ANTITRUST AND INTERNATIONAL ARBITRATION

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ABSTRACT

The arbitrability of competition claims has been the subject of debate for many years. Traditionally, the focus of such debate has always been related to the issue of public policy, imposed as a barrier to the arbitrability of this type of dispute. The first part of the present article has the purpose of analyzing the evolution of the referred debate and the consequent overcoming of the obstacle initially set by public policy. Moreover, the practical considerations generated as a result of the confirmation of said arbitrability, such as the scope of the arbitrator's performance and the extension of judicial review, shall also be analyzed.

The second part of the work aims at analyzing the issue of arbitrability of antitrust claims from a new standpoint, different from the public policy one: that of interparty relations and the existence of consent, similarly to what happens in Consumer Law. The main object of analysis for this part shall be the Arbitration Fairness Act of 2013, a bill still pending in the United States Congress, which purpose is to amend the U.S. Federal Arbitration Act in order to invalidate predispute arbitration agreements that establish resolution through arbitration of labor, consumer, antitrust, and civil rights disputes.

TABLE OF CONTENTS

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INTRODUCTION

The absence of restrictions on the arbitrability of disputes in some legal areas, such as antitrust and consumer law, has been the target of strong criticism by numerous U.S. states.[1] This basically translates to bills that aim at restricting the arbitrability of these specific types of conflict.[2] Among these bills, perhaps the most prominent is the *Arbitration Fairness Act of 2013*, which is still pending in the United States Congress.[3] The purpose of the referred bill is to amend the U.S. *Federal Arbitration Act*[4] in order to invalidate predispute arbitration agreements that establish resolution through arbitration of labor, consumer, antitrust, and civil rights disputes.

The interesting aspect of this bill is that it has the purpose of substantially reducing the arbitrability of conflicts currently viewed in a much friendlier fashion by international case law, which has been a lot more permissive to this category of dispute resolution.[5] Speaking specifically in terms of conflicts that involve situations related to antitrust law, the bill seems to go against the current

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[1] *See* Knepp v. Credit Acceptance Corp. (*In re* Knepp), 229 B.R. 821 (Bankr. N.D. Ala. 1999); Brown v. Genesis Healthcare Corp*,* 729 S.E.2d 217 (W. Va. 2012).

[2] GA. CODE ANN. § 9-9-2(c)(5) (2014); MONT. CODE ANN. § 27-5-114 (2013); TEX. CIV. PRAC. & REM. CODE § 171.002(a)(2) (2013). These laws impose restrictions to the validity of arbitration agreements that involve consumer disputes; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1015-16 (3d ed. 2014).

[3] Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013). The Arbitration Fairness Act was originally proposed in 2007, and twice again in 2009 and 2011, however, in none of these occasions, was it approved by the United States Congress.

[4] Federal Arbitration Act, 9 U.S.C. (2006).

[5] It is possible to argue that the provisions in the Arbitration Fairness Act of 2013 are rules of contractual validity rather than of arbitrability. Nevertheless, we understand that the bill has effects on the arbitrability of competition claims, as will be demonstrated in the second part of the article.

international case law trend regarding the expansion of the concept of arbitrability of such claims. This trend derives from an increase of trust in arbitration, overcoming barriers that had been initially imposed against the arbitrability of antitrust disputes.

It is still too early to say whether this bill will actually be enacted and, should that be the case, whether it will influence the drafting of similar legislative attempts in the international environment. Nevertheless, it is evident that initiatives of this kind once again question the scope of arbitrability of competition disputes.

For this reason, this article first analyzes the initial public policy issues surrounding the arbitrability of antitrust and competition claims. In particular, it will evaluate the arguments in favor of and against said arbitrability, with due regard to the public policy oriented European and U.S. judicial decisions that have addressed these arguments. Next, the article will examine the existence of consent and the new challenges imposed by public policy in order to finally gauge the context in which the bill can be inserted. Is it a new set of arguments contrary to the arbitrability of competition claims or is it just a derivative version of the difficulties resulting from the public policy argument?

I. THE FIRST ROUND: PUBLIC POLICY AND THE ARBITRABILITY OF COMPETITION CLAIMS

For a long time, matters related to Antitrust Law were considered to be inarbitrable, mostly due to their public policy nature. Public policy matters used to outweigh party autonomy, preventing the parties from establishing that their conflict be resolved through arbitration.[6] The objections to the arbitrability of antitrust disputes refer to problems that can be summarized in three categories: (i) the peculiarities of arbitral proceedings, which could ultimately undermine due process, such as a less rigorous discovery phase; (ii) the limited substantiation of arbitral awards; and (iii) the absence of appeals in arbitration, combined with the limited review of the decisions by national courts.[7] Especially in the field of Antitrust Law, these problems were faced with even greater mistrust as a result of the alleged problems that arbitration would pose to the enforcement of

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[6] American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968). On the occasion, the judicial court expressed its view 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,' see id., 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.

[7] OECD Secretariat, *Key Findings* 8-9*,* OECD Hearings: Arbitration and Competition (2010), http://www.oecd.org/competition/abuse/49294392.pdf.

competition. This is because such enforcement would not only be conducted by a public body, namely the competition authorities, but also by private agents seeking redress before the Judiciary.

Despite all the practical issues generated by the confirmation of the arbitrability of controversies related to Antitrust Law, which will be further discussed, arbitration provides advantages for the application and enforcement of competition rules. Firstly, the parties have the opportunity to select specialized arbitrators who are familiar with the subtleties and difficulties related to competition legislation (in litigation, parties do not have the option of choosing their judges). Besides that, it is possible that an arbitral award that protects competition policy would ultimately have more value in the international community than a judicial decision, since its enforcement in another country would most likely be easier. In other terms: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by 145 countries and is generally applied in a fast and efficient manner. The Hague Convention on Forum Selection Agreements, however, which promotes the enforcement of foreign judicial decisions, has been signed only by the European Union (EU), the United States and Mexico and has considerably less relevance in the international scenery than the New York Convention.[8]

A. Case Law on the Arbitrability of Competition Claims

Gradually, these problems began to be analyzed and further discarded. Initial studies on the arbitrability of competition matters point to a very important distinction, originally created in France, between matters considered to be inarbitrable *per se* and those which could eventually be deemed inarbitrable, depending on the specific circumstances of the case.[9] In this sense, it is possible to distinguish between disputes whose object is in itself inarbitrable, such as divorce and those where the review of the fulfillment of public policy requisites will be eventually conducted by the Judiciary, such as the ones involving antitrust or fraud. The latter are not considered to be inarbitrable *per se,* but can be classified as such according to the specificities of the case in question.[10]

Besides, the public policy argument used to be commonly raised by the parties as a way of dodging the choice of arbitration as the method of dispute resolution.[11] However, the increase of trust in arbitration as a whole and the

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[8] *Id.* at 14.

[9] FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 337 (EMMANUEL & JOHN SAVAGE eds., 1999).

[10] *Id.*

[11] In the first possibility cited, the parties could initiate the arbitral proceedings without raising any competition issues. Considering that such issues were considered inarbitrable, the arbitrator could not raise them *sua sponte*, thereby enabling the parties to escape the imposition of the competition

repudiation of its use as a shield for the parties to avoid this method of dispute resolution led to the understanding that the protection of collective rights and the respect of public policy could be reconciled with arbitration.[12] Such expansion of the concept of arbitrability is based primarily on case law and can also be deemed as a reaction to the above mentioned strategy. It results mostly from the reasoning of groundbreaking courts in some emblematic cases, described below:

1. Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.

