

Summer 8-31-2016

# Arbitrating Antitrust Claims: From Suspicion to Trust

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# ARBITRATING ANTITRUST CLAIMS: FROM SUSPICION TO TRUST

VERA KORZUN\*

*This Article examines the evolving role of international commercial arbitration in the enforcement of domestic antitrust laws. It first explores how antitrust claims and issues arise in international arbitrations. It then describes three phases in the evolution of domestic courts' attitude toward the adjudication of antitrust claims by international arbitral tribunals. Initially, national courts—like courts of the United States prior to the U.S. Supreme Court's pathmarking 1985 decision in *Mitsubishi v. Soler*—were suspicious of private adjudication of antitrust claims, cognizant of the public values implicated by antitrust law. A remarkable but unnoticed transformation has since ensued. Now, the national courts of most developed economies accept (and even mandate) adjudication of antitrust claims by private international arbitral tribunals. This transformation may be predictive of future acceptance of international arbitral tribunals as trustworthy forums for dispute resolution of other “public” subject matters. This Article concludes by suggesting how international arbitrators should discharge their new role and how domestic courts might police it.*

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## I. INTRODUCTION

International arbitration of antitrust claims is an important yet under-examined subject. Even today, thirty years after the U.S. Supreme Court established the arbitrability of U.S. federal antitrust claims in a foreign arbitral proceeding in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>1</sup> the possibility of arbitrating antitrust issues in international arbitration remains largely overlooked by both antitrust and arbitration lawyers. Seasoned practitioners of international arbitration are aware of the possibility and even occasionally witness antitrust claims raised in arbitral proceedings. The common perception, however, is that antitrust laws raise an array of complex issues ill-suited for international arbitration. In fact, antitrust claims have often been opposed in international arbitrations on “technical” grounds—arbitrability, mandatory law, public policy—rather than on the merits of the arbitration claims themselves.

Opponents of private arbitration of antitrust claims during the decades prior to *Mitsubishi* usually invoked the non-arbitrability argument.<sup>2</sup> After the *Mitsubishi* decision dis-

1. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

2. See *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d. Cir. 1968) (“[P]ervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases . . . [make] the antitrust claims raised here . . . inappropriate for arbitration.”); *Aimcee Wholesale Corp. v. Tomar Prods., Inc.*, 237 N.E.2d 223, 225 (N.Y.

patched the arbitrability objection, arguments based on mandatory law—claiming that a particular outcome would run afoul of the antitrust laws of a key jurisdiction—and attacks on rendered arbitral awards on the ground of public policy became the favored weapons of parties seeking to use antitrust law to avoid adverse international arbitral awards.<sup>3</sup>

The tension between antitrust laws and international arbitration derives from their fundamental opposition along the public-private dichotomy.<sup>4</sup> Antitrust laws seek to protect public interests by preserving free competition in the markets. Public antitrust or competition agencies commonly enforce these laws by imposing fines, injunctions, or even criminal penalties pursuant to domestic antitrust laws. In some jurisdictions—the United States being a notable example—antitrust laws permit private parties, including consumers, to sue for alleged unlawful anti-competitive conduct and to seek treble damages as a stand-in for the public harm caused by antitrust violations.

By contrast, international arbitration is a form of private ordering aimed at dispute resolution. It is a creature of con-

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1968) (“[T]he enforcement of our State’s antitrust policy should not be left within the purview of commercial arbitration.”); *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10, 25 (S.D.N.Y. 1975) (“It is now cardinal doctrine that the public interest in the enforcement of the antitrust [sic] laws makes antitrust claims inappropriate subjects for arbitration.” (footnote omitted)); *Capital City Pub. Co. v. Trenton Times Corp.*, 575 F.Supp. 1339, 1350 (D.C.N.J., 1983) (“[I]t is clear that at least a portion of plaintiff’s claims could not be subject to an agreement to arbitrate any way, under the principle that antitrust claims may not be the subject of arbitration.” (citation omitted)).

3. *See, e.g., Baxter Intern., Inc. v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003) (where the award-loser in arbitration sought to challenge the award in court alleging that the license agreement at issue, as interpreted by the tribunal, would violate the U.S. antitrust law and as such is against the public policy).

4. *See, e.g., Sotiris I. Dempegiotis, EC Competition Law and International Commercial Arbitration: A New Era in the Interplay of These Legal Orders and a New Challenge for the European Commission*, 1 *GLOBAL ANTITRUST REV.* 135, 135 (2008) (noting “the conceptual conflict that . . . arises out of the ‘confrontation’ between EC competition law and the international commercial arbitration realm, namely between a set of rules of a prevalent public law nature enjoying a supranational constitutional status through inclusion in the EC Treaty and serving as transnational mandatory norms on the one hand, and a private, confidential, flexible, and independent adjudication mechanism for the resolution and final settlement of international commercial (and mostly contractual) disputes on the other” (citation omitted)).

tract. As such, it may serve as an alternative to litigation in public courts. The supervisory power of courts is limited by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention),<sup>5</sup> a multilateral treaty committing its 156 states signatories to honor international arbitration agreements and arbitral awards subject to a limited number of exceptions. The most important exception with respect to antitrust law is that arbitral awards may be set aside at the place of arbitration or refused enforcement if they are contrary to the public policy of the state involved.<sup>6</sup> However, national courts tend to be exceedingly deferential when reviewing international arbitral awards, except where domestic implementation of the New York Convention makes available specific grounds for challenging their recognition or enforcement.

The public function of antitrust law and the private ordering of international arbitration collide when a party in an arbitral proceeding invokes antitrust claims in addition to standard breach of contract claims. In such a case, the state is neither enforcing its antitrust laws nor delegating enforcement authority to a private party, because international arbitrations often take place outside of the state's jurisdiction. Furthermore, parties to an international arbitration proceeding may choose to have a third country's law applied to the substance of their dispute, which could displace the antitrust law of a state that views its law as mandatory based on the extent of the dispute's connection with its jurisdiction.<sup>7</sup>

From a state's perspective, the tension posed by the surrender of control over antitrust enforcement to international

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5. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

6. *Id.* art. V(2)(b). See also G.A. Res 40/72, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, U.N. Doc. A/RES/40/72 (Dec. 11, 1985) amended by G.A. Res 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006), art. 34(2)(b)(ii) [hereinafter UNCITRAL Model Law].

7. Consider the facts of *Mitsubishi* where the sales agreement between a Puerto Rican automobile dealer and a Japanese car manufacturer and a Swiss automobile distributor subject to Swiss law provided for arbitration in Japan. The U.S. antitrust law could therefore be displaced in arbitration all together. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 614 (1985).

arbitrators is tempered by the prospect of back-end judicial review over arbitral awards. This back-end judicial review can be achieved by the setting aside or enforcement proceedings, most commonly on public policy grounds.<sup>8</sup> National courts, however, have struggled over the years to establish a proper standard of review for antitrust-related awards. On the one hand, under the pro-arbitration shadow of the New York Convention, they have expressed a strong desire to defer to determinations made by international arbitral tribunals.<sup>9</sup> On the other hand, national courts, starting with the U.S. Supreme Court in *Mitsubishi*, have acknowledged the need for a searching review of the antitrust implications of arbitral awards, given the involved public interests.<sup>10</sup>

Despite the theoretical appeal of allowing judicial review of antitrust issues, using the New York Convention's "public policy" ground for such review is problematic. Given the plasticity of public policy, national courts have been reluctant to invoke it too frequently as a ground for nullifying an arbitral award or denying its enforcement.<sup>11</sup> The challenge, then, is to find a way of ensuring that all applicable antitrust laws are considered and applied faithfully in arbitral proceedings without

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8. See *id.* at 638 (where the U.S. Supreme Court laid the grounds for what has become known as the "second look" doctrine by holding that "[h]aving permitted the arbitration to go forward, 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 the antitrust laws has been addressed").

9. See, e.g., *Baxter Intern., Inc. v. Abbott Laboratories*, 315 F.3d 829, 832 (7th Cir. 2003) ("*Mitsubishi* did not contemplate that, once arbitration was over, the federal courts would throw the result in the waste basket and litigate the antitrust issues anew. That would just be another way of saying that antitrust matters are not arbitrable. . . . The arbitration tribunal in this case 'took cognizance of the antitrust claims and actually decided them.' Ensuring this is as far as our review legitimately goes.")

10. See Hof's-Gravenhage 24 maart 2005, NJF 2005, 239 (Marketing Displays International Inc. (MDI)/VR) (Neth.), translated in 31 Y.B. COMM. ARB'N 808 (2006) (where the Court of Appeal of The Hague in the enforcement proceeding conducted a review on the merits of foreign arbitral awards to ensure correct application of EC competition law).

11. For instance, the U.K. courts are believed to have refused enforcement of an award on the public policy grounds only in a single case. See NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.104 (5th ed. 2009).

relying too heavily on intrusive judicial review of arbitral awards under the troublesome rubric of “public policy.”

The key, in my view, is to invoke the voluntary assistance of international arbitrators. If emphasis is put on the application of antitrust law in international arbitrations on the front end—engendering a norm of arbitrator-as-antitrust regulator, so to speak—resultant awards more likely will survive a deferential abuse-of-discretion type judicial review in back-end setting aside and enforcement proceedings.

Judicial perceptions of the suitability of arbitral tribunals for performing antitrust enforcement functions have already changed since *Mitsubishi*. Today, arbitral tribunals are not only perceived by the parties as a trustworthy forum for the resolution of private antitrust disputes, but courts have also become comfortable with entrusting arbitral tribunals with applying antitrust laws.<sup>12</sup>

The question is how to provide incentives for arbitrators to apply antitrust law at the front end, and to do so *sua sponte* where parties fail to raise antitrust concerns themselves. The answer may lie in the arbitrator’s obligation to produce an enforceable award. This obligation provides a compelling incentive for the arbitrator to consider and apply antitrust law, because failure to do so may lead to setting aside or non-enforcement of resultant arbitral awards. This Article argues that the arbitrator’s obligation with respect to antitrust law may be enforced through reputational remedies, which are especially effective in international arbitration as most international arbitrators are repeat players in the field.

This Article has two major aims. First, it will survey the history of antitrust claims in international arbitrations over the past thirty years. Prior studies of the history of antitrust claims in international arbitrations tend to focus on the 1985 U.S. Supreme Court decision in *Mitsubishi* and subsequent U.S. and European judicial decisions reaffirming the same basic princi-

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12. See, e.g., *Baxter*, 315 F.3d at 829 (affirming the lower court decision to confirm an international arbitral award that addressed antitrust claims, without allowing the plaintiff to reargue in front of the court antitrust claims already decided by the arbitral tribunal); Cour d’appel [CA] [regional court of appeal] Paris, 1e ch. (section C), Nov. 18, 2004, 2004 REVUE DE L’ARBITRAGE [REV. ARB] 986 (Fr.) (suggesting there exists an *ex officio* duty of an arbitrator to apply EU competition law).

ple that antitrust claims are arbitrable.<sup>13</sup> A second, less studied phase in the history of antitrust arbitration involves cases of judicial review of antitrust-related arbitral awards in setting aside and recognition and enforcement proceedings in national courts. Once *Mitsubishi* and similar decisions established the threshold principle of arbitrability, antitrust arbitrations were allowed to go forward, and judicial scrutiny turned to evaluation of resultant arbitral awards—what the U.S. Supreme Court in *Mitsubishi* referred to as the “second look.” The standard of review became an important issue in these second-generation cases.<sup>14</sup>

There appears, now, to be a third phase in the development of antitrust arbitration (see Table 1). Having accepted the notion that private arbitral tribunals are capable of adjudicating antitrust claims, national courts are increasingly demonstrating an expectation that arbitral tribunals are an appropriate and desired forum for enforcing arbitration laws. And so, courts are comfortable with ratifying arbitral awards pursuant to light-touch judicial review as long as antitrust law has been considered in arbitration. Even when the parties do not raise antitrust issues in arbitration proceedings, courts have suggested that arbitrators have an obligation to screen any award for antitrust law implications, just like a state regulator might do with respect to a proposed merger of companies.<sup>15</sup>

The second aim of this Article is to suggest how arbitral tribunals should honor their traditional dispute resolution

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13. See, e.g., Donald F. Donovan & Alexander K.A. Greenawalt, *Mitsubishi After Twenty Years: Mandatory Rules before Courts and International Arbitrators*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 11 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) (analyzing the *Mitsubishi* decision and its implications for the debate as to how domestic courts and arbitrators should treat mandatory law rules); Thomas J. Brewer, *The Arbitrability of Antitrust Disputes: Freedom to Contract for an Alternative Forum*, 66 ANTITRUST L.J. 91 (1997) (examining the decision in *Mitsubishi* and more recent case law and their implications for the enforcement of agreements to arbitrate antitrust disputes); Ludwig Von Zumbusch, *Arbitrability of Antitrust Claims Under U.S., German, and EEC Law: The ‘International Transaction’ Criterion and Public Policy*, 22 TEX. INT’L L.J. 291 (1987) (analyzing the *Mitsubishi* decision and comparing its approach to German and EEC law addressing arbitrability of antitrust claims).

14. See discussion *infra* Part III.B.

15. See Cour d’appel [CA] [regional court of appeal] Paris, 1e ch. (section C), Nov. 18, 2004, 2004 REVUE DE L’ARBITRAGE [REV. ARB.] 986 (Fr.).

mandate as creatures of contract written by private parties while also managing this newfound public duty as antitrust regulators. This puzzle raises difficult questions of mandatory law and the function of international commercial arbitration. A satisfactory resolution of the puzzle may also prove illuminating to current debates about the legitimacy of using private investor-state arbitral tribunals to resolve public regulatory matters under the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) agreements.

TABLE 1: THREE PHASES OF ANTITRUST ARBITRATION DEVELOPMENT

Phase/Its place in the arbitration process	Prior to or at the beginning of arbitration	During arbitration	During setting aside or enforcement proceedings
Phase 1	Establishing the arbitrability of antitrust law issues		
Phase 2			Establishing a proper standard of court review of arbitral awards
Phase 3		Developing trust in the arbitrators' ability to apply antitrust law	

This Article has three Parts. Following this introduction, Part II provides an overview of international arbitration of antitrust claims. It begins by explaining how various antitrust claims and issues may arise in international arbitrations. It continues by discussing a special case of commitment arbitrations—arbitrations that may derive from legal commitments undertaken by parties, most commonly, as a condition of merger clearance.<sup>16</sup> In doing so, it explains how antitrust law may be invoked in international arbitration through the concepts of mandatory law and public policy. Part III examines

16. For further details on commitment arbitrations, see *infra* Part II.A(2).

the law and practice of international arbitral tribunals and national courts in arbitrating antitrust claims over time. It asserts that we are witnessing a new phase in the development of antitrust arbitration where arbitral tribunals are increasingly relied upon by the state in the enforcement of antitrust laws beyond the parties' intent. Part IV then seeks to address the resultant arbitrators' obligation to raise and apply antitrust law in international arbitration. It concludes by offering observations and normative suggestions with a view to balancing the private interests of disputing parties in arbitrating antitrust claims with the public policy concerns of enforcing antitrust law. A short conclusion follows.

## II. ANTITRUST IN INTERNATIONAL ARBITRATION: AN OVERVIEW

This Part explains how and when antitrust claims or issues may arise in international arbitration and the court proceedings resulting from such arbitration. The focus of my analysis is on international arbitration, which generates more complicated issues regarding the application of antitrust law than would normally arise in domestic arbitration for at least three reasons. First, international arbitration may require the arbitral tribunal to consider the antitrust laws of several jurisdictions.<sup>17</sup> Second, such antitrust laws may be at odds with each other, compelling the tribunal to make a choice-of-law determination as to which of one-or-more conflicting antitrust laws should be applied in a given dispute. Third, at the post-award stage in setting aside or enforcement proceedings, interna-

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17. The multiplicity of various national antitrust laws to be considered in antitrust arbitration is the reflection of the international commercial arbitration itself, which commonly calls for application of several different systems of law. See BLACKABY ET AL., *supra* note 11, ¶ 3.07 (counting "at least five different systems of law which in practice may have a bearing on an international commercial arbitration"). Although antitrust issues and concerns may come up in an international commercial arbitration through a variety of concepts, such as the arbitrability, mandatory law, public policy, or the substantive law, any of the systems of law to be applied in international commercial arbitration may include antitrust law provisions. Consequently, in a typical international commercial arbitration one system of antitrust law may have to be considered as part of the law governing the arbitration agreement, another—through the law of the seat (*lex arbitri*), third—as part of the governing law to be applied to the substance of the parties' dispute, and at least one more—through the law of the country(ies) governing the recognition or enforcement of the arbitral award.

tional arbitration may yet again require courts to consider the antitrust laws and public policy of several jurisdictions—most prominently, of the place of arbitration or place of enforcement.

International arbitration has long been recognized as an important and often preferred mechanism of resolving international commercial disputes.<sup>18</sup> Parties to international business transactions often choose international commercial arbitration over litigation in a foreign jurisdiction because of the neutrality of the forum; the finality and enforceability of arbitral awards under the New York Convention;<sup>19</sup> and the privacy, confidentiality, and flexibility of the arbitral process.<sup>20</sup> Further, in contrast to litigation, where parties have little or no control in selecting the judge to resolve their dispute, parties to an international arbitration may choose members of the arbitral tribunal, tailoring arbitrators' qualifications and experience to the needs of a particular dispute.<sup>21</sup>

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18. See 1 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 68 (2009) (“[A]rbitration has for centuries been perceived as the most effective—if by no means flawless—means for resolving international commercial disputes.” (footnote omitted)); *id.* at 70 (“The same increasing preference for, and use of, international commercial arbitration is reflected in surveys of users and in empirical studies of the use of arbitration clauses in international commercial agreements” (footnotes omitted)).

