supported by opinions of Kazakhstani leading legal scholars, Suleimenov and Greshnikov, who both claim that this particular limitation under the national law significantly restricts further development of arbitration in the country.

By analyzing specifically the arbitrability of disputes emerging under the merger regulations, general rules on competition and statutory exceptions granted to undertakings that would otherwise be found in violation of competition law, this paper concluded that in all of the said above the European approach proved to be pro arbitrability; this is enhanced

by the supportive position of the Commission to promote arbitration and to extend the arbitrators' powers to those parties that are not initially covered by the arbitration agreement, as it is the case with the merger commitments' based arbitration. Having drawn a parallel to the Kazakhstani provisions on competition and its interrelation with the laws on arbitration, the need for exclusion of the contractual nature of the dispute origin as well as the prohibition of competition disputes arbitrability under the domestic arbitration act has been confirmed and proved to be of even greater importance.

The research conducted for the purpose of this thesis contributes to the works of legal scholars on arbitrability of competition law in the selected countries in general by combining rules of law and precedents of England and France with legal practitioners' and my personal opinions and conclusions. It also introduces a new supportive position in respect to amending of the Kazakhstani legislation regulating arbitration. Having agreed with what was noted by known scholars of Kazakhstan, I put forth new reasoning and grounds for criticizing the subject matter arbitrability of competition disputes as it is provided for by national laws of Kazakhstan. The analysis carried out under this thesis presents a new topic for legal discussions in respect to the notion of arbitrability of disputes concerning application of competition laws of Kazakhstan and its recommendable consideration of the English Arbitration Act and the established case-law as a model for changes.

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