The case revolved around a contract for the distribution of motor vehicles in Puerto Rico, negotiated between Mitsubishi Motors Corporation, a Japanese company, and Soler Chrysler-Plymouth, a U.S. company.[13] The contract provided for the resolution of disputes through arbitration, according to the rules of the Japan Commercial Arbitration Association, as well as the application of Swiss law. After a controversy arose, Mitsubishi started judicial proceedings before the District Court of Puerto Rico, requesting that Soler be compelled to arbitration in Japan, according to the contractual provision. The American company alleged that the contract violated the U.S. competition rules contained in the *Sherman Antitrust Act*, since it prevented the distributor from selling the vehicles outside of Puerto Rico.[14] On the occasion, the U.S. Supreme Court determined that the disputes involving antitrust issues could be resolved through arbitration, provided that arbitrators refrain from the activities within the exclusive jurisdiction of competition authorities, such as the granting of leniency and criminal investigations. Such confirmation of the arbitrability of antitrust claims was mostly possible because of the so-called *second look doctrine,* according to which the Judiciary would have the power to review the arbitral award in lawsuits filed for the annulment and enforcement of the referred decision. This way, the public policy nature of antitrust matters was reassured even though these matters were considered to be arbitrable. Among the reasons presented in the opinion delivered by Justice Blackmun, the Court emphasized the necessity of respecting the parties' agreement, which provided for arbitration, even if a competition issue

rules applicable to the controversy. In the second possibility, on the other hand, the party that did not wish to solve its dispute through arbitration, regardless of the existence of a valid and operative arbitral clause could raise a certain competition issue forcing the controversy to be taken to the Judiciary.

[12] This tendency can also be justified by the development and improving of competition legislation in an international scale. As the countries begin to regulate and punish anticompetitive behaviors, the fear that the competition issue may be neglected by an arbitral tribunal seated in countries less sensitive to such matters is diminished.

[13] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

[14] Sherman Antitrust Act, 15 U.S.C. (1976).

had been subsequently raised.[15] Besides that, there was also the tendency to favor arbitration that could be extracted from the FAA.[16] As for the complexity of the matter, also raised by one of the parties as an argument contrary to the arbitrability of the dispute, the court noted that there was no indication that arbitrators would be less capable of solving the issue than national judges. Therefore, there was an assumption that the parties would select competent and impartial arbitrators, ready to apply antitrust legislation, regardless of its public interest character.[17] The Mitsubishi case also consolidated the *effective vindication* doctrine, which establishes that the arbitration agreement shall be annulled in case the proceedings in the contractual forum are so burdensome and difficult for the party that, from a practical standpoint, they prevent such party from accessing courts. The dicta in the decision expressly announced that competition claims are arbitrable, as long as the party can maintain its statutory rights in arbitration.

2. Eco Swiss China Time v. Benetton International NV

The case revolved around a licensing contract for the manufacture and subsequent sale of watches, entered into by Eco Swiss China Time Ltd., a Bulova Company Inc. and Benetton International NV.[18] It also provided for the application of Dutch law and the resolution of disputes according to the rules of the Netherlands Arbitration Institution. The contract established a market-sharing agreement between the parties, since Eco Swiss was no longer permitted to sell watches in Italy, while Bulova could not sell them in other countries that were a part of the EU at the time. It so happens that, after the decision was issued, Benetton filed annulment proceedings under the allegation that there was a violation of EU competition law, more precisely of Article 81 of the EU Treaty.[19] Once the case was taken to the Dutch Supreme Court, the court requested an interpretation to the European Court of Justice, inquiring whether the arbitrators were obliged to apply competition rules *sua sponte* and whether national courts had the power to annul arbitral awards on the basis of them being contrary to the community's competition rules. The European Court of Justice concluded that the

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[15] The opinion of the court was delivered by Justice Blackmun and it was joined by Burger, C.J., White, Rehnquist, and O'Connor, JJ., joined. Justice Stevens filed a dissenting opinion, in which Brennan, J., joined, and in which Marshall, J., joined except as to Part II, 473 U. S. at 640. Justice Powell, took no part in the decision of the cases.

[16] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

[17] ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 250 *et seq* (LOUKAS A. MISTELIS & STAVROS L. BREKOULAKIS eds., 2009).

[18] Eco Swiss China Time v. Benetton International NV, Hoge Raad [Dutch Supreme Court] (2000).

[19] Treaty of Rome, art. 81, Jan. 1, 1958, 294 U.N.T.S. 3; MISTELIS & BREKOULAKIS, *supra* note 17, at 255-56.

national court would be forced to annul an award that violated European Competition Law, in case its domestic procedural rules provided for the annulment of arbitral decisions that contained violations to public policy. From this answer, one can infer that the ECJ considered the EU's antitrust rules to be equivalent to its public policy norms. From the decision in *Eco Swiss*, it is also possible to confirm the arbitrability of competition disputes, as well as the review of the antitrust matter by the national courts, to be performed by the Judiciary in a suit filed for annulment or recognition of the arbitral award. The court also stated it had the obligation to decide the competition issue, even if it had been raised at a late stage of the proceedings, namely during the suit filed to annul the arbitral award.[20] In this sense, the main consequence of *Eco Swiss*, as in *Mitsubishi*, was that it ensured that arbitrators not only would have the right but the duty to apply Community Law, which includes competition rules. It also guaranteed that national courts would have the right to review and, if appropriate, to annul arbitral awards that were not in accordance with such rules.[21]

One can conclude from these two leading cases that international case law followed the tendency to confirm the arbitrability of competition claims, as well as to guarantee the review of competition matters by the national courts.[22] The decisions following *Mitsubishi* and *Eco Swiss* not only further defined the contours and reach of these precedents, but also exposed the practical problems resulting from such determinations, as will be discussed below.

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[20] Philipp Landolt, *Eco Swiss and its Ramifications*, VIENNA ARBITRATION DAYS 2012 (2012), http://www.landoltandkoch.com/wp-content/uploads/2012/02/120130_VAD_PhLandolt_NotesReferences.pdf.

[21] MISTELIS & BREKOULAKIS, *supra* note 17, at 256.

[22] Baxter Int'l, Inc. v. Abbott Labs., 325 F.3d 954 (7th Cir. 2003); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 622 (2010); Shearson/American Express v. McMahon. 482 U.S. 220 (1987); Cour de Cassation [Cass.] [supreme court for judicial matters], 1e civ., June 4, 2008, Bull. civ. I, No. 06-15320 (Fr.); Cours d'appel [CA] [regional courts of appeal], 1e ch., sec. C, Nov. 18, 2004, No. 02-19606 (Fr.); *Société Aplix v. société Velcro, Cour d'appel de Paris (1Ch. C), 14 October 1993*, 1994 REVUE DE L'ARBITRAGE 164 (1994) (Fr.); *Société Labinal v. Sociétés Mors et Westland Aerospace, Cour d'appel de Paris (1Ch. A), 19 May 1993*, 1993 REVUE DE L'ARBITRAGE 645 (1993) (Fr.); Oberlandesgericht Thüringer [OLG] [Higher Regional Court of Thuringia] Aug. 8, 2007, 4 Sch 03/06 (Ger.); Oberlandesgericht Dresden [OLG] [Higher Regional Court of Dresden] Apr. 20, 2005, 11 Sch 01/05 (Ger.); *X SA v. Y SA, Z SA, Tribunal Fédéral [Federal Supreme Court], 13 November 1998*, YEARBOOK COMMERCIAL ARBITRATION 2000 – VOLUME XXV 443 (Albert Jan van den Berg ed., 2000); *V SpA and the arbitral tribunal v. G SA, Tribunal Fédéral [Supreme Court], Not Indicated, 28 April 1992*, YEARBOOK COMMERCIAL ARBITRATION 1993 – VOLUME XVIII 143 (Albert Jan van den Berg ed., 1993); *Netherlands No. 29, Marketing Displays International Inc. (US) v. VR Van Raalte Reclame B.V. (Netherlands), Gerechtshof [Court of Appeal], The Hague, Not Indicated, 24 March 2005*, YEARBOOK COMMERCIAL ARBITRATION 2006 – VOLUME XXXI 808 (Albert Jan van den Berg ed., 2006); Corte di Appello, 5 luglio 2006, n. 4209/2005, Giust. Civ. I, 2006 (It.); Corte di Appello, 21 dicembre 1991, n. 1786, 1991 (It.).