19. See New York Convention, *supra* note 5.

20. See White & Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration 6 (2015), [http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015\\_0.pdf](http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf) (listing the enforceability of awards, ability to avoid specific legal systems or national courts, flexibility, ability to select arbitrators, neutrality and finality as the most valuable characteristics of international arbitration that motivate its users to choose arbitration as a dispute resolution method). See generally BLACKBAY ET AL., *supra* note 11, ¶¶ 1.86–1.98 (discussing advantages of international arbitration by explaining why parties to an international dispute should arbitrate rather than litigate in national courts). For a discussion of the advantages of arbitration for resolving antitrust disputes, see Alexis Mourre & Luca G. Radicati Di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, 23 J. INT'L ARB. 171, 171 (2006). See also Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395, 395 (1993).

21. See White & Case, 2015 International Arbitration Survey, *supra* note 20, at 6 (naming “selection of arbitrators” as the fourth most valuable characteristic of international arbitration, according to the survey’s respondents). In antitrust arbitrations, parties may select arbitrators with prior ex-

Its recognized advantages aside, there remain constraints on international arbitration's capacity to adjudicate antitrust claims. First, despite *Mitsubishi* and its progeny, the arbitrability of antitrust issues may be limited by the arbitration laws of jurisdictions connected to the underlying dispute.<sup>22</sup> Second, a dispute may have contractual limitations preventing its resolution by international arbitration. For instance, international arbitration might not be available in the absence of an arbitration agreement between disputing parties, or where the scope of the agreement is too narrow to encompass antitrust claims.<sup>23</sup> Third, the antitrust law at issue might not afford private remedies that can be invoked in international arbitration. Instead, as it is commonly the case with EU competition law, the alleged antitrust violation may require public antitrust enforcement initiated by filing a complaint with antitrust authorities.<sup>24</sup> Finally, antitrust law may be viewed as

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perience in antitrust or background in economics to better address complex antitrust analysis often required for resolution of antitrust disputes. *See* *Attheraces Ltd. v. The British Horseracing Board Ltd.* [2007] EWCA Civ 38, [para. 7] (noting, in the opinion by Lord Justice Mummery, that arbitral tribunals might be better positioned than courts to address antitrust disputes because “[t]he nature of these difficult [pricing and access] questions [in relation to essential facilities] suggests that the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers”).

22. Antitrust issues appear to be non-arbitrable under Russian law. *See, e.g.,* Н.Ю. Ерпылева, *Международный коммерческий арбитраж: правовые основы функционирования*, №1 (2) МЕЖДУНАРОДНОЕ ПРАВО 1–74 (2013). It is also uncertain whether antitrust issues can be arbitrated under the laws of the UAE. *See* Gordon Blanke, *The New UAE Competition Law: Is It Arbitrable or Is It not Arbitrable? – That is the Question . . .*, KLUWER ARB. BLOG (Feb. 19, 2013), <http://kluwarbitrationblog.com/blog/2013/02/19/the-new-uae-competition-law-is-it-arbitrable-or-is-it-not-arbitrable-that-is-the-question/>.

23. *See, e.g.,* *AASI Creditor Liquidating Trust v. AU Optronics Corp.* (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2013 U.S. Dist. LEXIS 102307 65 (finding the arbitration clause providing for arbitration of disputes “between the parties regarding the terms of this Agreement” to be too narrow to encompass antitrust claims); *Zoran Corp v. DTS, Inc.*, 2009 WL 160238 (N.D. Cal. 2009) (distinguishing between antitrust claims falling within the scope of the arbitration and those remaining outside of it because of the narrow subject-matter of the arbitration clause at issue).

24. It should be noted that EU competition law still relies predominantly on public enforcement by the European Commission and national antitrust authorities of the EU Member States. *See* PHILLIP LANDOLT, *MODERNISED EC COMPETITION LAW IN INTERNATIONAL ARBITRATION* 2 (2006) (observing that

mandatory and therefore may have to be taken into account despite the choice of law made by the parties (e.g., mandatory law of the seat of arbitration) and/or in addition to such laws (e.g., mandatory law and public policy of the place of enforcement).

#### A. *Antitrust Claims in International Arbitration*

In international arbitration, antitrust claims or issues may arise in any of the three stages of the arbitration process: (1) prior to arbitration (most commonly, as part of the arbitrability discussion in court proceedings seeking to enforce the arbitration agreement); (2) during the arbitration (as part of governing law or mandatory law at issue); and (3) following the arbitration (in setting aside or enforcement proceedings, usually, as part of a public policy argument).

In the past, antitrust arguments were rarely raised in arbitral proceedings, although the private and confidential nature of international arbitration makes it impossible to ascertain the exact number of arbitrations where antitrust issues were invoked. One pioneering empirical study of antitrust claims in international arbitrations examined the application of EU

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“the primary basis for the enforcement of EC competition law is the action of public agencies”). Private suits for compensatory damages are possible in national courts of the Member States, but rarely used in practice. See Wouter P.J. Wils, *Should Private Enforcement be Encouraged in Europe?* 26 *WORLD COMPETITION* 473, 473 (2003) (noting that “[i]n private litigation . . . rarely are the EC antitrust rules used proactively (as a “sword”) to claim damages or injunctive relief in national courts”). However, private enforcement of EU competition law is expected to grow as the European Commission has been promoting it among Member States at least since 2003, when it began modernization of the EU competition law system following the introduction of Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, Council Regulation 1/2003, 2003 O.J. (L 1) 1 (EC) [hereinafter Regulation 1/2003]. It has been suggested that much of private enforcement can be done through arbitration. See, e.g., Laurence Idot, *Arbitration and the Reform of Regulation 17/62*, *EUR. COMP. L. ANN.* 307, 311 (2001) (arguing that “the contractual disputes that are affected the most by the reform [of the EU competition law system] have as good a chance of being settled by an arbitrator as by a national judge”). See also Dempegiotis, *supra* note 4, at 136 (“the enhanced role of private enforcement along with the corresponding growing importance of private adjudication in Europe generally constitute a quite clear indication of the significant anticipated expansion of the use of arbitration in the application of EC competition law”).

competition law in International Chamber of Commerce (ICC) arbitrations between July 1988 and January 1994.<sup>25</sup> Out of 700 arbitral awards rendered in that period, Verbist located only seventeen awards that involved questions of European competition law, including two awards dealing with the issue of arbitrability.<sup>26</sup>

In 2003, Dolmans and Grierson undertook a study of arbitrations involving EU competition law (mostly from the ICC, apart from one case from the Swiss Court of Arbitration for Sport) and concluded that “[s]omewhat surprisingly, competition arguments appear to have been rare in published competition cases.”<sup>27</sup> Out of twenty-eight published cases discussing EU competition law, the authors identified only three in which arbitral tribunals accepted antitrust law claims after proper consideration. All three of these instances dealt with non-compete clauses, which were invalidated or narrowed by the arbitral tribunal. One case also involved a ban on passive sales.<sup>28</sup> In two additional cases, arbitrators raised EU competition law arguments on their own.<sup>29</sup> At the time, a substantial workload of antitrust cases was believed to be conducted through ad hoc arbitrations.<sup>30</sup>

In the past decade, antitrust claims and issues have been invoked more often in international arbitrations. A recent study reports at least fifty-five ICC awards (published or publicly commented on) for the period of 1964-2010, with nearly one third of them rendered since 2000.<sup>31</sup> Forty-four of these awards dealt with issues of EU competition law (including Arti-

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25. See Herman Verbist, *The Application of European Community Law in ICC Arbitrations – Presentation of Arbitral Awards*, ICC INT’L CT. OF ARB. BULL., SPEC. SUPP., INTERNATIONAL COMMERCIAL ARBITRATION IN EUROPE 33 (1994).

26. *Id.* at 33.

27. Maurits Dolmans & Jacob Grierson, *Arbitration and the Modernization of EC Antitrust Law: New Opportunities and New Responsibilities*, 14 ICC INT’L CT. OF ARB. BULL. 37, 37 (2003). The study did not include unpublished awards, awards were arbitrators ignored antitrust issues, awards under arbitration rules other than those of the ICC, and settled cases. *Id.* at 38.

28. *Id.* at 37 n.7.

29. *Id.* at 38 n.8.

30. *Id.* at 37 n.4 (referring to findings reflected in M. Blessing, *EG/US Kartellrecht in Internationalen Schiedsverfahren – 77 Aktuelle Fragen aus der Praxis* (Basel: Helbing & Lichtenhahn, 2002)).

31. For more detailed information on these awards, see *Annex III: Table on ICC Arbitration Awards Involving Antitrust Issues over the Period 1964–2010*, in

cles 101 and 102 of the Treaty on the Functioning of the European Union<sup>32</sup> (TFEU) and state aid provisions); nine awards involved national antitrust laws of the Czech Republic, France, Germany, Hungary, Italy, South Korea, Portugal, and Spain; and two awards implicated U.S. antitrust laws.<sup>33</sup>

Following the U.S. Supreme Court decision in *Mitsubishi*,<sup>34</sup> and the European Court of Justice (ECJ) decision in *Eco Swiss*,<sup>35</sup> it appears that the arbitrability of U.S. and EU competition laws is, to use the words of Yves Derains, “no longer seriously challenged.”<sup>36</sup> Instead, antitrust claims are commonly used today in international arbitration as a “shield” (as in *Mitsubishi* itself), that is, raised as a defense to breach of contract or other claims.<sup>37</sup> In a typical “shield” case, a party seeks to excuse non-performance under a contract by alleging invalidity of the contract due to its inconsistency with applicable anti-

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2 EU AND US ANTITRUST ARBITRATION. A HANDBOOK FOR PRACTITIONERS 2063–92 (Gordon Blanke & Phillip Landolt eds., 2011).

32. See Consolidated Version of the Treaty on the Functioning of the European Union arts. 101 and 102, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU].

33. See Annex III: Table on ICC Arbitration Awards Involving Antitrust Issues over the Period 1964–2010, *supra* note 31, at 2063–92.

34. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

35. Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int'l*, 1999 E.C.R. I-3055.

36. Yves Derains, *Specific Issues Arising in the Enforcement of EC Antitrust Rules by Arbitration Courts*, 2001 EUR. COMPETITION. L. ANN. 323, 323 (2001) (making an observation with respect to EC antitrust law, but the same is applicable to U.S. antitrust law because of the U.S. Supreme Court’s decision in *Mitsubishi* establishing the arbitrability of federal antitrust law in the United States). See also Luca G. Radicati Di Brozolo, *Antitrust: A Paradigm of the Relations Between Mandatory Rules and Arbitration – A Fresh Look at the “Second Look”*, 7 INT’L ARB. L. REV. 23, 23 (2004) [hereinafter Radicati Di Brozolo, *Antitrust*] (explaining such consensus on the arbitrability “to a large extent on the premise that arbitrators will apply the competition law of the country whose courts decline jurisdiction in favour of arbitration, and on the further premise that in any case, those courts retain the possibility to case a ‘second look’ on the solution reached by the arbitrators”).

37. See Wils, *supra* note 24, at 473 (“In private litigation, Articles 81 and 82 EC are regularly invoked as a defence (or ‘shield’), mainly in contractual disputes . . . .”); *id.* at 474 (explaining that “antitrust prohibitions are used as a *shield* when they are invoked in defence against a contractual claim for performance or for damages because of non-performance or against some other claim, for instance in an intellectual property infringement action” (emphasis added)).

trust law.<sup>38</sup> Arbitral tribunals may then rule on the validity of the contract or, having established its existence and validity, award damages for non-performance or unsatisfactory performance of contractual obligations.<sup>39</sup>

Antitrust laws may also be raised in international arbitration as a “sword.”<sup>40</sup> In these cases, the party brings its claim in international arbitration seeking an injunction of anti-competitive actions or damages resulting from the alleged violation of antitrust law by its contractual counter party.<sup>41</sup> In both scenarios, arbitral tribunals settle civil disputes resulting from the application of antitrust law, and therefore do not interfere with but supplement the enforcement functions of public antitrust authorities.

Once an arbitral award is granted—regardless of whether antitrust claims were originally raised in arbitration—antitrust law may be invoked in suits to set aside, recognize, or enforce the award. Typically, such back-end suits involve allegations of a violation of public policy within the meaning of the New York Convention.<sup>42</sup> Such challenges raise the issues of the application of mandatory law in international arbitration, as well as the scope of the Convention’s public policy exception (discussed more thoroughly in Part II.B below).

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38. *Id.* at 474.

39. Int’l Chamber of Commerce. Joint Working Party on Arbitration and Competition, *Arbitration and Competition*, 21 SWISS REV. INT’L ANTITRUST L. 37, 38 (1984) (“But arbitrators can settle civil disputes which result from the application of the competition rules, in other words they can make a ruling on the validity or nullity of a contractual clause or of a contract and on the possible allocation of damages in the case of non-performance or defective performance of an obligation recognized as valid”).

40. *See* Wils, *supra* note 24, at 474 (explaining that “[t]he antitrust rules are used as a sword if they are used proactively by private parties as a basis for claiming damages or injunctive relief”).

41. *Id.*

42. For examples of cases involving allegations of the public policy violation due to the non-application or improper application of antitrust law in arbitration, see Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int’l*, 1999 E.C.R. I-3055; *Baxter Intern., Inc. v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003); *MDI v. Van Raalte* (decision of 24 March 2005), *supra* note 10; Request for a preliminary ruling from the Cour d’appel de Paris (France), lodged on 9 December 2014, *Genentech Inc. v Hoechst GmbH, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH* (Case C-567/14), 2015 O.J. (C73) 12.

### 1. *Antitrust Disputes and Their Suitability for Arbitration*

Most antitrust disputes derive from two bigger groups of antitrust violations—anticompetitive contracts and monopolization. Even within these two categories, antitrust disputes are extremely diverse as to their facts, parties, and the nature and complexity of the relationships among parties. Such disputes therefore vary widely in terms of suitability for arbitration, which might be further limited by the scope of the arbitration agreement at issue.<sup>43</sup>

Antitrust disputes can arise in contractual and non-contractual (tort) contexts.<sup>44</sup> Contractual claims arise out of, or in connection with, business agreements between disputing parties. Common examples include antitrust disputes related to the provisions of vertical agreements such as distribution, supply, licensing, and franchise contracts. There may also be disputes arising out of horizontal agreements between competitors (e.g., joint research and development (R&D) agreements). Because international arbitration is itself a creature of contract, antitrust issues that arise in international arbitral proceedings are most commonly of a contractual nature.<sup>45</sup> More rarely, a party alleging antitrust injury may bring non-contractual claims in international arbitration, for instance by asserting damages caused by monopolization (or abuse of dominance) or anticompetitive agreements with third parties, including division of markets or consumers, and price-fixing.<sup>46</sup>

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43. See Michael Bowsher, *Arbitration and Competition*, in COMPETITION LITIGATION IN THE UK 398, 415 (2005) (“[i]t does not of course follow that all issues will fall naturally within the scope of an arbitration . . . . In particular, some Art. 82 issues are unlikely to arise in arbitration unless the parties entered into an ad hoc agreement particularly in connection with this dispute”).

44. See *Idot*, *supra* note 24, at 309–11 (discussing different roles of arbitration for resolution of contractual disputes, such as disputes between parties to distribution or licensing agreements regarding their contractual provisions which might raise competition concerns, as opposed to non-contractual disputes, such as—most commonly—actions for damages resulting from abuse of a dominant position).

45. *Id.* at 309 (“In non-contractual disputes, arbitration is secondary . . . whereas it is pre-eminent in contractual disputes”).

46. *Id.* at 310 (“the rare [non-contractual] actions [for damages] that are brought usually result from abuse of dominant position. . . .”).

Baker and Stabile have suggested a helpful classification system.<sup>47</sup> Depending on the nature of the claim and the relationship of the parties, they distinguish four categories of antitrust disputes with varying suitability for arbitration: (1) partnership disputes, (2) bilateral buyer/seller disputes, (3) disputes over conspiracies with strangers, and (4) competitors' disputes.<sup>48</sup> Baker and Stabile view only the first two of these categories as suitable for arbitration because of the continuing or transaction-by-transaction contractual relationship between the parties.<sup>49</sup> By contrast, the remaining two categories, Baker and Stabile assert, are generally not suitable for arbitration, primarily due to the lack of privity between the parties.<sup>50</sup>

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47. See Baker & Stabile, *supra* note 20, at 398–400.

48. Partnership disputes are defined as “antitrust disputes between commercial ‘partners’—parties to a continuing cooperative relationship—concerning the terms of their contract.” *Id.* at 398. They include horizontal disputes between joint venture partners and vertical disputes between manufacturer and dealers, licensors and licensees, and franchisor and franchisees. *Id.* at 398–99. Bilateral buyer/seller disputes are “disputes between a buyer and a seller who deal with each other on a transaction-by-transaction basis, over the terms by which they conduct or refuse to conduct business.” *Id.* at 399. This category covers “a broad range of alleged vertical or unilateral activities—including secondary line price discrimination, tie-ins, resale or use restrictions, refusal to deal, or other monopoly abuses.” *Id.* Disputes over conspiracies with strangers, which are “claims by one party to a business relationship that another party has conspired with outsiders to injure it by suppressing competition,” include most horizontal conspiracies, such as price-fixing, market division, and boycotts. *Id.* at 399–400. Competitors' disputes, which embrace “claims by one competitor that it has been, or is likely to be, injured by the acts of one or more competitors,” encompasses such claims as predatory pricing, refusal to deal, abuses by the monopolist, primary line price discrimination, and exclusive dealing. *Id.* at 400.

49. *Id.* at 399 (“Partnership disputes generally are suitable for arbitration, in part because of the ongoing relationship of the most relevant parties and the ability to select an arbitrator with specialized skills.” (citation omitted)); *id.* (“[B]ilateral buyer/seller antitrust disputes may be quite suitable for arbitration as part of a general arbitration scheme for contract disputes.” (citation omitted)).

50. *Id.* at 415 (“This type of dispute [where the plaintiff asserts that the other party has conspired with third parties to the plaintiff's detriment] is much less suitable to arbitral resolution, even though the overall dispute has a strong “contractual” flavor”); *id.* at 400 (“These [competitors' disputes] generally are between parties without privity. Hence, there is no basis for arbitration absent a joint venture which might then throw the disputes back into the “partnership” category.”).

One can also distinguish stand-alone antitrust arbitrations and arbitrations of follow-on damages claims. The majority of known antitrust arbitrations are stand-alone arbitrations.<sup>51</sup> Such arbitrations typically involve a contractual relationship between the parties initiated expressly to address antitrust claims or instances where antitrust claims are invoked in parallel or in defense to other claims brought in arbitration. In addition to stand-alone antitrust arbitrations, one can identify antitrust arbitrations addressing follow-on damages claims based on the violations of antitrust law already established by public antitrust authorities.<sup>52</sup> This latter category of claims is exceptionally well suited for arbitration, and is expected to grow because arbitral tribunals in most of these cases are required only to calculate the amount of awardable damages.<sup>53</sup>

## 2. *The Peculiar Case of Commitment Arbitrations*

Apart from conventional antitrust arbitrations based on voluntary arbitration agreements between private parties to resolve their dispute by arbitration, a new type of antitrust arbitration is emerging in the European Union. The European Commission has increasingly been imposing behavioral commitments as a condition of merger approval between companies.<sup>54</sup> Behavioral commitments may be supplemented by an

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51. For instance, all fifty-five known ICC arbitration awards for the period of 1964–2010 resulted from stand-alone antitrust arbitrations, not arbitrations of follow-on damages claims. *Annex III: Table on ICC Arbitration Awards Involving Antitrust Issues over the Period 1964–2010*, in 2 EU and US Antitrust Arbitration. A Handbook for Practitioners 2063–92 (Gordon Blanke & Phillip Landolt eds., 2011).

52. See Francesca Richmond, *Arbitrating Competition Law Disputes: A Matter of Public Policy?*, KLUWER ARB. BLOG (Feb. 9, 2012), <http://kluwerarbitration-blog.com/blog/2012/02/09/arbitrating-competition-law-disputes-a-matter-of-policy>.

53. See Miriam Driessen-Reilly, *Private Damages in EU Competition Law and Arbitration: A Changing Landscape*, 31 ARB. INT'L 567, 587 (2015) ([I]t seems likely that we can expect to see an increase of some kind in the number of cases involving EU competition law infringements going to arbitration, not just as a defensive shield in commercial disputes, but potentially also as a sword in the context of a claim for damages in the follow-up to public enforcement). *Id.* (noting the advantages of arbitration in cases of follow-on damages claims that involve a mere assessment of damages).

54. See Gordon Blanke, *International Arbitration and ADR in Conditional EU Merger Clearance Decisions*, in 2 EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 1615–18 (Gordon Blanke & Phillip Landolt eds.,

obligation to arbitrate<sup>55</sup> and as such can lead to actual arbitrations initiated by third-parties beneficiaries adversely affected by a merged entity's failure to comply with its commitment obligations.

Behavioral commitments are promises concerning future behavior of the merged entity, such as to grant an actual or potential competitor access to key technology, networks, or key infrastructure.<sup>56</sup> Commitments of this type seek to control behavior of the merged entity following the merger in order to preserve competition in the markets. In contrast to one-time structural remedies, such as divestiture of assets, behavioral

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2011) (providing statistics and trends over time for the period of 1992 to 2009 with respect to conditional merger clearance decisions—including decisions that employed arbitration commitments—used by the European Commission in the context of the EU merger control). Commitments are most commonly imposed as a condition of merger approval under the EC Merger Regulation. See Council Regulation 139/2004, on the Control of Concentrations Between Undertakings, 2004 O.J. (L133) 1, 10–11 (EC).

55. See Commission Notice on Remedies Acceptable under the Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, 2008 O.J. (C267) 1, ¶ 66 (EC) [hereinafter Commission Notice on Remedies] (“Measures allowing third parties themselves to enforce the commitments are in particular access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees) or via arbitration proceedings involving national regulatory authorities if existing for the markets concerned.” (footnotes omitted)). The Commission may use either *ad hoc* or institutional arbitration. See Patrick R. Wautelet, *Arbitration in EU Commission Cleared Merger Transactions* (November 2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=970253](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970253) (giving the example of the *Vivendi* decision, where the Commission imposed on the merging companies an obligation to arbitrate under the ICC arbitration rules in front of a three-member arbitral tribunal with the seat in London and English as the language of the arbitration). See Commission Decision of 13 Oct. 2000, Non-opposition to a Notified Concentration (Case COMP/M.2050 – *Vivendi/Canal+/Seagram*), 2000 O.J. (C 311) 3.

56. See Commission Notice on Remedies, *supra* note 55, ¶ 17 (“[A] general distinction can be made between divestitures, other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and commitments relating to the future behaviour of the merged entity. . . . Commitments relating to the future behavior of the merged entity may be acceptable only exceptionally in very specific circumstances. In particular, commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps. In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and monitoring . . .”).

commitments require continuous monitoring to guarantee their effectiveness.<sup>57</sup>

To ensure compliance with behavioral commitments, the Commission may rely on its own monitoring power, use the monitoring trustee, or impose further conditions and obligations on the merged entity, such as an arbitration obligation.<sup>58</sup> When an arbitration obligation is imposed, the beneficiary of behavioral commitments (e.g., a competitor promised access to an essential facility) monitors the behavior of the merged entity and can trigger arbitration if it believes commitments have not been observed. The resulting arbitrations have been referred to as “commitment” or “merger” arbitrations.<sup>59</sup>

The *Axalto/Gemplus* case,<sup>60</sup> described in detail by a European Commission official,<sup>61</sup> illustrates the type and structure of commitment arbitration that can be imposed by the Com-

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57. See *Commission Notice on Remedies*, *supra* note 55, ¶ 13 (“Whereas divestitures, once implemented, do not require any further monitoring measures, other types of commitments require effective monitoring mechanisms in order to ensure that their effect is not reduced or even eliminated by the parties.”).

58. *Id.* ¶ 66. The Commission may also use combined monitoring employing both arbitration and a monitoring trustee. *Id.* ¶ 130 n.1 (providing examples of the European Commission’s decisions using combined monitoring, such as Commission Decision of 10 July 2002, Non-opposition to a Notified Concentration (Case COMP/M.2803 – *Telia/Sonera*), 2002 O.J. (C 201) 9; Commission Decision of 9 Sept. 2003, Declaring a Concentration to be Compatible with the Common Market and the Functioning of the EEA Agreement (Case COMP/M.3083 – *GE/Instrumentarium*), 2004 O.J. (L 109) 1; and Commission Decision of 29 Sept. 2003, Non-opposition to a Notified Concentration (Case COMP/M.3225 – *Alcan/Pechiney (II)*), 2003 O.J. (C 299) 19).

59. See, e.g., Gordon Blanke, *International Arbitration and ADR in Conditional EU Merger Clearance Decision*, in 2 EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 1605-1724 (Gordon Blanke & Phillip Landolt eds., 2011) (using the term “commitment arbitration”). See also Dempegiotis, *supra* note 4, at 145 (discussing “merger arbitrations,” by which the author means arbitrations resulting from the “arbitration commitments under the EC merger control regime”).

60. Commission Decision of 19 May 2006, Declaring a Concentration to be Compatible with the Common Market (Case No. COMP/M.3998 - *Axalto/Gemplus*) according to Council Regulation (EC) No. 139/2004, SG-Greffe (2006) D/202682.

61. See Johannes Lübking, *The European Commission’s View on Arbitrating Competition Law Issues*, 19 EUR. BUS. L. REV. 77, 83–86 (2008) (describing the European Commission’s consideration and details of the arbitration commitment employed in the *Axalto/Gemplus* decision).

mission on a proposed merger. The case involved an acquisition by the Dutch company Axalto of the Luxembourg company Gemplus—both producers of smart cards.<sup>62</sup> At the time of the merger, Axalto and Gemplus owned a large patent portfolio in the smart card industry and as such were “the main actors of the IP landscape within the industry.”<sup>63</sup> The Commission feared that following a proposed merger the companies would “stop licensing the combined technology to competitors . . . or that they would use the combined technology to increase the cost of competitors via ‘patent attacks’ and thereby to reduce effective competition in the market for smart cards.”<sup>64</sup> Hence, as a condition of merger clearance the European Commission imposed behavioral commitments, including a license commitment for a period of ten years, which made it mandatory for the merged entity to grant to any third party a non-exclusive license to manufacture and sell licensed products in the European Union and anywhere outside of the EU.<sup>65</sup> In the event that any such third party felt that a license was not granted as required, the pre-merger conditions also imposed an obligation to arbitrate the matter.<sup>66</sup>

The dispute resolution clause employed by the Commission was exceptionally detailed. It first provided for mediation for a period of ten to fifteen days.<sup>67</sup> If the mediation failed, the parties could resort to arbitration conducted under the ICC rules in Paris in front of a three-member arbitral tribunal.<sup>68</sup> French law was to be applied as the governing law, with

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62. See Commission Decision of 19 May 2006, *supra* note 60, ¶ 1.

63. See *id.* ¶ 55.

64. See Lübking, *supra* note 61, at 83.

65. For details of the commitments, see *Commitments to the European Commission, attached to Commission Decision of 19 May 2006, supra* note 60, at 22. In particular, Section B (License Commitment) provided that “the Combined Entity will, upon written request by any Third Party, grant a non-exclusive license to such Third Party (the ‘Licensee’) under any or all (*i.e.*, one, several or all) Patent Families of the Combined Entity’s Patent Portfolio as at the date such license is entered into to make, use, sell, and import Licensed Products anywhere in the EEA, and to export Licensed Products anywhere outside the EEA, on fair, reasonable, and non-discriminatory terms and conditions.” *Id.*

66. For conditions of the arbitration commitment, see *Commitments to the European Commission, Section F (Fast Track Dispute Resolution), in Commission Decision of 19 May 2006, supra* note 60.

67. Lübking, *supra* note 61, at 84.

68. *Id.* at 85.

English as the language of the proceedings. The parties were to adopt the fast-track arbitration procedure, where the arbitral tribunal was to “shorten all applicable procedural time-limits under the [ICC] Rules as far as admissible and appropriate in the circumstances.”<sup>69</sup> There was to be only “one round of written pleadings, containing all issues of fact and law submitted by the parties.”<sup>70</sup> Along with the monitoring trustee, both parties were to submit their proposals for a license to the tribunal so that it could rely on three different forms of the license when resolving the dispute and drawing up the terms and conditions of the license.<sup>71</sup> The European Commission was to be fully and actively involved in the arbitration, including the right to receive “all written submissions . . . ; all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration . . . ; the opportunity to file *amicus curiae* briefs; and . . . [be] present at the hearing(s) and . . . allowed to ask questions to parties, witnesses and experts.”<sup>72</sup> The parties were to prepare “a non-confidential version of the award, without business secrets,” which could be published by the Commission.<sup>73</sup>

Given all the details of the *Axalto/Gemplus* arbitration clause, the involvement of the European Commission in the dispute resolution between private parties seems excessive, especially considering the Commission’s right to participate in the arbitral proceeding. Yet, it can be explained by the peculiar nature of commitment arbitration where private dispute resolution backs up public enforcement of EU competition law by the Commission. One can also argue that the Commission overstepped its authority with respect to the arbitral institution (the ICC) by choosing the ICC rules for commitment arbitration, yet imposing its own modifications to the rules. This latter problem could be avoided by instead relying on ad hoc arbitration rules.

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69. See Commitments to the European Commission, Section F (Fast Track Dispute Resolution), ¶ 7, in Commission Decision of 19 May 2006, *supra* note 60.

70. Lübking, *supra* note 61, at 84.

71. *Id.* at 84–86.

72. See Commitments to the European Commission, Section F (Fast Track Dispute Resolution), ¶ 11, in Commission Decision of 19 May 2006, *supra* note 60.

73. *Id.* ¶ 15.

Apart from the EU merger control, the European Commission can accept behavioral commitments within the framework of its review under Articles 101 and 102 of the TFEU.<sup>74</sup> Overall, since its 1992 decision in *Elf/Minol*,<sup>75</sup> which became the first decision to invoke arbitration in behavioral commitments,<sup>76</sup> the Commission has used arbitration commitments in at least sixty-five conditional merger clearance decisions and six decisions under Article 9 of Regulation 1/2003.<sup>77</sup> Arbitration commitments are also known to the U.S. and Canadian antitrust and regulatory authorities, which are reported to have used them in at least eleven and seven commitment cases, respectively.<sup>78</sup>

Behavioral commitments have now led to actual arbitrations, as was the case with Sky Italia (a pay-TV channel owned by the U.S. company News Corporation) in 2012. Reportedly,

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74. See Regulation 1/2003, *supra* note 24, art. 9(1) (“Where the Commission intends to adopt a decision requiring that an infringement [of Article 101 or Article 102 of the TFEU] be brought to an end and the undertakings concerned offer *commitments* to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.” (emphasis added)).

75. Commission Decision of 04 Sept. 1992, declaring a concentration to be compatible with the common market (Case No. IV/M.235 – *Elf Aquitaine-Thyssen/Minol*), 1992 O.J. (C 232) 14, [http://ec.europa.eu/competition/mergers/cases/decisions/m235\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m235_en.pdf).

76. See Wautelet, *supra* note 58, at 2 (“The first such reference to arbitration in a commitment, is to be found in a 1992 decision concerning Elf Aquitaine.”).

77. Gordon Blanke, *EU Commitment Arbitrations—A Brief Introduction*, No. 1–2 (12–13) ARB. E-REV. 39, 40 (2013), <http://www.sadarbitrazowy.org.pl/magazine/default/index.html>. See also Lübking, *supra* note 61, at 77 (referring to the fact that the Commission used arbitration to monitor merger remedies in more than thirty cases).

78. See Daniel H. Margolis & Kenneth M. Vorrasi, *Arbitration in US Antitrust Enforcement*, in 2 EU AND EU ANTITRUST ARBITRATION, *supra* note 31, at 1745, 1747–55 (providing data on the use of arbitration in the enforcement actions by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) in the United States). See J. William Rowley et al., *Arbitration in Merger Control Remedies: Lessons from the Canadian Experience*, in 2 EU AND EU ANTITRUST ARBITRATION, *supra* note 31, at 1725, 1732–34 (providing data on the use of arbitration as merger remedies in Canada). Additionally, for examples of arbitration commitments used by the U.S. Federal Communications Commission (FCC), see General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, 19 FCC Rcd. 473 (2004).

the Sky Italia's competitor Reti Televisive Italiane (RTI) (a subsidiary of Mediaset, the largest commercial broadcasting company in Italy), accused Sky Italia of violating EU competition law and breaching its commitments to the European Commission by "acquir[ing] exclusive rights to broadcast the 2010 FIFA World Cup on pay-TV and refus[ing] to resell the digital terrestrial rights."<sup>79</sup> RTI then initiated an ICC arbitration relying on the News Corporation's commitment to arbitrate, which was incorporated into the 2003 European Commission's clearance decision permitting News Corporation to acquire and merge two Italian pay-TVs—Telepiù and Stream—in order to create a single Direct-to-Home (DTH) satellite pay-TV platform to be operated by Sky Italia.<sup>80</sup> In international arbitration, RTI first sought specific performance (asking the tribunal to order Sky Italia to sell the digital terrestrial rights), but then changed its claim to damages seeking to compensate lost revenue due to its own inability to broadcast the World Cup.<sup>81</sup> The arbitrators rejected the RTI's claims. In doing so, they held that the commitments made to the European Commission "regarding the 'world-wide sports rights' did not cover the World Cup."<sup>82</sup> The tribunal further found

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79. Matthew Pountney, *Sky Italia Wins Dispute over World Cup*, GLOBAL ARB. REV. (Feb. 24, 2012), <http://globalarbitrationreview.com/b/30199/>. See generally Luca Radicati Di Brozolo, *EU Merger Control Commitments and Arbitration: Reti Televisive Italiane*, 29(2) ARB. INT'L 223 (2013).

80. Commission Decision 2004/311/EC of 2 Apr. 2003, Declaring a Concentration to be Compatible with the Common Market and the EEA Agreement (Case COMP/M.2876 – *NewsCorp/Telepiù*), 2004 O.J. (L 110) 73. For details of the commitments made by News Corporation, see Commission Decision of 2 Apr. 2003, Declaring a Concentration to be Compatible with the Common Market and the EEA Agreement (Case COMP/M.2876 – *NewsCorp/Telepiù*), Annex: Undertakings Submitted by NewsCorp on Mar. 13, 2003 (Non-Confidential Version), Substantive Obligations, Pt. II at 6–17, C (2003) 1082 final (Apr. 2, 2003), [http://ec.europa.eu/competition/mergers/cases/decisions/m2876\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m2876_en.pdf). For a detailed arbitration commitment, see *id.* ¶ 5(b) at 16, which in a relevant part provided for an ICC arbitration to be conducted in Milan in English. See also *id.* ¶ 15(b)(vii) at 16 ("Decisions of the arbitrators shall be final and binding on all persons submitting to arbitration. Nothing in this Arbitration shall affect the powers of the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation and the EC Treaty. Nothing in the arbitration process above shall affect the powers of the ICA under the relevant national regulations").