B. Practical Considerations Regarding the Arbitrability of Competition Claims

1. Scope of the Arbitrators' Performance

Aside from the issue related to the arbitrability of conflicts involving competition law, the next step would be defining the scope of the arbitrator's work. In *Aplix v. Velcro*,[23] decided by the Paris Court of Appeals on October 14, 1993, the understanding that the arbitrators had the power to determine the potential torts repercussions of anticompetitive conducts was consolidated, provided that they did not invade the exclusive sphere of action of the competition authorities.[24] Therefore, for instance, they can establish the damages to be paid by the losing party (which engaged in an anticompetitive activity, generating losses). This does not hinder the work of the competition authorities, which maintain the exclusive jurisdiction to investigate and prosecute violations of Antitrust Law at an administrative level, and to impose certain sanctions. The arbitrators, on the other hand, have the duty to decide the competition issue according to the applicable law, generating *inter-parte* effects. In this sense, it seems clear that the two jurisdictions are not concurrent and have different spheres of application.[25]

As noted in a case between a Belgian and an Italian company judged by the Swiss Federal Tribunal in 1992, the arbitral tribunal has the obligation to analyze the validity of the contract at hand, to examine its compatibility with the applicable competition legislation and to impose the appropriate civil sanctions, even in the absence of a decision by the competition authority.[26] Therefore, they cannot shirk the application of such civil sanctions or deny the enforcement of the arbitration agreement under the allegation that they lack the authority to apply certain sanctions which are within the exclusive jurisdiction of competition authorities. Nevertheless, arbitrators may not invade the sphere of exclusive performance of the European Commission, such as the imposition of fines resulting from anticompetitive practices. The confirmation of the arbitrability of antitrust disputes was only made possible due to the judicial review of arbitral awards. This means that in enforcement or annulment proceedings, the Judiciary

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[23] *Société Aplix v. société Velcro, Cour d'appel de Paris (1Ch. C), 14 October 1993*, 1994 REVUE DE L'ARBITRAGE 164 (1994) (Fr.).

[24] *Société Labinal v. Sociétés Mors et Westland Aerospace, Cour d'appel de Paris (1Ch. A), 19 May 1993*, 1993 REVUE DE L'ARBITRAGE 645 (1993) (Fr.); *see also* Swedish Arbitration Act §1(3); Gordon Blanke, *Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition,* 23 J. INT'L ARB. 249 (2006).

[25] MISTELIS & BREKOULAKIS, *supra* note 17, at 253.

[26] *V SpA and the arbitral tribunal v. G SA, Tribunal Fédéral [Supreme Court], Not Indicated, 28 April 1992*, YEARBOOK COMMERCIAL ARBITRATION 1993 – VOLUME XVIII 143 (Albert Jan van den Berg ed., 1993).

has the opportunity to annul an award in case of blatant disrespect of public policy. Hence, with regard to Antitrust Law, the only matters that would be considered to be inarbitable *a priori* would be those under the exclusive jurisdiction of the competition authorities, according to the law applicable to the controversy.

2. Determination of the Applicable Law

Which shall be the law applicable to antitrust issues? In cases where there is no express determination by the parties as to the law applicable to the merits of the case, the arbitral tribunal shall have to determine the applicable substantive law based on principles of Private International Law and on a conflict of laws analysis. Such analysis is very complex, considering that the search for the law which has the "closest connection" to the contract – the main criterion for the conflict of laws analysis – is very subjective and uncertain.[27]

Nevertheless, even if there is an express provision in the contract concerning the law applicable to the substantive issues, the conclusion regarding which law shall be applied to competition matters is not automatic.[28] It is possible that the *lex causae* - the law chosen by the parties to govern the merits of the dispute - is unrelated to the transaction conducted. It is also possible that the parties, *ad argumentandum*, have deliberately chosen a certain law to avoid the application of other laws that contain, for instance, stricter competition rules.

One should also note that, even if the law chosen by the parties is indeed intimately related to the transaction established in the contract, it is not only possible but extremely common that the transaction involving the competition matter affects other jurisdictions.

The *lex arbitri*, law of the seat of the arbitration, on the other hand, is also frequently irrelevant to the antitrust issue, since the seat is commonly chosen for neutrality reasons and it mostly affects the dispute's procedural matters, rather than the substantive ones. The arbitrator's duty to apply Antitrust Law, thus, does not necessarily derive from the will of the parties — from the *lex causae* or from the *lex arbitri*[29] — , since competition rules may be applied even if not chosen or raised by the parties.[30] It is mostly understood that the competition legislation of the country or the countries impacted by the transaction shall be applied, even if

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[27] Antoine Kirry, *Arbitrability: Current Trends in Europe,* 12 ARB. INT'L. 373, 379 (1996).

[28] Matti S. Kurkela et al., *Certain Procedural Issues in Arbitrating Competition Cases,* 24 J. INT'L. ARB. 189 (2007).

[29] Luca Radicati di Brozolo, *Arbitration and Competition Law: The Position of the Courts and of Arbitrators*, 31, 45-47 OECD Hearings: Arbitration and Competition (2010), http://www.oecd.org/competition/abuse/49294392.pdf.

[30] *See id.* at 45.

the law chosen by the parties as applicable to the merits is another one.[31] The application of such laws shall be conducted according to their own applicability criteria, following the principle of self-connection of mandatory rules (*auto-rattachement des lois d'application imediate).*

Since antitrust matters are generally part of public policy, there are consequences that must be taken into account. The need for observation of international public policy basically results from the arbitrator's duty to issue an enforceable award. Even though there is no precise definition for these concepts, in general, public policy is described as a group of basic notions of morality and justice.[32] According to the *International Law Association*'s recommendations, international public policy refers to a country's rules that prevent the recognition and enforcement of an arbitral award issued in the context of international arbitration. Therefore, it comprises fundamental principles, the so-called "*lois de police",* as well as international obligations. Moreover, it is also worth stressing that the idea of international public policy must not be confused with the group of public policy principles which are common to various countries, referred to as transnational public policy. Actually, international public policy has an even narrower scope than domestic public policy.[33]

Besides the competition laws of the countries whose markets are affected by the dispute, the arbitrators must also consider the rules of the countries where the enforcement of the award will most likely be sought, as well as the countries which would be the most likely alternative arbitration forum, according to the parties' place of business and other relevant jurisdictional factors. As a result of the great number of scholarly opinions and possibilities of applicable laws, the arbitrators are left with an enormous deal of insecurity as to the applicable Competition Law. Thus, it is necessary to conduct a very cautious and thorough analysis of the circumstances and peculiarities of the case, as well as of the potential effects of the application of the referred laws. This analysis shall be set on common sense and reasonableness, so as to reconcile the duty to solve the controversy, following the parties' determinations, with the duty to protect the application of Competition Law.[34]

The arbitrator's activity regarding the determination of applicable antitrust laws shall be guided not only by the duty to issue an enforceable award but also by the duty not to become an accomplice to antitrust violations. Even though the arbitral tribunal is primarily at the service of the parties, it is also

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[31] Kurkela, et al., *supra* note 28, at 195.

[32] Concept extracted from the decision issued by Judge Joseph Smith in Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

[33] INTERNATIONAL LAW ASSOCIATION, *Final Report on Public Policy* 3, 6 (2002), http://www.newyorkconvention.org/publications/full-text-publications/general/ila-report-on-public-policy-2002.