81. Pountney, *supra* note 79.

82. *Id.*

that the World Cup event was “not crucial to competition in the Italian pay-TV broadcasting market” because “it is held only once every four years.”<sup>83</sup>

It remains to be seen how commitment arbitrations will ultimately influence antitrust arbitrations in general. To date, their contribution has not been significant because there is only a single reported case of an actual arbitral proceeding under the arbitration commitment, which proved to be not so different from the ordinary international arbitration. Overall, the arbitration community has welcomed the use of commitment arbitrations. Commentators have pointed out that arbitration is well suited (often better than national courts) for solving antitrust disputes, including disputes that may arise in the post-merger context.<sup>84</sup> Reliance on arbitration by European public antitrust authorities to ensure compliance with behavioral commitments in the context of merger review attests to the fact that arbitration, including international arbitration, has become a trusted forum for the enforcement of antitrust laws.

### B. *Antitrust as Mandatory Law and Public Policy*

The specificity of antitrust arbitration derives from the mandatory nature of antitrust law,<sup>85</sup> which can be so fundamental for a particular legal system that non- or mis-application of such law by the tribunal may be considered a public policy violation.<sup>86</sup> In international arbitration, the term

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83. *Id.*

84. See, e.g., Carl Nisser & Gordon Blanke, *ICC Draft Best Practice Note on the European Commission Acting as Amicus Curiae in International Arbitration Proceedings – An Explanatory Note*, 19 EUR. BUS. L. REV. 193, 197 (2008). See also Luca G. Radicati Di Brozolo, *Arbitration in EC Merger Control: Old Wine in a New Bottle*, 19 EUR. BUS. L. REV. 7, 12 (2008).

85. See, e.g., Phillip Landolt, *Arbitration and Antitrust: An Overview of EU and National Case Law*, in 2013 COMPETITION CASE LAW DIGEST A SYNTHESIS OF EU AND NATIONAL LEADING CASES 231, 232 (Nicholas Charbit et al. eds., 2012) [hereinafter Landolt, *Arbitration and Antitrust*] (“[S]tatutory rights such as those under the *Sherman Act* are often intended to be mandatory, and may not therefore be attenuated by private agreement”).

86. See, for example, *MDI v. Van Raalte* (decision of 24 March 2005), *supra* note 10, where the Dutch courts refused to enforce an award rendered in the United States under the AAA rules and Michigan governing law because a contract at issue was found to be in violation of EU competition law and therefore the public policy.

“mandatory law” is used to designate the law from which the parties cannot derogate by agreement.<sup>87</sup> EU competition law, in particular, is mandatory for the parties because it is the European Union law, which, as the ECJ explained, cannot be circumvented by contract between private parties.<sup>88</sup>

Mandatory law is most commonly discussed in the context of the governing law—the law to be applied to the merits of the parties’ dispute. Mandatory law requirements may determine the outcome of a dispute in addition to or despite the choice of law made by the parties. Additional mandatory law provisions may stem from other systems of law that have bearing on international arbitration: most importantly, the law governing the arbitration agreement, the law of the seat of arbitration, and the law of the place of enforcement.<sup>89</sup>

Furthermore, in contrast to domestic arbitration, international arbitration may require attention to mandatory law and considerations of public policy of several jurisdictions. Provisions of such laws may contradict each other, requiring the tribunal to choose one set of mandatory laws over the other.<sup>90</sup> For instance, where the law of a third country is chosen by the parties as applicable to their dispute, the arbitrators may have to take into account the antitrust law of the seat of arbitration, or an anticipated country of enforcement, or the law of the country with the closest connection to the contract.<sup>91</sup> Otherwise, the arbitral award may be set aside or refused enforce-

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87. See, e.g., G.A. Res. 65/22, UNCITRAL Arbitration Rules, art. 1(3) (Jan. 10, 2011) (referring to mandatory law as “the law applicable to the arbitration from which the parties cannot derogate”).

88. Case 102/81, *Nordsee v. Reederei Mond*, 1982 E.C.R. 1095, 1111 ¶ 14 (“parties to a contract are not . . . free to create exceptions to [European Union law]”).

89. BLACKABY ET AL., *supra* note 11, ¶ 3.07 (referring to at least five different systems of law that bear on an international arbitration).

90. William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 667 (1989) [hereinafter Park, *National Law and Commercial Justice*] (“[i]n a transnational dispute the arbitrator dealing with sensitive public law issues must look over his shoulder at national constraints imposed by the seat of the arbitration, the place of contract performance, and the situs of the loser’s assets. Not only must he be attentive to more than one legal system, but he must also juggle dictates that are not always consistent.”).

91. See, for instance, the facts of *Mitsubishi* where the U.S. federal antitrust law was admitted by the tribunal in arbitration, in part, as the law of the anticipated place of enforcement, although the governing law was Swiss and

ment on the grounds of public policy,<sup>92</sup> placing arbitrators at risk of breaching their obligation to the parties to produce an enforceable arbitral award.

One should also keep in mind that antitrust law has its own rules of application, commonly determined by the object or effect of the allegedly anticompetitive agreements or practices on trade or competition in the markets.<sup>93</sup> Furthermore, both U.S. antitrust law (in particular, Sections 1 and 2 of the Sherman Act<sup>94</sup>) and EU competition law (Articles 101 and 102 of the TFEU) are of extraterritorial application. These rules may have to be considered by arbitral tribunals where the contract at the center of a dispute has direct effects on the U.S. and EU markets, even if the contract was concluded and performed outside of these jurisdictions. Thus, irrespective of the will of the parties, which may choose to arbitrate abroad and apply the substantive law of a third country, the applicability of antitrust law in international arbitration may ultimately be determined by its own criteria of application established in such law. This has been referred to by Radicati Di Brozolo as the “self-connection” principle of antitrust law.<sup>95</sup>

Antitrust law is also deemed so fundamental that it is often considered to be a part of the public policy of a given

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the seat of arbitration was in Japan. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636–37 n.19 (1985).

92. *See* New York Convention, *supra* note 5, art. V(2)(b); UNCITRAL Model Law, *supra* note 6, art. 34(2)(b)(ii).

93. *See, e.g.*, TFEU, *supra* note 32, art. 101 (prohibiting as “incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may *affect trade* between Member States and which have as their *object or effect* the prevention, restriction or distortion of competition within the internal market”) (emphasis added). *See also* Sherman Act § 1, 15 U.S.C. §§ 1–7 (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of *trade or commerce* among the several States, or with foreign nations” (emphasis added)).

94. 15 U.S.C. §§ 1–2.

95. *See, e.g.*, Luca G. Radicati Di Brozolo, *Arbitration and Competition Law: The Position of the Courts and of Arbitrators*, 27 J. LONDON COURT INT’L ARB. 1, 20 (2011) [hereinafter Radicati Di Brozolo, *Arbitration and Competition Law*] (“The applicability of [antitrust] rules by virtue of their own criteria . . . could be justified following an approach based on the principle of ‘self-connection’ of mandatory rules . . . propounded by some French scholars.”).

jurisdiction, as decisions in *Mitsubishi* and *Eco Swiss* suggest.<sup>96</sup> For instance, there is general agreement among European courts and commentators that EU competition law is an integral part of the public policy of the European Union.<sup>97</sup> Being central to the EU legal order, European competition law is to be applied by courts and arbitral tribunals sitting in the EU Member States, but is also expected to be applied by non-EU courts and arbitral tribunals sitting outside of the European Union when the agreement or practice “affect[s] trade between Member States and . . . ha[s] as their object or effect the prevention, restriction or distortion of competition within the [European Union’s] internal market.”<sup>98</sup>

The concept of “public policy” is well known to the law and practice of international arbitration thanks to the New York Convention, which permits a court to refuse recognition or enforcement of an arbitral award if the award is contrary to the public policy of the country.<sup>99</sup> However, the Convention does not define public policy, leaving in practice such determination to the domestic laws of the contracting states. It thus gives to the state the freedom to determine the most essential notions and principles that constitute its public policy, and the power to refuse recognition and enforcement of awards that violate its public policy. Following the New York Convention, domestic arbitration laws have commonly included public policy as a ground for setting aside arbitral awards.<sup>100</sup> Again, the

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96. See *Mitsubishi*, 473 U.S. 638 (“Having permitted the arbitration to go forward, 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 the antitrust laws has been addressed. The [New York] Convention reserves to each signatory country the right to refuse enforcement of an award where the “recognition or enforcement of the award would be contrary to the public policy of that country.” (citation omitted)); Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int’l*, 1999 E.C.R. I-3093 at ¶ 39 (“provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention”).

97. See, e.g., Laurence Idot, *The Role of Arbitration in Competition Disputes*, in THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES 75, 91 (Ioannis Lianos & Ioannis Kokkoris eds., 2010) (“There is no doubt that competition law in general, and EC law in particular, are an integral part of public policy, within the meaning of the legal provisions on the review of arbitral award.”).

98. TFEU, *supra* note 32, art. 101.

99. New York Convention, *supra* note 5, art. V(2)(b).

100. See, e.g., United Kingdom Arbitration Act 1996, c. 23, §68(2)(g); NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] [NEW CIVIL PROCEDURE

statutes usually do not define public policy, thus allowing a case-by-case determination and a certain leeway for courts in exercising control over international arbitrations within their jurisdiction.

Being “notoriously difficult to define,”<sup>101</sup> public policy is generally understood as the “fundamental notions of a particular legal system,”<sup>102</sup> or, as a U.S. Court of Appeals famously held, the “most basic notions of morality and justice.”<sup>103</sup> National laws on international arbitration may distinguish “domestic” and “international” public policy, or use both in different contexts,<sup>104</sup> most commonly as a ground to set aside or refuse enforcement.<sup>105</sup> France, for example, permits the setting aside of an international arbitration award only where its recognition and enforcement is contrary to international public policy.<sup>106</sup> By contrast, Swiss international arbitration law al-

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CODE] arts. 1488, 1520 (Fr.); BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW], Dec. 18, 1987, *as amended up to July 1, 2014*, AS 1776 (1988), art. 190(2)(e) (Switz). *See also* UNCITRAL Model Law, *supra* note 6, art. 34(2)(b)(ii).

101. *See* Bernard Hanotiau & Olivier Caprasse, *Public Policy in International Commercial Arbitration*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 787, 788 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

102. *Id.* at 789.

103. *See* Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (Rakta), 508 F.2d 969, 974 (2d Cir. 1974).

104. *See* WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 219 (2nd ed. 2012) (suggesting that “[t]he adjectives ‘domestic’ and ‘international’ apply not to the source of the policy but rather to their field of application” (footnote omitted)).

105. *See* UNCITRAL Model Law, *supra* note 6, art. 34(2)(b)(ii) (allowing the court to set aside an arbitral award if the court finds that “the award is in conflict with the public policy of this State”); *id.* art. 36(1)(b)(ii) (allowing the court to refuse recognition or enforcement of an arbitral award if the court finds that “the recognition or enforcement of the award would be contrary to the public policy of this State.”). The provisions of the Model Law serve as a good indicator of the common practice among sovereign states as to date seventy-two countries (102 jurisdictions) have adopted domestic laws on international commercial arbitration based on the Model Law. *See* United Nations Commission on International Trade Law, Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

106. *See* NEW CIVIL PROCEDURE CODE, art. 1520(5) (Fr.).

lows the award to be annulled if it is incompatible with public policy.<sup>107</sup>

Considering its mandatory and (arguably) public policy nature, the applicability of antitrust law in international arbitration often depends in practice upon the seat of arbitration and anticipated place of enforcement. When the seat of arbitration is located in the European Union, for example, the arbitrators will have to apply EU competition law because it is a part of the public policy of the member states, and breach of the public policy of *lex arbitri* may lead to setting aside of the award.<sup>108</sup> And so, if a claim is made in an international arbitration that a contract is void for violating EU competition law, but the tribunal declines to rule on this claim, the award can be set aside in a member state (e.g., under French law it can be done on *infra petita* grounds).<sup>109</sup> On the other hand, if the seat of arbitration is outside the European Union, failure to apply European competition law will generally not lead to setting aside of an award on grounds of public policy in the respective non-EU country. Still, arbitral tribunals sitting outside the European Union may apply European competition law when it is the law of the contract.<sup>110</sup> They may also consider European competition law seeking to ensure enforcement of the award in the European Union, where failure to assess questions of EU competition law can lead to denial of enforcement on the public policy ground of the New York Convention.<sup>111</sup>

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107. See FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW, art. 190(2)(e) (Switz).

108. Hans van Houtte, *The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission*, 19 EUR. BUS. L. REV. 63, 65 (2008).

109. FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 582 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD GAILLARD GOLDMAN].

110. Van Houtte, *supra* note 108, at 66–68.

111. See Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int'l*, 1999 E.C.R. I-3055, I-3093 (“It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty . . . . [T]he provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention.”).

Courts across jurisdictions are generally reluctant to use public policy as a ground for challenging arbitral awards, reserving it for the most egregious violations. To date, instances of its successful application are few.<sup>112</sup> The courts of third countries also do not have to respect the mandatory and public policy nature of the U.S. and EU antitrust law when such laws are implicated in setting aside or enforcement proceedings. For instance, the Swiss courts have stated that the alleged violation of EU competition law in the award does not rise to the level of public policy violation that warrants the annulment of an award on public policy grounds.<sup>113</sup>

Hence, even with respect to the U.S. and EU competition laws there is no uniformity across jurisdictions as to their relevance for public policy as a ground for challenge of arbitral awards. However, parties continue trying to set aside or fight recognition and enforcement of arbitral awards on public policy grounds. Following the *Mitsubishi* decision in the United States and *Eco Swiss* in the European Union, non-application or improper consideration by the arbitral tribunal of relevant antitrust laws has increasingly been invoked by the losing party in arbitration as a violation of public policy and therefore a ground for challenging arbitral awards in setting aside and enforcement proceedings.<sup>114</sup>

### III. ANTITRUST ARBITRATION AND THE COURTS: THREE PHASES OF THE RELATIONSHIP

The relationship between arbitral tribunals and national courts has a long history that has evolved significantly over time. This evolution began decades prior to *Mitsubishi*,<sup>115</sup> with the overwhelming suspicion of national courts of the ability of arbitral tribunals to resolve antitrust claims. The courts at the time were mainly concerned that public policy implications of

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112. See BLACKABY ET AL., *supra* note 11, ¶ 11.104 (observing that English courts are reluctant to use public policy as a ground for refusing enforcement so that there is only a single known case where a court in England invoked public policy to refuse enforcement of an award).

113. See Tribunal Fédéral [TF] [Federal Supreme Court] Mar. 8, 2006, Arrêts du Tribunal fédéral suisse [ATF] 2006 REVUE DE L'ARBITRAGE [REV. ARB.] 763 (Switz.).

114. See court cases analyzed *infra* Parts III.B and III.C.

115. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 614 (1985).

antitrust disputes would not be considered in private dispute resolution.<sup>116</sup> They therefore resisted the arbitrability of antitrust law, preserving domestic courts' exclusive jurisdiction over antitrust claims. The tension between the prerogatives of national courts in, on the one hand, ensuring enforcement of domestic antitrust laws and, on the other hand, supporting arbitration of international commercial disputes, gradually pushed the courts towards greater support of international arbitration. Once the arbitrability of antitrust law was established,<sup>117</sup> it opened the doors to antitrust arbitrations. Over time, courts' attitude towards ability of arbitral tribunals to apply domestic antitrust laws had transformed.

The history of this relationship is best illustrated by the court cases analyzed below, where the focus has shifted from the issue of the arbitrability of antitrust law to the proper standard of review of antitrust-related arbitral awards in setting aside and enforcement proceedings. Most recently a new wave of cases, marking the newest phase of this relationship, has addressed the obligation of the arbitrator to raise antitrust concerns in arbitral proceeding *sua sponte*, or, failing to do so, face the risk of delivering a non-enforceable arbitral award.

#### A. *Phase I: Arbitrability Fought for and Established*

While international and domestic arbitration today are universally recognized, states have always kept limitations on

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116. See, e.g., *Am. Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968) ("it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest"); *Aimcee Wholesale Corp. v. Tomar Prods., Inc.*, 237 N.E.2d 223, 225 (1968) ("[t]he evil is that, if the enforcement of antitrust policies is left in the hands of arbitrators, erroneous decisions will have adverse consequences for the public in general, and the guardians of the public interest, the courts, will have no say in the results reached"). See also *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10 (S.D.N.Y. 1975); *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968).

117. See *Mitsubishi*, 473 U.S. at 614–15. See also *Eco Swiss China Time Ltd.*, 1999 E.C.R. I-3055 (indirectly endorsing the arbitrability of EC competition law by holding that a failure to apply such law in arbitration can be a ground for annulment of an award for violation of the public policy within the meaning of the New York Convention; the European Court of Justice (ECJ) thus acknowledged that the issues of EU competition law can be addressed in international arbitration).

the subject matter of disputes that can be resolved by arbitration, first and foremost through the concept of arbitrability.<sup>118</sup> Such limitations restrict the jurisdiction of arbitral tribunals over claims irrespective of the will of the parties to have their dispute resolved by arbitration.

The issue of arbitrability may be raised in front of a court or an arbitral tribunal, most commonly, in actions to enforce the arbitration agreement, to set aside or recognize and enforce the arbitral award, or during the arbitration itself. The court in these cases will generally rely on its own law (*lex fori*),<sup>119</sup> while the arbitral tribunal will often apply the law governing the arbitration agreement, but may also consider the law of the seat of arbitration.<sup>120</sup> Other laws that may have to be taken into account include the law governing the parties or the law chosen by the parties to apply to their agreement.<sup>121</sup>

### 1. *The Arbitrability of U.S. Antitrust Law*

In addressing the arbitrability of antitrust law, U.S. courts initially advanced several reasons for the perceived unsuitability of arbitration for resolution of antitrust disputes, including the complexity of antitrust claims and the danger of enforcing arbitration clauses incorporated into the contracts of adhe-

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118. See, e.g., New York Convention, *supra* note 5, art. II(1) (defining the arbitration agreement, the Convention refers to “a subject matter capable of settlement by arbitration”). See also European Convention on International Commercial Arbitration art. VI(2), Apr. 21, 1961, 484 U.N.T.S. 364.