[34] Radicati di Brozolo, *supra* note 29, at 46-47.

subject to a greater duty: that of pursuing justice and respecting the applicable antitrust rules.[35]

3. Obligation to Raise the Competition Issue *Sua Sponte*?

The view that the arbitrators may apply the antitrust rules of the countries whose markets are affected by the controversy in question seems to have been reasonably accepted. However, what happens when the competition issue is not raised by the parties of the dispute? Would the arbitrator have the possibility – or even the duty – to raise the issue *sua sponte?* This is a very delicate situation, involving several principles such as procedural equality and party autonomy, among others.

Firstly, it should be highlighted that the arbitrator is, above all, bound to the will of the parties, i.e., to the provisions of the arbitration agreement and of the contract as a whole. Additionally, party autonomy is one of the fundamental principles of arbitration. Therefore, the parties are, in principle, free to fit the proceedings to suit their needs. For this reason, upon an initial analysis, one could conclude that in the event that the competition matter is not raised by one of the parties, it would not be the arbitrator's duty to do so, since this would be failing to adhere to the will of the parties and exceeding its prerogatives. The situation becomes even more complicated due to the fact that the application of competition rules is independent from the application of the law chosen by the parties to govern the merits of the controversy.[36] Moreover, the discussion of the competition issue *sua sponte* could ultimately lead to a violation of the procedural equality between the parties and of the right to fair and equitative proceedings. Invariably, the antitrust matter will benefit one of the parties over the other. Hence, the arbitrator that raises such an issue on its own motion could be deemed as biased since, even if involuntarily, it is favoring one of the parties.

On the other hand, as previously mentioned, one of the arbitrator's main duties is to issue an enforceable award. That is, a decision which annulment may not be requested based on the public policy provisions of the New York Convention[37] Furthermore, the arbitral tribunal has the duty to comply with national and international public policy rules, since the annulment of an award based on violations of public policy could ultimately cause the arbitrator who issued the decision to be held personally accountable. It is, thus, argued that in light of the mandatory character of antitrust rules, which are generally considered

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[35] *Id.* at 46.
[36] *Id.* at 45.
[37] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

to be a part of public policy,[38] the arbitrator would have the obligation to raise the competition matter even if it is not raised by the parties. Nonetheless, the tribunal would still have to give the parties the opportunity to express their views on the matter, under penalty of violating due process.[39]

As to the EU, after the decision in *Eco Swiss*, a great deal was discussed about an alleged duty of the arbitrator to raise the competition issue and, consequently, the possible accountability of the arbitrator should such issue be neglected. Accordingly, the arbitral tribunal would also be entrusted with the task of ensuring the application of public policy rules, which includes European Competition Law, under penalty of subsequent annulment of the arbitral award that was issued. However, the referred-to reasoning can be better explained by *Thalès v. Euromissiles*,[40] a case ruled on by the Paris Court of Appeals on 18 November 2004. The parties to the dispute at hand had entered into two contracts, the second one being a licensing contract that put Euromissiles in the position of sole producer and seller of the good in question. Years later, because of a lack of agreement as to the price of the product, arbitration proceedings were initiated in the International Chamber of Commerce. At the end of the proceedings, Thalès was ordered to pay damages to the other party as a result of the unduly avoidance of the contract. Then, it filed an unsuccessful lawsuit to annul the arbitral award and subsequently appealed before the Paris Court of Appeals, alleging a violation of the European Competition Law and consequently of the French Code of Civil Procedure.

The Paris Court of Appeals recognized that the antitrust rules were undoubtedly a part of European public policy and that the arbitrator did have an implicit duty to apply such rules in protection of public policy principles. Nevertheless, the court duly stressed that the annulment of an arbitral award due to a violation of European antitrust rules — and, consequently, of public policy – – could only occur in situations where such violations were *effective, blatant and undeniable*.[41] Arbitrators could only be held accountable, by means of an annulment of the award issued by them, in cases where the competition matter

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[38] Oberlandesgericht Thüringer [OLG] [Higher Regional Court of Thuringia] Aug. 8, 2007, 4 Sch 03/06 (Ger.); Oberlandesgericht Dresden [OLG] [Higher Regional Court of Dresden] Apr. 20, 2005, 11 Sch 01/05 (Ger.); Netherlands No. 29, Marketing Displays International Inc. (US) v. VR Van Raalte Reclame B.V. (Netherlands), Gerechtshof [Court of Appeal], The Hague, Not Indicated, 24 March 2005, YEARBOOK COMMERCIAL ARBITRATION 2006 – VOLUME XXXI 808 (Albert Jan van den Berg ed., 2006).

[39] Radicati di Brozolo, *supra* note 29, at 50.

[40] Cours d'appel [CA] [regional courts of appeal], 1e ch., sec. C, Nov. 18, 2004, No. 02-19606 (Fr.).

[41] "The violation of international public policy in the sense of article 1502-5° NCPC (New code of Civil Procedure) must be blatant, effective and concrete." Cours d'appel [CA] [regional courts of appeal], 1e ch., sec. C, Nov. 18, 2004, No. 02-19606 (Fr.).

was obvious and it had not been raised.[42] In *Thalès v. Euromissiles*, the French tribunal understood that the violation of Competition Law was not automatically perceptible, and therefore it could not lead to the annulment of the decision that was issued.[43]

The possibility of raising the competition issue *sua sponte,* thus, should be analyzed *in casu*, balancing between the duty to issue an enforceable award, the duty to respect the parties' wishes, and the duty to conduct fair and equitative arbitral proceedings.[44] It would not be reasonable to require that arbitrators raise antitrust matters that are not manifest and intuitively identified; hence, this duty is limited to the situations in which there is a blatant violation of the competition protection rules. Therefore, arbitrators are not supposed to raise competition issues that were not brought it by parties, unless such issues are blatant violations of law and public policy.

4. Review of Arbitral Decisions in Competition Disputes

The current shared view is that the competition matters are, in principle, arbitrable. However, such view is only possible due to the possibility of judicial review by the courts. According to case law from both the United States and the European Union, namely the *Mitsubishi* case and the *Eco Swiss* case, the arbitrability of the controversy depends on the observation of the so-called *second look doctrine*.[45] Thus, the torts repercussions of competition disputes are, in principle, arbitrable and courts shall only intervene in actions filed to enforce or annul arbitral awards.[46] This view derives basically from two premises: (i)

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[42] *See X SA v. Y SA, Z SA, Tribunal Fédéral [Federal Supreme Court], 13 November 1998*, YEARBOOK COMMERCIAL ARBITRATION 2000 – VOLUME XXV 443 (Albert Jan van den Berg ed., 2000).

[43] Blanke, *supra* note 24, at 249.

[44] AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2013 118 (Christian Klausegger, Peter Klein et al. eds., 2013).

[45] Radicati di Brozolo, *supra* note 29, at 34.

[46] It should be clarified, however, that the current assumption of arbitrability of antitrust matters is clearly distinguished from the analysis concerning the conformity of the arbitration agreements to the applicable competition laws. Even if the controversy is deemed to be arbitrable, thus, it is possible that the arbitral clause contains violations to antitrust legislation, such as, Articles 81 and 83 of the European Union Treaty. The analysis of the arbitrability of the dispute relates to the jurisdiction of the tribunal, that is, it is understood that, should the dispute be inarbitrable, the tribunal shall have no jurisdiction to solve it. Once this issue is settled, the tribunal then moves to a substantive analysis of the merits, referring to the compatibility of the arbitration agreement's terms to the competition laws applicable to the case. Even if they have the same effects, namely the nullity or invalidity of the arbitration agreement, the exam related to the arbitrability and the analysis concerning the conformity of the clause to antitrust rules are different and are conducted in different stages. In short, the fact that the dispute is arbitrable does not, in any way, entail that it shall be in accordance with Competition Law. While the first is a jurisdictional matter, the second is a substantive one.

arbitrators have the duty to apply the appropriate antitrust rules and will, in principle, do so and (ii) national courts shall then have the possibility to review the arbitral decision.[47]

This way, state courts are granted the opportunity to reexamine the arbitral award and the arbitrability issue in an action for annulment or enforcement of the arbitral award. This practice, however, creates a practical problem from a procedural standpoint. Due to the usual international repercussions of antitrust disputes, it is possible, for instance, that a case involving the U.S. antitrust legislation is judged outside of the United States. In this situation, the party could initiate an action for annulment or enforcement of the award outside of the U.S. and the U.S. courts would not have the possibility of reexamining the compliance with its antitrust rules.[48]

5. Extension of the Judicial Review

In addition to being a condition for arbitrability, the idea that national courts have the right to reexamine arbitral decisions is also consolidated in international case law. Nevertheless, there are still some uncertainties as to the extension of such review. In order to solve them, it is necessary to distinguish between two scholarly opinions: the maximalist approach and the minimalist approach. According to the maximalists, the Judiciary can and should perform an extensive review of the factual and legal conclusions behind the arbitral award, in order to guarantee strict compliance with the applicable competition rules. The minimalists, on the other hand, believe that the court's activity should be limited to verifying whether the arbitral tribunal indeed dealt with the competition matter and if its decision was issued appropriately, without revisiting the factual and legal conclusions reached by them. Therefore, courts should only ensure the non-occurrence of blatant violations to public policy without reexamining the merits of the issues decided by the arbitrators.[49]

Very often, the parties' choice to arbitrate is related to certain advantages such as the speed of the proceedings and the finality of the decisions, since, as a rule, there is no appeal and the grounds for annulment of the arbitral award are very restricted. Therefore, the establishment of an extensive and intrusive review could be construed as a trend contrary to the very nature of arbitration. It is also important to note that, even though a majority of countries in the European Union view Competition Law as a part of public policy, not every violation of a

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[47] Radicati di Brozolo, *supra* note 29, at 32.

[48] BORN, *supra* note 2, at 796.

[49] In Mitsubishi*,* the U.S. Supreme Court determined that: "While 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"; *see also* Radicati di Brozolo, *supra* note 29, at 33 *et seq.*

competition rule is a violation of public policy in the sense of Article V(2)(b) of the New York Convention.[50]

Moreover, the popularization and the development of arbitration as a preferred dispute resolution alternative contribute to the adoption of the minimalist view.[51] Although the possibility of judicial review within actions for annulment or enforcement of the award is granted to the parties, it should be emphasized that national judges are not necessarily more competent or better versed in Antitrust Law than arbitrators. Likewise, case law seems to follow a restricted review of the decisions issued in arbitrations. In *Baxter v. Abbot*[52], a case decided by the U.S. Court of Appeals for the 7th Circuit, the judges, in line with the *Mitsubishi* ruling, held that the courts' performance should be restricted and should not involve the reexamination of the merits of the case. It was highlighted that an error in law was not among the grounds for annulment of the arbitral award and that there would be no reason to "disturb" the arbitral award, even if the arbitrators were wrong about the absence of an antitrust violation.

Similarly, in *Cytec v. SNF*,[53] both reviewing courts opted for the minimalist approach. The case in question concerned two contracts entered into by Cytec and SNF. The first one provided for the supply of a chemical component while the second one stipulated that SNF would purchase all the surplus of the referred component exclusively from Cytec, for a period of 8 years. When a dispute between the parties arose, they initiated arbitration proceedings seated in Brussels and administered by the International Chamber of Commerce. Two awards were then issued, a partial and a final one, establishing that the

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[50] New York Convention, *supra* note 35, art. V(2)(b); "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: b) The recognition or enforcement of the award would be contrary to the public policy of that country"; *Tensacciai v. Terra Armata, Tribunal Federal Suiss, Not Indicated, 8 March 2006*, 2006 REVUE DE L'ARBITRAGE 763 (2006). In Tensacciai v. Terra Armata, the Swiss Federal Supreme Court expressed its view that competition rules were not a part of public policy, according to the Swiss Private International Law rules. In regards to the countries in the European Union, Competition Law is generally considered as a part of public policy. However, minor violations to competition rules can be occasionally understood as falling outside the scope of public policy.

[51] *SA Gallay v. Societe Fabricated Metals INC, Cour de cassation (1re Ch. Civ.), 5 January 1999*, 2001 REVUE DE L'ARBITRAGE 805 (2001); Baxter Int'l, Inc. v. Abbott Labs., 325 F.3d 954 (7th Cir. 2003); Cour de Cassation [Cass.] [supreme court for judicial matters], 1e civ., June 4, 2008, Bull. civ. I, No. 06-15320 (Fr.); *Cytec Industries BV v. SNF SAS, Cour d'appel de bruxelles (17e Ch.), Not Indicated, 22 June 2009*, 2009 REVUE DE L'ARBITRAGE 574 (2009); Cours d'appel [CA] [regional courts of appeal], 1e ch., sec. C, Nov. 18, 2004, No. 02-19606 (Fr.).

[52] *Baxter,* 325 F.3d 954;

[53] Cour de Cassation [Cass.] [supreme court for judicial matters], 1e civ., June 4, 2008, Bull. civ. I, No. 06-15320 (Fr.); *Cytec Industries BV v. SNF SAS, Cour d'appel de bruxelles (17e Ch.), Not Indicated, 22 June 2009*, 2009 REVUE DE L'ARBITRAGE 574 (2009).

provision of exclusivity set forth in the contract did violate European competition law.

The French Supreme Court, in a suit filed for recognition of the award offered by Cytec, ruled that the review of the decision should only examine whether there was an effective and manifest violation of international public policy, which had not happened in the case at hand.[54] So, it confirmed the decision of the Paris Court of Appeals, which had already expressed the view that the court should only perform an "extrinsic review", recognizing the arbitral decision in France. The Brussels Court of Appeals also opted for the limited review of the award, overturning the previous ruling of the Brussels First Instance Tribunal, which had granted the annulment of the award requested by SNF, performing an extensive review of the decision.[55] Therefore, both the French Supreme Court and the Belgian Court of Appeals ruled that the award issued by the ICC was valid and legal, considering that the review of the decision should be restricted and upholding the institute of arbitration.[56]

Despite the predominant minimalist trend, one may note some inconsistencies in the review standards used by national courts. In *Terra Armata v. Tensacciai*,[57] for example, in recognition proceedings, the Milan Court of Appeals opted for a slightly more detailed review of the arbitral award. Unlike the minimal review standard established in *Thalès v. Euromissile*,[58] or even in any of the above mentioned cases, the Milan Court of Appeals decided to go beyond that threshold. While the French Supreme Court had declared in *Thalès* that it would annul an award in case there was a "blatant, effective and concrete" violation of a rule of the community, the Italian court chose to apply a higher and more thorough standard of review, in order to make sure that the arbitral tribunal had been diligent and had adhered to EU competition rules. According to Phillip Landolt's analysis, compared to the criteria applied in the other cases analyzed above, the criteria applied by the Italian court in the *Terra Armata v. Tensacciai* decision would better suit the necessity of testing the compatibility of the

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[54] Cour de Cassation [Cass.] [supreme court for judicial matters], 1e civ., June 4, 2008, Bull. civ. I, No. 06-15320 (Fr.).

[55] *Cytec Industries BV v. SNF SAS, Cour d'appel de bruxelles (17e Ch.), Not Indicated, 22 June 2009*, 2009 REVUE DE L'ARBITRAGE 574 (2009).