119. See TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 264–65 (5th ed. 2012) (referring to the Court of Appeal of Bologna decision in *Coveme SpA (Italy) v. Compagnie Française des Isolants SA (France)*, App., Bologna, 21 dicembre 1991, n. 1786, translated in 18 Y.B. COMM. ARB. 422 (1993), where the Italian court applied Italian law to the issue of arbitrability, while the arbitration clause provided for the ICC arbitration in Paris under French governing law).

120. See generally Bernard Hanotiau, *The Law Applicable to Arbitrability*, 26 SINGAPORE ACADEMY L.J. 874 (discussing the law that could be applied to determine the issue of arbitrability in international arbitration).

121. See BLACKABY ET AL., *supra* note 11, ¶ 2.115 (“If the issue of arbitrability arises, it is necessary to have regard to the relevant laws of the different States that are or may be concerned. These are likely to include the law governing the party involved, where the agreement is with a State or State entity; the law governing the arbitration agreement; the law of the seat of arbitration; and the law of the ultimate place of enforcement of the award.”).

sion.<sup>122</sup> More often, the courts pointed to the dual nature of antitrust claims, which seek to provide antitrust relief to private parties, but have direct consequences on the public interest of ensuring free competition in the markets. These courts raised concerns as to whether private adjudicators would be sensitive to public interests, capable of performing both private and public functions.<sup>123</sup> The courts were reluctant to enforce arbitration agreements related to “core” public law claims, such as antitrust, fearing that private adjudicators may under-enforce laws intended to protect society as a whole.<sup>124</sup>

In *American Safety Equipment Corp. v. J. P. Maguire & Co.*<sup>125</sup> the U.S. Court of Appeals for the Second Circuit pronounced four main reasons against expanding arbitrability to antitrust law issues. First, the court emphasized the public interest implicated by antitrust violations: “A claim under the antitrust laws is not merely a private matter. . . . Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage. . . . We do not believe that Congress intended such claims to be resolved elsewhere than in the courts.”<sup>126</sup>

Second, the court expressed concerns over possible existence of standard arbitration clauses in contracts with monopolists, and expressed doubts as to “whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations.”<sup>127</sup> Third, the court referred to the complexity of antitrust litigation and the extensiveness and diversity of the evidence involved, which in the eyes of the court made antitrust claims inappropriate for an arbitration mechanism designed for simpler controversies. Finally, the Court stated that it would be improper for

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122. See *American Safety*, 391 F.2d at 827 (“[I]t is also proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations. Here again, we think that Congress would hardly have intended that.”).

123. For further discussion on private adjudicators and the public interest see, for example, *PARK*, *supra* note 104, at 209–29.

124. See, e.g., *Hunt*, 410 F.Supp. at 25 (“It is now cardinal doctrine that the public interest in the enforcement of the antitrust [sic] laws makes antitrust claims inappropriate subjects for arbitration.” (footnote omitted)).

125. 391 F.2d 821.

126. *Id.* at 826–27.

127. *Id.* at 827.

commercial arbitrators, often chosen for their business expertise, to determine issues of great public interest.<sup>128</sup> Consequently, for a period of time it was firmly established in U.S. law that federal antitrust claims were not arbitrable, and could therefore only be brought in U.S. federal courts.<sup>129</sup>

This all changed with the U.S. Supreme Court decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>130</sup> where the Court firmly established the arbitrability of federal antitrust law in the United States. In *Mitsubishi*, a dispute arose out of sales and distribution agreements signed in 1979 by a Puerto Rican automobile dealer (Soler) with a Japanese automobile manufacturer (Mitsubishi) and a Swiss automobile distributor (CISA). The sales agreement was subject to Swiss law and provided for arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association. After initial success in the distribution of Mitsubishi-manufactured vehicles in the territory of Puerto Rico, assigned to it in the contract, Soler agreed to an increase of the minimum sales volume. However, it was soon unable to meet the new sales quota and felt compelled to ask Mitsubishi to delay or cancel several orders.<sup>131</sup> Soler then sought permission from Mitsubishi to trans-ship some vehicles for sale in continental United States and Latin America.<sup>132</sup> When Mitsubishi refused, the dispute escalated, and Mitsubishi brought an action against Soler in a district court in Puerto Rico, seeking to compel arbitration. It then commenced arbitration in Japan. Soler counterclaimed, alleging that Mitsubishi and CISA had conspired to divide markets in restraint of trade in violation of Section 1 of the Sherman Act,<sup>133</sup> a principal U.S. antitrust statute.

In view of the international character of the parties' arrangement, the district court ordered the parties to arbitrate

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128. *Id.* at 827–28.

129. See Baker & Stabile, *supra* note 20, at 401–03 (observing the original hostility of U.S. courts to the idea of arbitrating antitrust claims until the turning point with the U.S. Supreme Court decision in *Mitsubishi*).

130. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985).

131. *Id.* at 617.

132. *Id.* at 617–18.

133. 15 U.S.C. § 1

their claims, including those under the Sherman Act.<sup>134</sup> The Court of Appeals for the First Circuit affirmed in part and reversed in part, having read the arbitration clause to encompass claims arising under the Sherman Act.<sup>135</sup> The U.S. Supreme Court granted certiorari primarily to address the issue of the arbitrability of U.S. antitrust claims in international arbitration.<sup>136</sup>

In establishing the arbitrability of antitrust law, the U.S. Supreme Court relied on several rationales. In line with the strong U.S. pro-arbitration policy, it held that there were no reasons to depart from rigorous enforcement of arbitration agreements where a party raised claims founded on statutory rights.<sup>137</sup> It also invoked “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes”—all warranting the expansion of arbitrability to statutory antitrust claims.<sup>138</sup> The Court then addressed the *American Safety* concerns and weighed them against “a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses.”<sup>139</sup> The concerns related to the adhesion contracts were found by the Court to be unjustified. According to the Court, “[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted.”<sup>140</sup> Similarly, the antitrust complexity argument did not persuade the Court, which held that the potential complexity of antitrust disputes “should not suffice to ward off arbitration,” particularly since arbitration offers “adaptability and access to expertise,” where the subject matter of a dispute may be taken into account during the appointment of arbitrators.<sup>141</sup> The Court also rejected

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134. *Mitsubishi*, 473 U.S. at 620.

135. *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 723 F.2d 155 (1st Cir. 1983), *aff'd in part, rev'd in part*, 473 U.S. 614 (1985).

136. *Mitsubishi*, 473 U.S. at 616.

137. *Id.* at 626.

138. *Id.* at 629.

139. *Id.* at 631.

140. *Id.* at 632.

141. *Id.* at 633–34.

the argument that arbitrators, potentially chosen from the business community, would be hostile to the constraints on business conduct, which are imposed by antitrust law.<sup>142</sup>

The Supreme Court thus expressed trust in the ability of arbitral tribunal to recognize antitrust violations and apply U.S. antitrust law, even in cases where the seat of arbitration is outside of the United States and the arbitral tribunal is therefore beyond the supervisory power of U.S. courts. Starting with *Mitsubishi*, antitrust claims under the Sherman Act,<sup>143</sup> the Clayton Act,<sup>144</sup> and the Robinson-Patman Act,<sup>145</sup> are now considered suitable for international arbitration, and will be referred to arbitral tribunals as long as the parties have agreed to arbitrate them.<sup>146</sup>

## 2. *The Arbitrability of EU Competition Law*

Competition law issues are also generally arbitrable in the European Union and most of its member states; it is no longer disputed in the European Union that the civil law consequences of antitrust violations can now be addressed in arbitra-

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142. *Id.* at 634.

143. 15 U.S.C. §§ 1-7 (prohibiting anticompetitive agreements and monopolies).

144. 15 U.S.C. §§ 12-27 (prohibiting price discrimination, exclusive dealing, tying, and mergers and acquisitions that may lessen competition or create a monopoly).

145. 15 U.S.C. §13 (prohibiting anticompetitive practices, such as price discrimination).

146. For cases addressing antitrust issues in the context of arbitration, see *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004); *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (5th Cir. 2002); *Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors, Corp.*, 271 F.3d 6 (1st Cir. 2001); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437 (9th Cir. 1994); *Cindy's Candle Co. v. WNS, Inc.*, 714 F. Supp. 973 (N.D. Ill. 1989), supplemented, 721 F. Supp. 167 (N.D. Ill. 1989). For more recent cases, see *In re Titanium Dioxide Antitrust Litigation*, 962 F.Supp.2d 840 (D. Md. 2013); *Breckenridge Edison Dev., L.C. v. Sheraton Operating Corp.*, No. 13 CV 6804(VB) (S.D.N.Y. filed Sept. 18, 2014); *In re A2P SMS Antitrust Litigation*, 972 F.Supp.2d 465 (S.D.N.Y. 2013); *AASI Creditor Liquidating Trust v. AU Optronics Corp.* (*In re TFT-LCD (Flat Panel) Antitrust Litig.*) No. M 07-1827 (N.D. Cal., Feb. 9, 2012).

tion.<sup>147</sup> The ECJ has never expressly dealt with the issue of the arbitrability of EU competition law in a case equivalent to *Mitsubishi*. However, it is commonly understood that the ECJ endorsed the arbitrability of EU competition law indirectly through its famous decision in *Eco Swiss China Time Ltd v. Benetton International NV*.<sup>148</sup> In *Eco Swiss*, a licensing agreement concluded by the Dutch company Benetton (the licensor) with the Hong Kong company Eco Swiss and the American company Bulova Watch Company Inc., granted Eco Swiss the right to produce “watches and clocks bearing the words ‘Benetton by Bulova’, which could then be sold by Eco Swiss and Bulova.”<sup>149</sup> The agreement provided for the resolution of all disputes by arbitration in the Netherlands and contained a Dutch choice of law clause.<sup>150</sup> Upon early termination of the agreement by Benetton and the resulting dispute, the parties proceeded to arbitration.<sup>151</sup> The arbitral tribunal ordered Benetton to compensate Eco Swiss and Bulova for damages.<sup>152</sup> During arbitration, none of the parties raised antitrust arguments, although the licensing agreement provided for market sharing in violation of Article 101 of the TFEU.<sup>153</sup> Once the

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147. See Landolt, *Arbitration and Antitrust*, *supra* note 85, at 239 n.14 (providing examples of court cases from various European jurisdictions addressing the arbitrability of competition law issues).

148. See Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int'l*, 1999 E.C.R. I-3055. See also Landolt, *Arbitration and Antitrust*, *supra* note 85, at 233 (“There is no decision of the EU legal order explicitly pronouncing EU competition law to be arbitrable, although this is not doubted since it is an inference which can be drawn from a number of decisions of the [ECJ].”).

149. *Eco Swiss* 1999 E.C.R. ¶ 9.

150. *Id.* ¶ 10 (The arbitration clause provided that “all disputes or differences arising between the parties are to be settled by arbitration in conformity with the rules of the Nederlands Arbitrage Instituut (Netherlands Institute of Arbitrators) and that the arbitrators appointed are to apply Netherlands law.”)

151. *Id.* ¶ 11 (The licensing agreement was concluded for a term of eight years, but Benetton chose to terminate it three years prior to the end.)

152. *Id.* ¶ 12–13 (Under the final award, Benetton was to pay \$23,750,000 to Eco Swiss and \$2,800,000 to Bulova.)

153. *Id.* ¶ 14 (“During the arbitration proceedings neither the parties nor the arbitrators had raised the point that the licensing agreement might be contrary to that provision [of Article 101 of the TFEU].”). The issue of the EU competition law violation arose because of the market-sharing provision of the licensing agreement, which prohibited Eco Swiss from selling in Italy watches and clocks manufactured under the agreement. *Id.* ¶ 21. It also prohibited Bulova from selling such products in other countries of the Euro-

award was granted, Benetton applied for an annulment in a Dutch court on the public policy ground, claiming that the agreement at issue violated EU competition law.<sup>154</sup>

The ECJ, to which the issue was referred for a preliminary ruling, noted that to ensure efficiency of arbitration, the scope of review of arbitral awards should be limited, with only exceptional circumstances leading to annulment or non-recognition of an award.<sup>155</sup> However, it also underlined the central role of EU competition law for the “accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.”<sup>156</sup> It therefore held that courts of the member states may treat a failure to apply EU competition law in the arbitral award as a violation of public policy within the meaning of the New York Convention.<sup>157</sup> Following the *Eco Swiss* decision, a national court of an EU member state, when approached with an application for annulment of an arbitral award, must grant that application if it considers the award to be contrary to EU competition law.

At the national level, courts of EU member states have also recognized the arbitrability of antitrust law. In France, for example, the arbitrability of antitrust issues was recognized in the decision of the Court of Appeal of Paris of 1993.<sup>158</sup> Under English law, antitrust issues are arbitrable “as far as the effect of competition law on the rights of the parties themselves are concerned.”<sup>159</sup> Private aspects of competition law can also be

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pean Union. *Id.* There was no block exemption available and the parties did not notify their agreement to the European Commission, thus depriving it of a chance to receive individual exemption. *Id.* ¶ 21.

154. *Id.* ¶ 14.

155. *Id.* ¶ 35 (“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 recognise an award should be possible only in exceptional circumstances.”).

156. *Id.* ¶ 36.

157. *Id.* ¶ 41 (“[A] national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.”).

158. *See* Cour d’appel [CA] [regional court of appeal] Paris, 1<sup>e</sup> ch., May 19, 1993, 1993 REVUE DE L’ARBITRAGE [REV. ARB.] 645, note Jarrosson (Fr.).

159. *See* ET Plus SA v. Jean-Paul Welter & The Channel Tunnel Group Ltd [2005] EWHC (Comm) 2115, [50] (Eng.) (“There is no realistic doubt that such [Arts. 81 and 82] ‘competition’ or ‘anti-trust’ claims are arbitrable; the

arbitrated under the Dutch law.<sup>160</sup> In Sweden, the arbitrability of competition law claims was established by statute: the 1999 Arbitration Act, which provides that “arbitrators may rule on the civil law effects of competition law as between the parties.”<sup>161</sup> In Lithuania, the arbitration law includes competition law claims for damages in the realm of commercial disputes which can be referred to arbitration.<sup>162</sup>

### B. *Phase II: Courts Take a Second Look*

Once arbitrability was established, antitrust arbitration entered its second phase of development—an increasing reliance on court review of arbitral awards on public policy grounds. The standards of such review differ and are largely still being developed in various jurisdictions.

The right of courts to review arbitral awards as to their application of antitrust law is commonly tracked back to the *Mitsubishi* decision, where, relying on the public policy defense of the New York Convention, the U.S. Supreme Court reserved for U.S. courts the right to have a second look at the award at the enforcement stage.<sup>163</sup> This became known as the “second look” doctrine, which has received its share of criticism from arbitration practitioners and academics and led some commentators to suggest that *Mitsubishi* opened the door for substantive review of arbitral awards addressing statutory

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issue is whether they come within the scope of the arbitration clause, as a matter of its true construction.”).

160. See LANDOLT, *supra* note 24, ¶ 5–19 (“Under Dutch law there has been little hesitation in accepting that the parties are able to settle the private aspects of competition matters themselves, and that therefore these aspects are arbitrable.”).

161. 1 § SWEDISH ARBITRATION ACT (SFS 1999:116) (Swed.) available at <http://www.sccinstitute.com/the-swedish-arbitration-act-sfs-1999121.aspx>.

162. See Law on Commercial Arbitration of the Republic of Lithuania, 2 April 1996, No. I-1274 (New wording of the Law from June 30, 2012, No. XI-2089, June 21, 2012, *Official Gazette Valstybes \_inios*, 2012, No. 76-3932 (June 30, 2012) (unofficial translation), available at <http://www.lawin.com/en/publications/reviews/lawin-publishes-english-translation-of-the-new-law-on-commercial-arbitration-of-the-republic-of-lithuania/>).

163. See *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (“Having permitted the arbitration to go forward, 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 the antitrust laws has been addressed.”).

claims.<sup>164</sup> However, Born points out that it is unclear “whether a court in the U.S. will have a chance to look at such an award” rendered in international arbitration.<sup>165</sup> Indeed, U.S. courts might not have an opportunity to review an award if both the annulment and enforcement are sought solely outside of the United States.

It is uncertain which standard of review is required by the “second look” doctrine—a broad examination of the arbitral award or only a quick look at whether the arbitrator in fact considered antitrust law.<sup>166</sup> The U.S. Supreme Court only observed in this respect that “[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”<sup>167</sup> As Park rightly points out, the doctrine appears problematic in either case, since “[i]f it calls for review on the merits, it disrupts the arbitral process. But if it calls only for a mechanical examination of the face of the award, it may not provide an effective check on an arbitrator who mentions the Sherman Act before he proceeds to ignore it.”<sup>168</sup> However, the “second look” doctrine can be reconciled with pro-arbitration bias and limited review of arbitral awards under the U.S. law if, as Landolt be-

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164. The suggestions are based on the reading of the U.S. Supreme Court’s decision in *Mitsubishi*, 473 U.S. 614, where the Court held that “[w]hile the efficacy of the arbitral process requires that *substantive review* at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them” (citation omitted) (emphasis added). *Id.* at 638. For criticism of the “second look” doctrine, see generally Gordon Blanke, *The “Minimalist” and “Maximalist” Approach to Reviewing Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last*, in *POST-HEARING ISSUES IN INTERNATIONAL ARBITRATION* 196 (Devin Bray & Heather L. Bray eds. 2013).