[56] It is possible to find some articles, prior to 2009, commenting on the disparity between the standards of review used by French courts and by Belgian courts, since up to June 2009, the understanding of the Brussels First Instance Tribunal, that the review of the awards should be extensive, was still in force. Nevertheless, such understanding was revoked on June 22, 2009, as from the judgment of the Brussels Court of Appeal, in which the court shared the view of the French Supreme Court, that the review should be minimal.

[57] Corte di Appello, 5 luglio 2006, n. 4209/2005, Giust. Civ. I, 2006 (It.); Corte di Appello, 21 dicembre 1991, n. 1786, 1991 (It.).

[58] Cours d'appel [CA] [regional courts of appeal], 1e ch., sec. C, Nov. 18, 2004, No. 02-19606 (Fr.).

decisions with the European competition legislation. This is because a minimal review would facilitate and create the risk of non-compliance with the applicable antitrust rules by arbitrators.[59]

Regardless of these inconsistencies, one can say that the minimalist approach prevails. In more practical terms, in order for an antitrust violation to be deemed a transgression of public policy, it must be blatant and jeopardize the objectives of the competition policy.[60] As a rule, an award that does not condemn horizontal agreements which lead to more severe competition restrictions, such as price fixing, output restriction and market division amongst competitors will almost certainly be a violation of public policy. The violation of public policy will be less evident, however, in decisions related to vertical restraints, such as exclusivity agreements, where the illegality is less obvious and more subject to an effects test.[61] In these situations, the analysis must be conducted case by case, according to the specific circumstances.

In this sense, case law shows that an extensive review of the arbitral award should only be conducted in very exceptional situations, such as: (i) grave suspicion of fraud by the tribunal, covering up flagrant anticompetitive behaviors; (ii) the absence of decision on obvious competition matters; and (iii) the issuance of contradictory, obscure or incomplete arbitral awards, preventing the review from being performed by the national court.[62]

6. Interactions and Arbitral Enforcement Arbitral of Competition Disputes

As mentioned above, one of the main conditions for the confirmation of the arbitrability of competition disputes was precisely the existence of the review of the antitrust issues, to be performed by the national courts. However, besides actions filed for recognition and annulment of arbitral awards, proceedings involving the very same contractual relationship might arise before arbitrators and judges or competition authorities at the same time. Also, due to the usual international nature of business transactions involving antitrust issues, parallel proceedings may occur simultaneously in different countries. This raises two questions: (i) should any of the proceedings be stayed, and (ii) if so, which one of the proceedings should be stayed?

Before addressing these issues, it is important to describe how competition agencies and arbitrators can interact so as to understand the scope of their cooperation.

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[59] Phillip Landolt, *Judgment of the Swiss Supreme Court of 8 March 2006 – A Commentary* (2006), http://landoltandkoch.com/wp-content/uploads/2010/12/EBLR-19-1-Landolt1.pdf.

[60] Radicati di Brozolo, *supra* note 28, at 34.

[61] *Id.* at 41.

[62] Radicati di Brozolo, *supra* note 29, at 34, 43.

7. Assistance from the Competition Authorities

Although the scope of the arbitrations is restrained to the civil consequences of the antitrust disputes,[63] a previous decision by the competition bodies with respect to the parties' conduct does not always exist. The first question then arises: can the arbitral panel request assistance from the competition authorities? In judicial proceedings in Europe, for example, interaction between national courts of the countries that are part of the EU and the competition authorities is fairly common. The EEU's very legislation provides for the possibility of the courts to request assistance from the European Commission (EC), as well as the right of the EC to intervene in cases pending before the European courts.[64] Thus, judges can actually request the sharing of documents, the issuance of reports on the application of Competition Law, among other activities.

When it comes to arbitral tribunals, however, the consultation of the competition authorities is questionable. It is necessary to distinguish between two possibilities: the presence and the absence of consent by the parties. Should the parties be in agreement as to the competition authority's intervention, the authority would be able to act, if so desired, without question. Nevertheless, if there is no consent from one of the parties, the situation becomes considerably more complicated. First of all, arbitration is a private means of dispute resolution and the existence of consent, as well as party autonomy, are pillars of the arbitral process. Even so, frequently, the lack of information and the non-intervention by the competition authority may hinder the fair and adequate resolution of the conflict set out by the parties, which is ultimately the main goal of arbitral proceedings.

One must also take into an account the usual duty of confidentiality present in arbitration. Parties commonly want the procedure to be confidential. In such situation, the process of cooperation between the arbitral tribunal and the competition authority becomes very intricate, as the information from the arbitral

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[63] *Société Labinal v. Sociétés Mors et Westland Aerospace, Cour d'appel de Paris (1Ch. A), 19 May 1993*, 1993 REVUE DE L'ARBITRAGE 645 (1993) (Fr.); *Société Aplix v. société Velcro, Cour d'appel de Paris (1Ch. C), 14 October 1993*, 1994 REVUE DE L'ARBITRAGE 164 (1994) (Fr.); *V SpA and the arbitral tribunal v. G SA, Tribunal Fédéral [Supreme Court], Not Indicated, 28 April 1992*, YEARBOOK COMMERCIAL ARBITRATION 1993 – VOLUME XVIII 143 (Albert Jan van den Berg ed., 1993).

[64] In regards to national courts, the assistance to be granted by the competition authorities is expressly provided for in some jurisdictions. The EU legislation, for example, imposes as a duty of the EC the granting of assistance to European courts in competition matters. This assistance includes the supply of documents, the issuance of reports, opinions, among other activities. The cooperation between the competition authorities and the judicial courts occurs according to the laws of the country where the court is situated, that is, according to the national provisions regarding the entering of third parties into the judicial proceedings.

proceedings may not be provided to any external party.[65] Besides, the arbitral tribunal must be certified that the request made by one of the parties is justified and that it does not constitute a stalling strategy. As a result of all of these complexities due to the characteristics of arbitration, one is inclined to the conclusion that the intervention of the competition authorities is only possible with the consent of the parties. It is also noted that the report eventually provided by the competition authority is not binding; that is, the final decision is still up to the arbitrators to hand down, regardless of the opinion that was expressed by the competition authority.

Besides the possibility of requesting assistance from the competition authority, one should also consider the possibility of spontaneous intervention, in which case the authority would take part in the proceedings as *amicus curiae.* Even though the receipt of the written submissions is not mandatory, as in judicial proceedings, the tribunal may accept the intervention of the competition authority as long as it considers it appropriate and there is a consensus between the parties. However, the authority is not allowed, under any circumstances, to impose its intervention. Therefore, some scholars consider the possibility of intervention as *amicus curiae* as having been discarded.[66] As for arbitral proceedings, the competition authority could also act as an *expert witness*, in order to assist the arbitral tribunal by means of its specialized knowledge on competition.[67]

8. Existence of Pending Parallel Proceedings

Naturally, the second question would be related to the possible simultaneous proceedings concerning the same antitrust dispute. Should the arbitral proceedings be stayed? Should it happen only when the other proceedings are taking place in courts? In every situation or only given certain conditions? It is indeed possible for two pending proceedings concerning the same case to coexist, one before the arbitral tribunal and the other before the national court or the competition authority. Then, the question is of what should be done in such case. The answer to this question is not easy and it depends on various circumstances, such as the specific facts of the case, the alleged violation of competition law and the timing of the proceedings.

For instance, the third paragraph of the U.S. *Federal Arbitration Act* stipulates that district courts are to stay judicial proceedings before courts when there is a written agreement establishing the resolution of disputes through

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[65] Klausegger, Klein et al., *supra* note 43, at 121.

[66] Laurence Idot, *Arbitration and Competition* 68, OECD Hearings: Arbitration and Competition (2010), http://www.oecd.org/competition/abuse/49294392.pdf.

[67] EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 109-10 (Gordon Blanke & Phillip Landolt eds., 2011).

arbitration.[68] Arbitration is thus strongly favored as a means of dispute resolution.[69] Illustratively, it can be noted that the stay of judicial proceedings was requested before the District Court as a result of the pending arbitration in *Mitsubishi*. Such stay was granted by the court since it considered that the claims in question were within the scope of the arbitration agreement entered into by the parties. The U.S. Supreme Court upheld this interpretation, although competition disputes were not expressly mentioned in the arbitration clause.

Arbitral tribunals, on the other hand, especially in international arbitration, may, in general, proceed with the arbitration, regardless of the existence of parallel proceedings before a competition authority. The majority view is that there is no need for one of them to be stayed. Within the EU, for example, even if there already are proceedings pending before the EC, the predominant view is that the arbitral tribunal does not have the duty to stay the arbitration and that it should itself decide whether it wishes to solve the matter instantly or wait for the Commission's conclusions.[70] Likewise, the Commission is also not required to interrupt the investigation being conducted.[71] It is worth noting that before Regulation 1/2003 the competition legislation's enforcement system was hyper-centralized; therefore, several activities such as the granting of individual exemptions could be performed exclusively by the EC.[72] The courts were always forced to stay and postpone proceedings that involved such matters, in order to wait for the Commission's analysis. Nowadays, as the system became more decentralized, the staying of the proceedings is considered to be at the discretion of the national agencies, as well as of the arbitral tribunals dealing with the same antitrust violation.[73]

One must also consider that the competition authority may have issued a ruling, in which case it is generally understood that the arbitrator is not bound by

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[68] Federal Arbitration Act §3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Available at: http://www.law.cornell.edu/uscode/text/9/3. Accessed on: 15/08/14.

[69] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Peterson v. Shearson/American Express, Inc., 849 F.2d 464 (10th Cir. 1988); Deloitte Noraudit A/S v. Deloitte Haskins & Sells, 9 F.3d 1060 (2d Cir. 1993).

[70] Blanke & Landolt, supra note 67, at 894.

[71] Idot, *supra* note 64, at 72.

[72] *Id.* at 59-60; MISTELIS & BREKOULAKIS, *supra* note 17, at 254.

[73] *Id.* at 259.

such decision. In this sense, the administrative decision does not have a *res judicata* effect, but rather serves as persuasive authority for the arbitrators. It must be emphasized, however, that in the event the tribunal decides to issue an award which is contrary to the previous decision by the competition authority, such award must be solidly substantiated and the reasons for the disagreement must be explained, in order to safeguard it from a possible suit filed for annulment.[74]

It is also worth mentioning that the objectives of the arbitral tribunal and of the competition authority are fairly different, which could be used as an argument to defend the continuation of parallel proceedings. Arbitrators have as their main goal the resolution of the controversy between the parties, being the decision on the competition issue necessary for the achievement of this goal. On the other hand, the purpose of the competition authority is to ensure and monitor the application of, and compliance with, competition rules.[75] This distinction, even though theoretical, may have practical effects on the performance of each of these bodies.

II. THE SECOND ROUND: CONSENT AND THE ARBITRABILITY OF COMPETITION CLAIMS

Traditionally, the discussion revolving around the arbitrability of competition claims has always been related to public policy and to the arbitrators' possibility and power to protect and comply with the competition protection legislation. Nevertheless, as the debate becomes increasingly complex, due to the practical difficulties previously mentioned, a new possible discussion arises on the arbitrability of antitrust issues. This new discussion concerns the existence of consent and to unfair arbitration agreements, similarly to what is debated in regards to the arbitration of consumer disputes. It is not certain, however, whether this discussion really entails a revival of the debate on the arbitrability of competition matters from a new perspective or whether it is just a discussion concerning the contractual validity of arbitration agreements. For this reason, it is worth analyzing how the questions regarding arbitrability came to be in consumer disputes (arising from inquiries on the existence of consent to arbitrate) in order to further explain what happened in the context of competition disputes, being both cases inserted in the *Arbitration Fairness Act of 2013*.

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[74] Idot, *supra* note 65, at 71.

[75] MISTELIS & BREKOULAKIS, *supra* note 17, at 258-59.

A. Consent and the Arbitrability of Consumer Claims

The debate regarding the arbitrability of consumer disputes revolves basically around the existence of consent from the parties in the arbitral proceedings. Even though the matter is treated differently by the various legislations applicable to the case, one can note a global trend to impose certain restrictions on the arbitrability of cases that involve consumers, due especially to their position of inferiority and to the existence of unfair arbitration agreements. The absence of the so-called "equal bargaining power" between the parties makes one question the existence of actual consent for resorting to arbitration.

One may say that the most probable trigger for the development of the *Arbitration Fairness Act of 2013,* in regards to consumer disputes, was *AT&T v. Concepció*n,[76] in which the US Supreme Court upheld the validity of an arbitration agreement that prevented the consumers in the contract from joining other consumers in occasional arbitral proceedings; that is, there was a class action ban, or, more specifically, a class-wide arbitration ban. In the referred case, a contract that provided for the supply of free cellphones was executed between AT&T and Mr. and Mrs. Concepción. After taxes were charged on the phone's sales price, the couple decided to sue the company before a Californian district court. The claim was then joined together with a class action, under the allegation that AT&T had engaged in misleading advertisement and fraudulent conducts, since it charged sales taxes over free phones. AT&T, however, decided to file a claim with the purpose of compelling the Concepcións to go to arbitration, based on the arbitral clause contained in the contract. Nevertheless, both the District Court and the Court of Appeals denied the request, alleging that the referred-to clause was unconscionable. Generally speaking, the doctrine of unconscionability refers to the *absence of conscious choice by one of the contracting parties, associated with terms that are unreasonably favorable to the other party*,[77] and it is frequently used to invalidate clauses that are considered to be unfair, even though the FAA[78] does not present objective restrictions to the arbitrability of this kind of dispute.

The U.S. Supreme Court decided to overturn the previous decisions, reaffirming the validity of the arbitration agreement and referring the parties to arbitration proceedings. On the occasion, the Court reasoned that collective

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[76] AT&T Mobility LLC v. Concepción, 563 U.S. 321 (2011).
[77] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).
[78] Federal Arbitration Act, *supra* note 4.

actions were not compatible with the FAA. The opinion of the court, delivered by Justice Scalia, also provided that the rule deriving from *Discover Bank*,[79] regarding the unconscionability of consumer arbitration agreements, was preempted by the FAA and thus could not be used as an argument to support the invalidity of the arbitral clause in question. Finally, the need to respect the terms of the agreement and the pro-arbitration tendency of U.S. Law, established especially after *Moses H. Cone*[80] were highlighted, in order to enable proceedings that are efficient and effective.

It is also important to emphasize that, as a rule, the analysis related to unconscionability is a matter of contractual validity rather than of arbitrability. Basically, the difference between the two categories resides in the extension and the reach of their conclusions. The arbitrability discussion usually arises due to the nature of a certain kind of dispute, rendering a whole category of controversies inarbitrable. The debate around the contractual validity, on the other hand, relates to the fairness of the arbitration agreement's terms, based on a case by case analysis.[81] Although the result of the inarbitrability of the dispute and of the invalidity of the clause is the same, namely the end of the arbitral proceedings, they depart from different premises and have a different scope.

The *AT&T v. Concepción* decision has greatly impacted consumer relations, since it has the potential of guaranteeing that the companies have the possibility to compel consumers to file individual arbitral claims. In the view of consumer groups, the decision could represent a risk to consumer's demands, since, very frequently, the value of the lawsuit itself is relatively low, especially if compared to the high costs of arbitration. In the case discussed above, for instance, the value of the taxes that were charged amounted to roughly 30 dollars. Therefore, the cost-benefit ratio of the arbitration procedure may become unfavorable to consumers, causing them to ultimately give up on the proceedings, at the expense of their rights.