165. I BORN, *supra* note 18, at 797.

166. Radicati Di Brozolo, *Antitrust*, *supra* note 36, at 24. See also Landolt, *Arbitration and Antitrust*, *supra* note 85, at 235 (“[T]he suggestion [in *Mitsubishi*] is that the reviewing court need only verify that antitrust, where raised, has been dealt with by the arbitral tribunal, and need not enquire into how the tribunal dealt with it.”)

167. *Mitsubishi*, 473 U.S. at 638.

168. PARK, *supra* note 104, at 217.

lieves, it entails nothing else than the usual New York Convention public policy scrutiny.<sup>169</sup>

Surprisingly, to date there are only a handful of cases in the United States that have invoked *Mitsubishi* and its “second look” doctrine to complain of tribunal’s application of mandatory law and challenge the arbitral award on public policy grounds.<sup>170</sup> One of the rare examples is provided in *Baxter v. Abbott Laboratories*,<sup>171</sup> where the Court of Appeals for the Seventh Circuit, relying on *Mitsubishi*, declined to take a “second look” at the treatment of antitrust law, since the arbitrators had already dealt with it in arbitration.<sup>172</sup> The court in *Baxter* also stressed that a mistake in the application of antitrust law is not a ground for setting aside.<sup>173</sup>

By contrast, in Europe, there is a continuous flow of cases from various jurisdictions seeking to develop a proper standard of review of antitrust-related arbitral awards in setting aside and enforcement proceedings. Even prior to *Eco Swiss*, the Supreme Court of Slovenia—then not yet an EU member state—set aside an arbitral award rendered in Yugoslavia on the grounds that the contract at issue created “if not a monopoly, at least a privileged situation” and as such violated competition law and therefore the public policy of Slovenia.<sup>174</sup>

More recently, the courts in Europe have been busy seeking to ensure that EU competition law has been properly addressed in arbitral awards.<sup>175</sup> In doing so, the court have em-

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169. LANDOLT, *supra* note 24, ¶ 5–22.

170. Donovan & Greenawalt, *supra* note 13, at 38 (“In the two decades since *Mitsubishi*, it appears that U.S. courts have decided only a single case in which a party has complained about an international tribunal’s application of a statutory claim implicating a U.S. mandatory law.”).

171. *Baxter Intern., Inc. v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003).

172. *Id.* at 832.

173. *Id.* at 831 (“But the initial question is whether Baxter is entitled to reargue an issue that was resolved by the arbitral tribunal. We think not; a mistake of law is not a ground on which to set aside an award.”).

174. *Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska*, Oberster Gerichtshof, 20 October 1993 and 23 February 1998, 24 Y.B. COMM. ARB. 919, 919 (1999) (Austria).

175. The issue of ensuring compatibility of international arbitral awards with EU competition law has been recently discussed in the Genentech case pending with the ECJ, where the Advocate General has expressed his opinion that it is for the courts, and not the arbitral tribunals, to ensure compatibility of the award with EU law. See Opinion of Advocate General Wathelet,

ployed a surprisingly divergent standards of review of arbitral awards in setting aside and recognition and enforcement proceedings. The principal cases discussed below have revived in court analysis and academic discussion a familiar battle between the “maximalist” and “minimalist” approaches to court review of arbitral awards.<sup>176</sup> The maximalist approach calls for the full-fledged review of arbitral awards on the merits, and was famously followed by the Dutch courts in the *Marketing Displays International* case<sup>177</sup>. This case involved an application for enforcement in the Netherlands of three arbitral awards issued in an arbitration in the United States. The arbitration resulted from a dispute regarding royalties and a violation of the exclusivity provision in a patent, trademark, and know-how license agreement between a U.S. company, Marketing Displays International, Inc. (MDI), and a Dutch company, Van Raalte Reclame B.V. (Van Raalte). The agreement provided for the application of the law of the state of Michigan and the law of the United States, with all disputes to be resolved by arbitration under the rules of American Arbitration Association (AAA).<sup>178</sup> Having won the arbitration, MDI applied for enforcement in the Netherlands, where the Hague Court of First Instance refused to enforce the award, finding the agree-

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Genentech Inc. v. Hoechst GmbH, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH, Case C-567/14, EU:C:2016:177, para. 61 (delivered Mar. 17, 2016) (judgment not yet issued) (“The task of arbitrators in international commercial arbitration is to interpret and apply the contract binding the parties correctly. In the performance of this task, arbitrators may naturally find it necessary to apply EU law, if it forms part of the law applicable to the contract (*lex contractus*) or the law applicable to the arbitration (*lex arbitri*). However, the responsibility for reviewing compliance with European public policy rules lies with the courts of the Member States and not with arbitrators, whether in the context of an action for annulment or proceedings for recognition and enforcement.” (footnote omitted)).

176. See, e.g., Radicati Di Brozolo, *Arbitration and Competition Law*, *supra* note 95, at 4–8 (reviewing maximalist and minimalist approaches in the court review of antitrust-related arbitral awards). See also Gordon Blanke, *The “Minimalist” and “Maximalist” Approach to Reviewing Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last*, in *POST-HEARING ISSUES IN INTERNATIONAL ARBITRATION* 169 (Devin Bray & Heather L. Bray eds. 2013) (discussing whether the “Middle Way” is the best way forward in the review of EU competition law awards).

177. See *MDI v. Van Raalte* (decision of 24 March 2005), *supra* note 10, at 808.

178. *Id.* at 808–09.

ment to be in breach of now Article 101(1) of the TFEU, and not eligible for an exemption under Article 101(3).<sup>179</sup> The issue of the EU competition law violation was never raised in the arbitration.<sup>180</sup> MDI then appealed to the Court of Appeal of The Hague, which confirmed the lower court's decision to refuse enforcement.<sup>181</sup> In doing so, the Court of Appeal invoked the *Eco Swiss* judgment, pointing to the public policy nature of EU competition law as a ground for challenge.<sup>182</sup> It then conducted an in-depth analysis of the license agreement for its compliance with EU competition law. The court found it to be *prima facie* anti-competitive and not eligible for an exemption.<sup>183</sup> The Court of Appeal thus performed a full review on the merits in the enforcement proceeding, which raised alarms in the international arbitration community, fearful that arbitral awards were losing their finality because of EU competition law implications.<sup>184</sup>

Different standards of review were applied by the French and Belgian courts with respect to the same award in what became known as the *SNF/Cytec* saga.<sup>185</sup> The dispute in that case

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179. *Id.* at 815.

180. *Id.*

181. *Id.* at 819.

182. *Id.* at 814–15.

183. *Id.* at 815–19.

184. See, e.g., Assimakis Komninos, *Dutch Court Refuses to Enforce US Arbitral Awards on Public Policy Grounds for Violation of EU Competition Law*, 19 INT'L DISPUTE RESOL. 5, 7 (2006) ("The judgment of the Court of Appeal of The Hague is a disappointing development for international arbitration in Europe."). See also Mourre & Radicati Di Brozolo, *supra* note 20, at 182 ("[T]he judgment . . . is in contrast with mainstream thinking and case law, according to which . . . court control over awards should be limited to exceptional circumstances, where there is a manifest disregard of a fundamental principle, or where the contract entered into by the parties amounted to fraud. Where competition law comes into play, such a manifest and flagrant violation would occur, for instance, in the presence of a hardcore price-fixing or market-partitioning cartel.").

185. See Pierre Heitzmann & Jacob Grierson, *SNF v. Cytec Industrie: National Courts within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Article 81 EC*, 2 STOCKHOLM INT'L ARB. REV. 39 (2007) (analyzing the facts of the case and the resultant court proceedings and arguing that the courts should not review awards on the merits just because there are allegations of international public policy violation). See also Alexis Mourre, *Courts in France and Belgium Confirm Limited Review of Awards under European Competition Law*, KLUWER ARB. BLOG (Feb. 7, 2010), <http://kluwerarbitration-blog.com/blog/2010/02/07/courts-in-france-and-belgium-confirm-limited->

led to the ICC arbitration in Brussels with the tribunal issuing a partial award on liability in 2002 and then a final award on damages and interest in 2004. In its partial award, the tribunal found the long-term contract for the supply of a chemical compound between Cytec Industries BV (Cytec, a Dutch supplier) and SNF SAS SA (SNF, a French buyer) to be contrary to present Article 101 of the TFEU. Both parties were found equally liable, as they knew or should have known that their contract was null.<sup>186</sup> The parties were to compensate each other for half of any damages suffered as a result of such nullity. Under the final award, however, the tribunal awarded damages only to Cytec, as SNF was not able to prove that it could have obtained a better deal from other supplier, and thus was unable to substantiate its damages.<sup>187</sup> Following the arbitration, Cytec filed for enforcement of the final award in France. SNF then sought to set aside the awards in Belgium.<sup>188</sup>

In the enforcement proceeding, SNF attempted to challenge the award, arguing violations of Articles 101 and 102 of the TFEU.<sup>189</sup> The Paris Court of Appeal granted enforcement, employing the minimalist approach in its review of the award.<sup>190</sup> The Court explained that it exercises “only an extrinsic review of the award since only the recognition or enforcement of the award is reviewed with respect to its compliance with international public policy at the time of its submission to the judge.”<sup>191</sup> Reiterating its wording in *Thalès*,<sup>192</sup> the

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review-of-awards-under-european-competition-law (reviewing the *SNF v. Cytec* saga and arguing that the courts in their review of arbitral awards should seek to strike a balance between finality of the awards and protection of public interest of free competition in the markets).

186. Heitzmann & Grierson, *supra* note 185, at 41.

187. *Id.*

188. *Id.*

189. *Id.* (“SNF challenged the enforcement proceedings before the French courts on a number of grounds, including that the agreement violated Articles 81 and 82 EC by awarding the allegedly dominant party, Cytec, more benefits through the annulment of the 1993 Contract than through its performance.”).

190. See Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., Mar. 23, 2006, 32 Y.B. Comm. Arb. 282 (2007) (Fr.).

191. For an English translation of the decision, see Heitzmann & Grierson, *supra* note 185.

192. See Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., Nov. 18, 2004, 2004 REVUE DE L’ARBITRAGE [REV. ARB.] 986 (Fr.).

Court held that there has to be a “flagrant, real and concrete violation of international public policy” to warrant the challenge of an award.<sup>193</sup> It therefore granted enforcement, having verified that the tribunal had “addressed the issue of whether the . . . contract complies with the provisions of [Articles 101 and 102 of the TFEU], with respect to the facts and the legal instruments which were presented by the parties, as well as with respect to the case-law of the ECJ.”<sup>194</sup> The Court of Cassation confirmed the Court of Appeal’s decision.<sup>195</sup>

In Belgium, the awards were first annulled by the Court of First Instance of Brussels, which reviewed the reasoning of the arbitral tribunal with respect to present Articles 101 and 102 of the TFEU, but chose not to examine the underlying evidence.<sup>196</sup> The decision of the Court of First Instance was met with slight confusion, considering its contrast with the French courts’ judgments regarding the proper standard of review of arbitral awards.<sup>197</sup> It appeared that the Brussels court sought to invoke a more substantial review than the minimalist approach of the French courts, but its review was still more limited than that employed by the Dutch courts in the *Marketing Displays International* case. The Brussels court’s approach was welcomed by some commentators as offering a “middle way” between maximalist and minimalist positions in the court re-

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193. See Heitzmann & Grierson, *supra* note 185, at 42 (offering an English translation of Belgian and French cases).

194. *Id.* at 47.

195. Cour de cassation [Cass.] [Supreme Court for Judicial Matters] Ie civ., June 4, 2008, 2008 REVUE DE L'ARBITRAGE [REV. ARB.] 473, note I. Fadlallah (Fr.).

196. See Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Bruxelles, March 8, 2007, 2007 REVUE DE L'ARBITRAGE [REV. ARB.] 303 (Belg.). See also Heitzmann & Grierson, *supra* note 185, at 46–47 (quoting the Court as holding that it is “not for this court to rehear the merits of the case which was submitted to arbitration but rather to verify, by reading the award, whether . . . [t]he Tribunal has or has not breached Articles 81 and 82 of the EC Treaty, which are [rules of public policy]”).

197. See Heitzmann & Grierson, *supra* note 185, at 47 (“While the . . . judgment [of the Court of First Instance of Brussels] does appear to be more closely in line with the views of those practitioners who favour a more substantial review of international awards on antitrust issues, it goes beyond what most practitioners would expect: the [Court] . . . effectively reviewed the allocation of damages as a result of a contract held contrary to Article 81 EC.”).

view of antitrust-related arbitral awards.<sup>198</sup> Yet, to the relief of most arbitration lawyers, this decision was later reversed by the Brussels Court of Appeal.<sup>199</sup> The Court of Appeal concluded that SNF was seeking to revisit the tribunal's decision in order to address the prejudice it faced from the nullity of the contract, which, according to the Court of Appeal, does not raise an issue of public policy.<sup>200</sup>

The standard of review was also addressed in several cases in Germany, such as the 2004 decision of the Court of Appeal of Düsseldorf in the enforcement proceedings that raised the issue of compatibility of an arbitral award rendered in Zurich to EU competition law.<sup>201</sup> The court in this case performed an in-depth analysis of the award, which encompassed "an extensive examination of the evidence, including the hearing of witnesses," followed by a "detailed and wide-ranging examination of the legal aspects of the case."<sup>202</sup> By contrast, the Court of Appeal of Thüringen, which looked at the enforcement request of the Swiss arbitration award in 2007, relied on "a summary plausibility review" of the award in its assessment of whether the tribunal had properly addressed EU and German competition law.<sup>203</sup> The courts in other EU jurisdictions, such as Italy and Sweden, have similarly stated that the review of arbitral awards as to their application of EU competition law has to be limited.<sup>204</sup>

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198. See, e.g., Gordon Blanke, *The "Minimalist" and "Maximalist" Approach to Reviewing Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last*, in *POST-HEARING ISSUES IN INTERNATIONAL ARBITRATION* 169, 169 (Devin Bray & Heather L. Bray eds., 2013).

199. See *Cours d'Appel* [Court of Appeal] Bruxelles, 17e ch. June 22, 2009, 2009 *REVUE DE L'ARBITRAGE* [REV. ARB.] 574, note Mourre.

200. See JAN PAULSSON, *THE IDEA OF ARBITRATION* 142 (2013) (quoting the Brussels Court of Appeal as "[SNF] was pursuing a complete revision of the arbitral awards in order to open the door for a different assessment of the prejudice flowing from the nullity of a contract, which does not raise an issue of *ordre public*").

201. See Landolt, *Arbitration and Antitrust*, *supra* note 85, at 236–37 (referring to Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] July 21, 2004, VI-Sch (Kart) 1/02 (Ger.)).

202. *Id.*

203. *Id.* at 237 (referring to Oberlandesgericht Thüringen [OLG] [Thüringen Court of Appeals] Aug. 8, 2007, A.G. Co v. Sch. AG, VI Sch (Kart) 01/02, OLGR Jena 2008, 162–64 (Ger.)).

204. See Mourre, *supra* note 185 ("In Italy, both the court of appeal of Milan in *Tensacciai* (8 March 2006) and Florence (*Nuovo Pignone*, 21

Interestingly, despite the decisions of the ECJ and the national courts of the member states regarding the public policy nature of EU competition law, Swiss courts have held that such law—although important for the proper functioning of the Common market—does not constitute public policy.<sup>205</sup> As a result, an arbitral award is unlikely to be set aside or refused enforcement in Switzerland on the ground that it violates EU competition law (and therefore public policy within the meaning of the New York Convention).

### C. Phase III: You Can Do It, Arbitral Tribunals!

Although the majority of the second phase cases deal with the standard of review of arbitral awards, they also inform us about the arbitrator's obligation to apply antitrust law.<sup>206</sup> Where the parties are silent in arbitration regarding the antitrust implications of their contract or conduct, the arbitrator may also have to raise antitrust issues *sua sponte* or, using a concept more familiar to European lawyers, *ex officio* (by virtue of one's position). As I argue in this Article, the focus of the recent cases is gradually shifting to the arbitrator's obligation with respect to antitrust law. This marks a new, third phase in

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March 2006) clearly stated that the scrutiny should be limited to verifying that the arbitrators duly considered the competition law issues and held that a misapplication of such rules is not tantamount to a violation of international public policy. In Sweden, the Svea court of appeal held in 2005 (Rep. of Latvia v. Latvijas Gaze) that the concept of public policy should be given a narrow application in the context of the review of an arbitral award and that a violation of competition law can only lead to an annulment in 'obvious cases.'").

205. Tribunal Fédéral [TF] [Federal Supreme Court] Mar. 8, 2006, 2006 REVUE DE L'ARBITRAGE [REV. ARB.] 763 (Switz.). See also David P. Roney, *Switzerland: Swiss Federal Supreme Court Holds Competition Law is Not Part of Public Policy*, 9 INT. A.L.R. 49, 51 (2006) ("The Swiss Federal Supreme Court thus concluded that provisions of competition law, whether Swiss, European or other, do not form part of the essential and widely recognized values which, according to conceptions prevailing in Switzerland, should constitute the foundation of any legal system.").

206. See Radicati Di Brozolo, *Antitrust*, *supra* note 36, at 25 ("[T]he central problem of the relations between competition law and arbitration is unquestionably that of the powers of national judges in respect of the control of awards raising antitrust issues, both in setting-aside and in enforcement proceedings. The debate is crucial also for the purposes of identifying the 'obligations' of arbitrators regarding the application of competition law.").

the development of antitrust arbitration, where tribunals are trusted with the antitrust enforcement.

The discussion of the arbitrator's obligation to apply anti-trust law is not new. The question was famously raised by the Dutch court in *Eco Swiss* in its reference for a preliminary ruling.<sup>207</sup> The ECJ did not answer the question directly. Yet, it is commonly believed that *Eco Swiss* created such an obligation—at least under EU law with respect to EU competition law—by holding that a national court has the right to annul an award violating EU competition law on public policy grounds.<sup>208</sup>

The arbitrator's *ex officio* obligation was also addressed in the famous *Thalès* decision, where the Paris Court of Appeal held that the mere fact that the arbitrator failed to raise EU competition law *ex officio* did not warrant setting aside of the award.<sup>209</sup> In light of the *Thalès* decision, some commentators argued that there was “no such thing as the implied *ex officio* duty on the part of the international arbitrator to take into account mandatory European law issues, including more specifically, European Community (EC) competition law, in order to render an enforceable award.”<sup>210</sup> By contrast, other commentators firmly believe that the *Thalès* decision “seeks to lay down a standard for the breach of the arbitrator's *ex officio*

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207. Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int'l*, 1999 E.C.R. I-3055, ¶ 30 (asking to what extent the ECJ's earlier decisions on the right of courts to raise EU competition law claims of their own motion apply by analogy in private arbitration where the parties make no reference to the provisions of EC competition law and under applicable rules of procedure arbitrators are not at liberty to raise such claims on their own motion).

208. *Id.* ¶ 41. See also Landolt, *Arbitration and Antitrust*, *supra* note 85, at 239 (“*Eco Swiss* . . . results in a duty under EU law for arbitrators to apply EU competition law.”).

209. See Cour d'appel [CA] [regional court of appeal] Paris, 1e ch, Nov. 18, 2004, 2004 REVUE DE L'ARBITRAGE [REV. ARB.] 986. See also Mourre & Radicati Di Brozolo, *supra* note 20, at 177 n.35 (quoting the *Thalès* decision as holding that “the sole fact that antitrust law was not raised *ex officio* by the arbitral tribunal does not justify the setting aside of the award”).

210. Gordon Blanke, *Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law: A Réplique to Denis Bensaude's "Thalès Air Defence BV v. GIE Euromissile,"* 23 J. INT'L ARB. 249, 249 (2006) (paraphrasing the arguments of Denis Bensaude, former counsel of the International Chamber of Commerce Court of Arbitration). Blanke ultimately disagrees with the Bensaude's interpretation of *Thalès* as to the existence of the arbitrator's duty to raise antitrust concerns *ex officio*. *Id.*

duty.”<sup>211</sup> The *Thalès* decision is further cited for the proposition that the arbitrator’s *ex officio* obligation to apply antitrust law is not absolute, and the award will not be annulled or refused enforcement where, as Blanke suggests, “competition law issues concerned were so intricate that they could not be readily detected by the arbitrator at the time of rendering the award in question.”<sup>212</sup>

Challenges of arbitral awards in setting aside and recognition and enforcement proceedings also increasingly allege breach of antitrust law by the arbitrator himself—in particular, by the alleged misapplication of antitrust law, failure to raise and apply antitrust claims in arbitration on tribunal’s own motion, or violation of antitrust law provisions by the award itself.<sup>213</sup>

For instance, Baxter International, Inc. (a licensor and an award debtor) argued in the annulment proceeding that the tribunal itself violated U.S. antitrust law by constructing the exclusivity requirement of the license agreement to prohibit Baxter to compete with its own licensee, Abbott.<sup>214</sup> In arbitration, Baxter alleged that it was not bound by the exclusivity requirement and that if the license indeed prohibited it from competing with the licensee, the license would be in violation of Section 1 of the Sherman Act. Seeking to annul the award, it then argued in court that the tribunal’s construction of the license agreement, as presented in the award, violated U.S. an-

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211. *Id.* at 250 (“[A]n arbitrator . . . remains obliged to review the case he is dealing with for potential EC competition law issues and raise these of his own motion in the event that neither of the parties has done so in their respective submissions to the arbitral tribunal.” (citation omitted)).

212. *Id.* Note that in *Thalès*, during the ICC arbitration neither the legal representatives of the parties, nor the ICC legal counsel, nor the tribunal itself recognized competition law issues in question. And so, as Blanke explains, the Paris Court of Appeal did not consider the public policy violation to be blatant enough to warrant setting aside of the award on the public policy ground for the arbitrator’s failure to raise and apply competition law issues. *Id.* at 256.

213. See Heitzmann & Grierson, *supra* note 185, at 42 (referring to the SNF/Cytec saga and the SNF’s setting aside application in Belgium alleging the breach of EC competition law by the tribunal).

214. *Baxter Intern, Inc. v. Abbott Laboratories*, 315 F.3d 829, 832 (7th Cir. 2003) (“According to Baxter, there is a difference between arbitrating an antitrust issue (the subject of *Mitsubishi*) and *creating* one—which it accuses these arbitrators of doing. If the tribunal had construed the Baxter-Marubishi agreement differently, there would have been no antitrust problem.”).

itrust law. Relying on *Mitsubishi*, however, the U.S. Court of Appeals for the Seventh Circuit categorically refused review on the merits of the parties' dispute, pointing out that mistake of law does not constitute a ground for setting aside.<sup>215</sup>

A similar argument was made in the *Genentech* case, which is now before the ECJ for a preliminary ruling from the Court of Appeal of Paris.<sup>216</sup> In this case, Genentech (a U.S. biotechnology corporation now owned by Swiss Roche) reportedly argued in setting aside proceeding that the sole arbitrator in the ICC arbitration in Paris violated EU competition law by finding Genentech liable for royalties and awarding damages to Hoechst (a German affiliate of Sanofi) without first determining whether Genentech infringed the patents at issue.<sup>217</sup> At the center of the dispute is a licensing agreement<sup>218</sup> governed by German law, which provides for the payment of royalties by Genentech (the licensee) for the use of rights covered by patents issued to Hoechst (the licensor). In arbitration, Hoechst argued that Genentech had not been paying royalties with respect to two drugs allegedly developed with the use of patented technology—Rituxan and Avastin, the former being the top selling drug of Roche, with annual sales of over €5 billion.<sup>219</sup> There are three patents involved: a European patent

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215. *Id.* at 831 (“Under domestic law, as well as under the Convention, arbitrators ‘have completely free rein to decide the law as well as the facts and are not subject to appellate review.’” (citation omitted)).

216. Request for a preliminary ruling from the Cour d’appel de Paris (France), lodged on 9 December 2014, *Genentech Inc. v Hoechst GmbH*, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH (Case C-567/14), 2015 O.J. (C73) 12.

217. For the reported facts of the case, see Lacey Yong, *Paris Court Turns to ECJ in Set-Aside Case*, GLOBAL ARB. REV. (Oct. 6, 2014), <http://globalarbitrationreview.com/news/article/33034/paris-court-turns-ecj-set-aside-case/>.

218. According to the facts of the related litigation in the United States, under the agreement Genentech was to pay “a running royalty of 0.5% on the sale of commercially marketable goods incorporating a ‘Licensed Product’”. *Sanofi-Aventis Deutschland GmbH v. Genentech, Inc.*, 716 F.3d 586, 589. The agreement further defined licensed products as “materials (including organisms), the manufacture, use or sale of which would, in the absence of this Agreement, infringe one or more unexpired issued claims of the Licensed Patent Rights.” *Id.*

219. See Pierre Véron & Amandine Métier, *FR - Genentech v. Hoechst and Sanofi-Aventis Deutschland / Referral CJEU*, EPLAW PATENT BLOG (Oct. 17, 2014), <http://www.eplawpatentblog.com/eplaw/2014/10/fr-genentech-v-hoechst-and-sanofi-aventis-deutschland-referral-cjeu.html>.

revoked for lack of novelty,<sup>220</sup> and two U.S. patents found not to have been infringed by Genentech in related U.S. patent litigation.<sup>221</sup> Despite the U.S. court decisions, the sole arbitrator found Genentech liable for the breach of the licensing agreement and awarded Hoechst over 100 million Euro in damages and over 50 million Euro in interest. In the setting aside proceeding, Genentech contends that the requirement to pay royalties in case of invalidity/non-infringement of patents (as provided for by the arbitral award) distorts competition on the market in violation of Article 101 of the TFEU. It thus argues that pursuant to Article 1520 of the French Code of Civil Procedure<sup>222</sup> the award has to set aside in France, as it violates EU competition law and is therefore contrary to international public policy.<sup>223</sup> In its preliminary ruling request, the Court of Appeal of Paris has asked the ECJ whether provisions of EU competition law must be interpreted as precluding to giving effect, in case of revocation of the patents, to a license agreement which requires the licensee to pay royalties “for the sole use of the rights attached to the licensed patent.”<sup>224</sup>

With the preliminary ruling request currently pending, one might think that the Court of Appeal of Paris in *Genentech* does not trust the tribunal and therefore conducts a more thorough analysis of the award than its usual minimalist review. However, considering the strong pro-arbitration bias of French law and prior decisions of the Court of Appeal of Paris, this seems unlikely. The preliminary ruling request does not mention the award, arbitration, or the arbitrator’s obligation to apply EU competition law. Instead, the Court appears to be concerned with the substantive provisions of EU competition law and the ECJ’s interpretation thereof to conduct its own

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220. See Pierre Véron, *Is Paying for a Licensed but Later Invalidated Patent Contrary to Article 101 of the TFEU?* KLUWER PATENT BLOG (Oct. 18, 2014), <http://kluwerpatentblog.com/2014/10/18/is-paying-for-a-licensed-but-later-invalidated-patent-contrary-to-article101-of-the-tfeu/> (describing the facts of the case and its procedural history).

221. See *Sanofi-Aventis Deutschland GmbH v. Genentech, Inc.*, Nos. C 08–4909 SI, C 09–4919 SI, 2011 WL 839411 (N.D. Cal. 2011), *aff’d*, 473 Fed.Appx. 885 (Fed. Cir. 2012).

222. Code de Procédure Civile [C.P.C.] [Civil Procedure Code] art. 1520 (Fr.).

223. Yong, *supra* note 217.

224. Request for a preliminary ruling from the Cour d’appel de Paris (France), lodged on 9 December 2014, *supra* note 216.

analysis of the international public policy violation. It needs such interpretation to assess whether a “flagrant, effective and concrete” violation of international public policy took place.<sup>225</sup> If the ECJ indicates that there is a violation of EU competition law, going forward the Court of Appeal will be able to screen out international public policy violations and grant annulment of arbitral awards in similar cases. For the *Genentech* case itself, however, the alleged violation is hardly “flagrant”—which would require annulment of the award—since even the Court of Appeal is uncertain, and therefore has referred the question to the ECJ.<sup>226</sup>

Taken together, the above cases clearly suggest that courts across jurisdictions will not review arbitral awards because of their antitrust implications unless neither the parties nor the tribunal on its own motion have raised antitrust claims in arbitration (see decisions in *MDI* and *Thalès*). Where the courts do allow the challenge to go forward in setting aside (*Baxter*, *Thalès*, *SNF/Cytec* in Belgian courts) or enforcement proceedings (*MDI*, *SNF/Cytec* in French courts), they usually do not review awards on the merits (with the exception of *MDI*) and would not set aside or refuse enforcement on public policy grounds unless the violation is extremely serious (*e.g.*, meeting the “flagrant, effective and concrete” standard of *Thalès*). Finally, the court would not allow setting aside even where the tribunal has made a mistake in the application of antitrust law (see *Baxter*).

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225. See also Cour d’appel [CA] [regional court of appeal] Paris, 1e ch. (section C), Nov. 18, 2004, 2004 REVUE DE L’ARBITRAGE [REV. ARB.] 986 (Fr.).

226. Note that in his Opinion in the *Genentech* case Advocate General Wathelet has expressed concerns over the flagrant infringement standard used by French law. See Opinion of Advocate General Wathelet, *supra* note 175, para. 58 (“In my opinion, limitations on the scope of the review of international arbitral awards such as those under French law mentioned by Hoechst and Sanofi-Aventis as well as by the French Government—namely the flagrant nature of the infringement of international public policy and the impossibility of reviewing an international arbitral award on the ground of such an infringement where the question of public policy was raised and debated before the arbitral tribunal—are contrary to the principle of effectiveness of EU law.”). Therefore, it particularly interesting to see how the ECJ in the *Genentech* case will address the issue of review of international arbitral awards for compatibility with EU law in light of the European public policy considerations.

This does not mean, however, that the arbitrator has no duty to apply antitrust law in international arbitration. On the contrary, applying antitrust law, as well as raising antitrust issues *sua sponte*, has become mandatory for any arbitrator seeking to render an enforceable award. Failure to do so would make an award susceptible to challenges on public policy grounds in setting aside and enforcement proceedings. Raising antitrust concerns and applying antitrust law, albeit with mistakes of law, would, on the other hand, most probably shield the award from subsequent challenge in the absence of a severe public policy violation.

#### IV. INSIDE THE ARBITRAL PROCEEDINGS: THE ROLE OF ARBITRAL TRIBUNALS

As the discussed cases and awards demonstrate, arbitral tribunals across jurisdictions are increasingly being pushed by courts towards application of antitrust law. Yet, strictly speaking, there is no legal duty on an arbitrator to apply mandatory law. Not a single legal act provides for the liability of an arbitrator for failure to apply mandatory law. What, then, is the nature of the arbitrator's obligation to raise and apply antitrust law? And how can arbitrators be incentivized to enforce antitrust law without compromising the central features of international arbitration (the finality of arbitral awards, and the neutrality, impartiality and independence of arbitral tribunals)? This Part seeks to answer these questions.

##### A. *Beyond the Parties' Intent: Arbitrator's Obligation to Apply Antitrust Law*

Given the advantages of international arbitration, parties entering into an arbitration agreement often believe in the contractual nature of their arrangement, that can be "custom tailored"<sup>227</sup> to fit the needs of a particular dispute. This includes the ability to choose the law to govern the arbitration agreement, the arbitration, and the merits of the dispute, as well as to appoint international arbitrators with the skills and experience to settle the dispute as instructed by applicable laws and arbitration rules. In return, arbitrators are expected

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227. See Baker & Stabile, *supra* note 20, at 414.

to perform their duties with a view to produce an enforceable arbitral award.<sup>228</sup>

Yet, to the surprise of the parties, arbitrators often apply mandatory law in international arbitration.<sup>229</sup> This is the case even though the role of the arbitrator in the application of mandatory law varies across jurisdictions and commentators disagree whether the arbitrator has an obligation to apply mandatory law. Proponents of the private nature of international arbitration have observed that it is not the role of arbitral tribunals to protect public interest. Unlike courts, arbitral tribunals are not the organs of the state.<sup>230</sup> They also argue that the arbitrator in international arbitration should have no particular state interests to protect, as first and foremost he owes his duty to the parties, and not to any legal order mandatory laws of which he may be relied upon to enforce.<sup>231</sup> Moreover, by respecting mandatory law provisions (for instance, of the place of contract performance) and thus ignoring the choice of law made by the parties, the arbitrator risks the enforceability of arbitral award, as he may exceed jurisdiction “under the law of a country called to enforce the award or monitor the integrity of the process.”<sup>232</sup> By contrast, by disregarding mandatory law requirements the arbitrator risks that the award will be set aside or refused enforcement, as such award may be found to be in violation of the public policy of the country. The above dilemma cannot be easily resolved.

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228. See International Chamber of Commerce (ICC) Rules of Arbitration, art. 41 effective Jan. 1, 2012, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration> (“[T]he arbitral tribunal shall . . . make every effort to make sure that the award is enforceable at law.”).

229. Mourre & Radicati Di Brozolo, *supra* note 20, at 171 n.1 (“Arbitrators now routinely apply mandatory rules, even *ex officio*.”).

230. See, e.g., Hans Smit, *Mandatory Rules in International Commercial Arbitration*, 18 AM. REV. INT’L. ARB. 155, 155 (2007) (“[i]n the good old days, arbitrators did not adjudicate issues of mandatory law. These were within the exclusive jurisdiction of the competent public authorities” (footnote omitted)).

231. See Philippe Pinsolle, *Private Enforcement of European Community Competition Rules by Arbitrators*, 7 INT’L ARB. L. REV. 14, 22 (2004) (“Arbitrators have no forum, and they are not the guardians of any legal order. To them, any legal system is foreign. Their main duties are to apply the law chosen by the parties and to render an enforceable award.”).

232. Park, *supra* note 104, at 269.

When antitrust issues come into consideration in international arbitration, the job of the arbitrator becomes even more complicated. First, if the parties instruct the tribunal to apply a particular governing law in an attempt to get around antitrust law requirements of a particular jurisdiction, the tribunal faces a familiar problem of mandatory law application. Where multiple—possibly diverging or even conflicting—mandatory laws come into the discussion, the arbitrator will have to choose which mandatory law to apply. In particular, the duty to produce an enforceable award may require the tribunal to apply antitrust law of the jurisdiction(s) where the award is expected to be enforced. The latter task is more difficult to achieve where antitrust laws of relevant jurisdictions take an opposing view on the antitrust issue at stake.<sup>233</sup> Thus, the arbitral tribunal may need to consider the consequences of choosing one antitrust law over another, and the resultant non-application of relevant mandatory law in light of particular circumstances of the case and anticipated places of enforcement.

Second, if the parties specifically instruct the tribunal not to apply antitrust law, the arbitrators face a much more serious problem: by following the parties' instructions they could themselves violate antitrust law. At least under EU law, they could be considered facilitators of restrictive practices and found personally liable for enforcing an agreement in violation of EU competition law.<sup>234</sup>

Third, the parties may not be aware of the antitrust law implications of their contract or deliberately choose not to argue antitrust law, leaving the arbitrator in the uncomfortable

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233. For instance, U.S. federal antitrust law is no longer treating vertical minimum resale price maintenance (RPM) as per se illegal, while EU competition law still views such arrangements as hard-core restrictions of competition prohibited under Article 101 of the TFEU. See EINER ELHAUGE & DAMIEN GERADIN, *GLOBAL COMPETITION LAW AND ECONOMICS* 743–44 (2nd ed. 2011) (“In the United States, vertical minimum price-fixing agreements were regarded as per se illegal from 1911 until the 2007 decision [*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)] . . . . Under EU competition law, . . . a vertical agreement providing for resale price maintenance is deemed such a hard-cored restriction.”).

234. See Gordon Blanke & Renato Nazzini, *Arbitration and ADR of Global Competition Disputes: Taking Stock* (Part II), 48 *GLOBAL COMP. LITIG. REV.* 87 (2008) (citing Case T-99/04, *AC-Treuhand AG v. Comm'n*, 2008 E.C.R. II-1501 to support the claim that arbitrators themselves can be considered instruments of anticompetitive conduct).

position of having to decide whether he can raise such issues *sua sponte* without violating his obligations towards the parties.<sup>235</sup> The application of antitrust law by arbitral tribunals is thus surrounded by various uncertainties, which continue to define international antitrust arbitrations and related court proceedings.

Yet it is clear that the duty of an arbitrator to render an enforceable award—which no longer can be achieved without proper consideration of mandatory laws—also requires the arbitrator to apply antitrust law. Moreover, it is arguable whether, by analogy to the court's obligation to raise illegality on its own motion,<sup>236</sup> arbitrators are also obligated to raise and apply antitrust law *sua sponte*, beyond the claims raised by the parties in international arbitration.<sup>237</sup>

Far beyond being simply an instrumentality of the private parties, arbitrators are increasingly invoked in international arbitration to protect public interests. In antitrust arbitrations, their role is thus becoming akin to that of courts and public antitrust authorities. The expansion of arbitrability to antitrust issues comes with a condition for arbitrators—that is ensuring that antitrust law will be applied in arbitration itself. As long as arbitrators adhere to their part of this bargain, courts are seemingly willing to refrain from excessive interference into international arbitration by largely relying on minimal review of antitrust-related arbitral awards, such as the quick

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235. See Van Houtte, *supra* note 108, at 66. Note that an arbitrator must give the party an opportunity to argue the issue in a post-hearing brief. Otherwise, the award may be set aside on the ground that the losing party was unable to present its case within the meaning of the New York Convention.

236. See, e.g., Michael Bowsher, *Arbitration and Competition*, in *COMPETITION LITIGATION IN THE UK* 398, 408 (2005) (“In England there seems no particular reason why the approach of a tribunal should be different from that taken by a court in a similar situation,” referring to *David Birkett v. Acorn Business Machines Ltd.* [1999] 2 All E.R. (Comm) 429).

237. See, e.g., Landolt, *Arbitration and Antitrust*, *supra* note 85, at 238 (“[w]here a state will annul or refuse to enforce an arbitral award for its failure to apply antitrust law, in effect that state is placing the arbitral tribunal under a duty to raise antitrust matters of its own motion. This is because, although it would be rare for an annulment of an award to have direct personal consequences for an arbitrator, in practice arbitrators do endeavour to render enforceable awards.”).

safety-valve look taken by the Seventh Circuit in *Baxter*.<sup>238</sup> The balance of this relationship is rather fragile, however, which is why arbitrators as the biggest proponents of international arbitration should ensure that antitrust law is raised and applied in international arbitration.

However, it is still unclear how to provide incentives for international arbitrators to comply with this obligation. One solution may be in imposing “arbitrator liability” for failure to apply antitrust law.<sup>239</sup> However, given the current state of international arbitration, which combines both jurisdictional and contractual elements, liability of arbitrators would likely not be welcomed by arbitrators and other users of international arbitration system. The reasons militating against arbitrator liability include interference with the jurisdictional functions of arbitrators (which are viewed as akin to the courts in this respect), as well as the danger of depriving arbitrators of their neutrality and impartiality. Further, once the award is granted, arbitrator liability would open arbitrators to unwanted personal attacks from the award loser seeking to retaliate against arbitrators for the outcome of the arbitration.

Another solution was suggested by Hans Smit, who introduced the idea of referring all questions of mandatory law arising in arbitration to “a single judicial institution of the country or state whose mandatory law is to be applied.”<sup>240</sup> Such a system would mirror the preliminary ruling requests available for the courts in the European Union seeking to acquire interpretation of the EU law from the ECJ. As suggested, the system would also ensure consistency through the interpretation of antitrust law to be applied by arbitral tribunals, as well as the same judicial institutions being in charge of review of arbitral awards once they are rendered.<sup>241</sup> It is an interesting solution, but unfortunately unrealistic today. With respect to the appli-

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238. See *Baxter Intern., Inc. v. Abbott Laboratories*, 315 F.3d 829, 832 (7th Cir. 2003) (“The arbitral tribunal in this case ‘took cognizance of the anti-trust claims and actually decided them.’ Ensuring this is as far as our review [of the award] legitimately goes.”).

239. See, e.g., Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Law*, 49 DUKE L.J. 1279 (2000) (proposing a mechanism of arbitrator liability, which would allow the losing party in an arbitration to sue the arbitrator on the ground that a mandatory rule was ignored).

240. Smit, *supra* note 230, at 170.

241. *Id.*

cation of EU competition law by arbitral tribunals, any request would have to be referred to the ECJ. However the ECJ has already held that arbitral tribunals are not considered to be tribunals for the purposes of preliminary ruling requests under Article 267 of the TFEU.<sup>242</sup> Thus, certain cooperation with national courts would be required before a question regarding antitrust law to be applied in arbitration could be referred to the ECJ. This would necessarily complicate the arbitration process for everyone involved. Similarly, it is hard to imagine a single judicial institution that would be willing and able to pick up all potential requests for the interpretation of U.S. antitrust law to be applied in international arbitrations and then also review all awards resulting from such application.

Instead, the most effective way to achieve the desired level of application of antitrust law by arbitrators might be through the informal norm of shaming. Most arbitrators are repeat players in the domain of international arbitration. It is in their interest to ensure enforcement of arbitral awards to maintain their reputation and secure future appointments. Thus, it is important to make arbitrators aware of the antitrust issues that may arise in international arbitration. In addition, arbitrators should know that they are increasingly expected to apply antitrust law irrespective of the will of the parties, and may have to do so even on their own motion. Failure to apply antitrust law may lead to setting aside or refusing recognition and enforcement of arbitral awards on public policy grounds, thus breaching the arbitrator's fundamental duty to the parties—to produce an enforceable award.

### B. *Observations and Normative Implications*

For years following the Supreme Court's decision in *Mitsubishi*, antitrust arbitrations and related court proceedings—for example, judicial review of the award under the “second look” right created by *Mitsubishi*—remained underutilized and largely unknown for arbitration and antitrust practitioners alike. For participants of the arbitration process, including

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242. See Case 102/81, *Nordsee v. Reederei Mond*, 1982 E.C.R. 1095 (finding the link between arbitration procedure and the legal remedies in the national courts to be insufficiently close to qualify former as a “court or tribunal of the Member State” per Article 177 of the EEC Treaty).

counsel and arbitral tribunal, the antitrust concerns often appeared to be *terra incognita*—seemingly outside of the scope of the contractual dispute, but with a dangerous potential to unnecessarily complicate arbitral proceedings. Antitrust issues were then conveniently ignored.

With the growing reliance on arbitration for resolution of antitrust disputes, the availability of arbitration agreement covering antitrust claims is often a matter of chance rather than deliberate contract drafting aimed to include antitrust claims into the scope of arbitration agreement. Additionally, rather than thinking of arbitration as a forum for private enforcement of antitrust law, parties continue to invoke antitrust claims primarily as a defense or a counter-claim for breach of contract claims in international arbitration (using it as a shield rather than a sword in arbitration). They seem, however, to be more antitrust-proactive when they lose in international arbitration and then seek to challenge the award on public policy grounds in setting aside and enforcement proceedings.

For public authorities entrusted with the enforcement of U.S. and EU antitrust laws, arbitration has never been a forum for enforcement work as they primarily rely on administrative and criminal sanctions, as well as litigation. Antitrust authorities have gradually come to realize that arbitration can be successfully used in the enforcement of antitrust law. First, the European Commission began introducing an obligation to arbitrate as part of behavioral commitments in the context of its merger review. Now, with the help of domestic courts backed up by the public policy considerations, the state seems to be imposing enforcement obligations on the tribunals themselves, in effect interfering with the private and contractual nature of international arbitration.

It appears, however, that in the period of nearly thirty years since *Mitsubishi* the courts in the U.S. have neither encountered a large amount of antitrust arbitration cases, nor had a chance to frequently exercise and develop their right to have a “second look” at arbitral awards.<sup>243</sup> The attention towards arbitration of antitrust claims has revived in recent years

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243. See Donovan & Greenawalt, *supra* note 13, at 38 (“In the two decades since *Mitsubishi*, it appears that U.S. courts have decided only a single case in which a party has complained about an international tribunal’s application of a statutory claim implicating a U.S. mandatory rule.”).

following three U.S. Supreme Court decisions addressing arbitration of claims in the context of consumer contracts and class action waivers, implicating the ability of individual consumers to raise antitrust claims on behalf of a class in arbitral proceedings.<sup>244</sup> Yet, even though it is impossible to know for sure how many international arbitrations raise issues of antitrust law, one would certainly expect more challenges related to antitrust law than currently appear in the U.S. courts. Interestingly, for decades preceding *Mitsubishi* parties were willing to fight for the arbitrability of antitrust issues and in their quest reached the U.S. Supreme Court. However, since *Mitsubishi*, few parties have arbitrated these claims; when they have, they appear to be willing to comply with antitrust-related arbitral awards, without using a second chance to fight such awards in a setting aside or enforcement proceeding. A similar trend, although with a larger number of court decisions from various EU jurisdictions, can be observed with respect to arbitrations addressing EU competition law issues.

Having gained the much-desired arbitrability of antitrust law, why do so few antitrust-related arbitral awards appear in the courts? One explanation may be the limited antitrust experience of arbitration practitioners who often have difficulties in recognizing antitrust issues and applying antitrust laws.<sup>245</sup> As has been observed, the lack of understanding of antitrust issues and the fear of complicating arbitral proceedings may motivate some arbitrators and counsels to adopt “the policy of the ostrich” even where the recognition of an anti-

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244. *E.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (holding that a party may not be compelled to submit to class arbitration where the arbitration agreement is silent on the issue); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act (FAA) preempts a state law rules prohibiting class action waivers in arbitration agreements); *Am. Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (holding that the FAA does not permit courts to invalidate arbitration agreements that contain class action waivers, despite the fact that the cost of arbitration may be prohibitively high for a claimant to proceed to arbitration on an individual basis).

245. See LANDOLT, *supra* note 24, ¶ 1–08 (“Arbitration practitioners frequently struggle with the EC competition law questions. They struggle to identify them, and if they have discerned that faint looming of a competition issue they approach it with perceptible caution.”); *id.* at 3 n.1 (“The result of competition law analysis in arbitration is thus frequently, and conveniently, a determination that in fact no violation has occurred.”).

trust violation would significantly change the position of the parties (e.g., retroactively relieving one of them of contractual obligations due to a contract being in breach of antitrust law).<sup>246</sup> Not surprisingly, the antitrust law analysis in the context of arbitral proceedings frequently results in a determination that no antitrust violation has occurred.<sup>247</sup>

The second explanation may come from the contractual nature of international arbitration. Simply put, international arbitration requires an arbitration agreement and as such necessarily limits the types of antitrust claims and disputes that can be resolved in arbitration. And so, although antitrust claims are objectively arbitrable, arbitration is often not a viable option because the parties have not contracted to arbitrate, or the scope of their arbitration agreement is too narrow to include antitrust claims.

The third explanation may be that what we observe with respect to antitrust arbitrations—namely, the apparent lack of court cases dealing with antitrust-related arbitral awards—is no more than a reflection of a general trend in international arbitration where most arbitral awards are believed to be complied with voluntarily by the parties.<sup>248</sup> If this is so, then the majority of arbitral awards, including antitrust-related awards, are never challenged in courts in setting aside or enforcement proceedings. And there is no reason to believe that the situation is substantially different for antitrust arbitrations. Thus, the low number of court cases related to antitrust arbitrations is arguably not a sign of troubles or non-existence of antitrust arbitrations, but rather an indication that antitrust arbitration remains a developing area of practice.

However, even the limited number of court cases we have observed to date persuasively demonstrate that the courts are no longer suspicious of parties seeking to arbitrate antitrust claims behind the “closed doors” of international arbitration. Instead, the courts and regulators increasingly invoke the assis-

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246. *Id.* ¶ 1–13.

247. *Id.* at 3 n.1 (referring to Laurence Idot, *Arbitration and EC Law*, 5 INT'L BUS. L.J. 561, 576 (1996), where the examination of published arbitral awards revealed that “arbitrators almost invariably find no violation of the rule of EC competition law”).

248. S.I. Strong, *Border Skirmishes: The Intersection between Litigation and International Commercial Arbitration*, J. DISP. RESOL. 1, 8 (2012).

tance of arbitral tribunals in the enforcement of antitrust law, even in the absence of the parties' will to arbitrate such claims.

The attitude towards international arbitration has thus evolved from suspicion to trust. First, arbitration was considered to be unsuitable for the resolution of antitrust claims. Next, following the U.S. Supreme Court decision in *Mitsubishi*, it was allowed to address antitrust claims, but the courts were explicitly granted the right to review the resultant awards (although the precise standards of such review were never articulated by the courts and are still being developed). Today, the focus appears to be shifting from merely resolving antitrust disputes in arbitration to finding ways to motivate arbitral tribunals to enforce antitrust law even where the parties have not raised antitrust issues.

As a result, what we witness today is the increasingly changing role of arbitral tribunals in antitrust arbitrations—from that of a neutral adjudicator of private disputes to the performer of hybrid functions of adjudication and enforcement of domestic antitrust laws. We can further improve the current regime of antitrust arbitrations by invoking even greater assistance of arbitrators in the application of antitrust law in lieu of allowing courts to interfere in the arbitral process through extensive review of arbitral awards for compliance with antitrust law. As the published awards and court cases illustrate, arbitrators are well capable of doing so in the most complex antitrust disputes. They also should feel obliged to raise and apply antitrust law even *sua sponte*, motivated by a desire to produce an enforceable award backed up by reputational concerns. Arbitrators are repeat players in international arbitration and as such they benefit from producing enforceable awards immune from potential challenges due to their antitrust law implications. Overall, this would allow the parties to exercise their right of private dispute resolution, but also give the state further assurances that antitrust claims and issues are duly addressed by arbitral tribunals in international arbitrations.

## V. CONCLUSION

It may be too late to set international arbitration completely free of mandatory laws, to establish a truly autonomous private order for transnational dispute resolution. As the late

Hans Smit eloquently put it, “it may well be that too much water has flown over the dam to reverse the Supreme Court’s contrary rulings.”<sup>249</sup> But despite the nominal yoke of mandatory antitrust laws, international arbitration has won the battle on the ground. It has repeatedly proved capable of settling private disputes involving public policy concerns, such as international arbitration of domestic antitrust claims. Along the way it has gained trust not only from private parties choosing arbitration for the resolution of their international disputes, but also from national courts and public antitrust authorities.

With trust comes duty. In the case of antitrust arbitration, it is the obligation of international arbitrators to raise and properly apply any antitrust issues in a proceeding before them and to ensure the recognition and enforcement of the resultant arbitral award.

What is the best way to ensure that international arbitral tribunals fulfill this duty? As national courts have realized, intrusive judicial review of awards under the public policy rubric is not the answer. What is needed, instead, are incentives for international arbitrators to address antitrust laws on their own, which in turn requires arbitrators informed and up to date on the relevant law and the presumption of their public function as agents of public antitrust authorities.

As the arbitral awards and court cases described above demonstrate, over a period of only thirty years international arbitration has gained the strong trust of courts and antitrust authorities as a forum for the enforcement of antitrust laws. This evolution appears to confirm international arbitration’s ability to successfully address regulatory disputes on par with domestic courts, at least in the realm of antitrust. If in that realm, there may yet be hope in other realms.

A particularly tendentious criticism of the TTIP and the TPP regimes are their investor-state dispute settlement (ISDS) mechanisms. The gist of the critique is that the investor-state arbitral tribunals will be pro-corporation and inadequate substitutes for national public courts and adjudicators.<sup>250</sup> The ar-

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249. Smit, *supra* note 230, at 170.

250. See European Commission Concept Paper, Investment in TTIP and Beyond – The Path for Reform Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards an Investment Court (May 5,

guments and fears we hear today with respect to ISDS are substantially similar to those expressed in the *American Safety*<sup>251</sup> doctrine with respect to the role of international arbitral tribunals in enforcing antitrust laws. Given the remarkable transformation from suspicion to trust of arbitral tribunals in the antitrust arena, there is at least reason to hope that arbitration in the context of the far-reaching TTIP and TPP will not be as inconsistent with the public interest as the naysayers have predicted.

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2015), [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.pdf](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf) (expressing the Commission's concerns over the lack of transparency and legitimacy in the current system of investor-state dispute settlement (ISDS), including the ability of foreign investors—through investor-state arbitration—to interfere with the government's right to regulate for the public benefit and therefore proposing to replace the current ISDS regime with a permanent international investment court system).

251. See *Am. Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d Cir. 1968) (“We conclude only that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear. In some situations Congress has allowed parties to obtain the advantages of arbitration if they ‘are willing to accept less certainty of legally correct adjustment,’ but we do not think that this is one of them. In short, we conclude that the antitrust claims raised here are inappropriate for arbitration.” (quoting *Wilko v. Swan*, 346 U.S. 427, 438 (1953))).