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[79] Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005). It is interesting to notice that in Discover Bank, the Supreme Court of California determined that waiver of collective actions in consumer arbitration agreements were unfair in case (i) the contract was an adhesion one, (ii) the disputes between the parties involved small amounts of damages and (iii) the party with the inferior bargaining power alleged the deliberate intention of the other party to commit fraud against consumers.

[80] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

[81] Should they be, indeed, understood as rules of contractual validity, the provisions in the Arbitration Fairness Act of 2013 could fit into the category of "blanket rules of invalidity," that is, the ones that invalidate a whole category of arbitral clauses regarding, for instance, consumer arbitrations. Such rules are subject to having their validity and their effectiveness questioned, especially under Article II of the New York Convention, from which it can be inferred that arbitration agreements shall be subject to the same of contractual validity imposed on other categories of contracts; BORN, *supra* note 2, at 1023.

Thus, the *Arbitration Fairness Act of 2013* may be seen as a reaction to this type of situation, as it allegedly protects the parties considered to be weaker during the execution of contracts. In the specific case of consumer law, it seems that the bill attempts to replicate what is already seen in numerous legal provisions abroad. This is because, unlike what occurs in the United States, arbitration of consumer disputes is regulated or even prohibited in many countries. Regardless of the fact that each European country has its own view on the issue, according to the EU Directive on *Unfair Terms in Consumer Contracts,* the terms of standard consumer contracts are subject to equality and justice requirements. Amongst its determinations, the referred-to directive establishes that a contractual provision is *prima facie* unfair and consequently invalid in case it forces the consumer to resolve its controversies exclusively through arbitration not contained in a legal provision.[82] The European Court of Justice has already expressed its view that the fairness and equality of a consumer contract, and more specifically, of its arbitration agreement, shall be analyzed and decided by the arbitral tribunal, even if the matter has not been raised by the parties, since the directive is part of the community's public policy.

The member-States also have specific laws on the matter. German and Austrian Law, for example, require the provisions referring to the resolution of consumer disputes through arbitration to be recorded in a separate arbitration agreement, signed by the consumer, in order for them to be considered valid. According to English Law, consumer arbitral clauses shall be considered invalid in case they are below a certain monetary value or in case they are considered unfair. These are only some of the examples of the different approaches to the arbitration of consumer controversies within European countries.[83]

The debate surrounding the *Arbitration Fairness Act of 2013* is ostensibly concerned with lack of consent and the unfairness of the clauses, topics usually associated with contractual validity. However, considering the act aims at invalidating a whole category of pre-dispute arbitration agreements, one can inquire as to whether it would have effects on the discussion regarding arbitrability instead.

B. Extension of the Discussion on Consent to Antitrust Law

Before turning to the next topic, it is important to draw attention to the fact that the bill of the *Arbitration Fairness Act of 2013*, originally proposed in 2011, only referred to labor, consumer, and civil rights disputes, but *not* competition disputes. The inclusion of antitrust issues occurred only in the 2013

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[82] EUROPEAN UNION, *Council Directive 93/13/EEC on unfair terms in consumer contracts* (Apr. 5, 1993), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:en:HTML.

[83] BORN, *supra* note 2, at 1019-20.

version of the bill. The major impetus for such inclusion was the decision of the U.S. Supreme Court in *American Express v. Italian Colors Restaurant*,[84] which upheld the validity of an arbitral clause banning collective actions in the competition context, similarly to what had happened in *AT&T v. Concepción*.

The parties, American Express and Italian Colors entered into a contract that provided for the resolution of the eventual disputes through arbitration and established that claims could not be filed as class actions. Regardless of the terms of the arbitral clause, the Respondent, Italian Colors, initiated a class action against American Express, alleging violations to U.S. Antitrust Law. According to the Respondent, American Express had used its monopoly in the charge cards market to force the merchants to accept credit cards at rates approximately 30% higher than those of competing credit cards, thus violating §1 of the Sherman Act.[85] The Claimant then tried to compel the parties to go to arbitration before the District Court, which granted the motion. The Court of Appeals, however, reversed the referred-to decision, under the allegation that the contractual waiver was invalid and, therefore, the arbitration could not proceed, since, from a financial standpoint, the costs of the arbitration greatly exceeded the amount to be received, rendering an individual arbitration impossible. Such understanding was reaffirmed by the Court of Appeals three times until it reached the Supreme Court.

The Supreme Court was then entrusted with the task of ruling on the validity of a prospective contractual waiver of collective arbitrations in situations where the costs of individual arbitration exceed the value of the claim, to be potentially retrieved by the Respondent. Contrary to the lower court's decision, the view issued by the Supreme Court majority was that such waivers were valid for various reasons.[86] Some of these reasons had already been discussed in *AT&T v. Concepción*, such as the need to respect the contract's terms and the pro-arbitration tendency extracted from the *Federal Arbitration Act*. Besides that,

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[84] American Express v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013).

[85] Sherman Antitrust Act §1:

> Every 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, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

[86] The opinion of the court was delivered by Justice Scalia and joined by Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Thomas, J., filed a concurring opinion. Breyer, J., filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.

Justice Scalia, who issued the court's opinion,[87] emphasized that the doctrine of *effective vindication*,[88] consolidated in *Mitsubishi*, aimed at preventing the party from prospectively renouncing its right to pursue statutory remedies.[89] Nevertheless, according to him, "*the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy*" and, thus, the doctrine in question was not applicable to the case at hand. To this end, he explained that competition provisions do not necessarily guarantee an affordable procedural path for the filing of claims. The court also pointed out that it could not foresee all the costs involved in the arbitration and that the issue had already been settled in *AT&T v. Concepción*, which rejected the cost-effective argument that collective actions would be necessary to judge certain claims.

The dissenting opinion supports the Respondent's arguments, which claimed that the terms of the arbitration agreement in question prevented their effective vindication by rendering the procedure economically non-viable.[90] According to the dissent, the referred doctrine would apply to the case examined, since not only did the contract prevent the initiation of collective actions, it also impeded any kind of sharing, transferring, or reduction of costs, causing the arbitration costs to be prohibitive for the Respondent. The result was a true blockage of the access to statutory remedies, supposedly guaranteed after *Mitsubishi*. Besides that, the decision in *AT&T v. Concepción*, as argued by Justice Kagan, who filed the dissent, should not be applied to *American Express v. Italian Colors Restaurant*, since the former did not properly involve the prohibition of collective actions, but rather the prohibition of the effective vindication. This is contrary to what had happened in the previous case, where the referred doctrine had not even been raised as an argument. According to the dissenting opinion, thus, *American Express v. Italian Colors Restaurant* fell exactly under the circumstances related to the effective vindication, considering that the costs of the arbitration became impeditive, effectively eliminating antitrust liability.

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[87] Justices Roberts, C.J, Kennedy, Thomas, and Alito, J.J. joined in this opinion. Thomas, J., filed a concurring opinion.

[88] The doctrine of effective vindication, used as an argument by Italian Colors, was set as a condition for the arbitrability of competition claims, consolidated in *Mitsubishi*, and it generally establishes that the arbitration agreement shall only be valid should the party be able to effectively vindicate its statutory rights through arbitration.

[89] Remedies against violations to U.S. Antitrust Law, provided for in the Sherman Act.

[90] The dissenting opinion was delivered by Justice Kagan and joined by Justice Ginsburg and Breyer.

CONCLUSION

It is possible to conclude from the considerations made above that the debate around the arbitrability of competitions claims under the public policy argument was mostly solved and overcome, although several practical issues remain to be further decided. Nevertheless, a new debate arises regarding arbitrability based on the balance between the parties, on the existence of unfair clauses, and on the presence of consent. It discusses the possibility of one party imposing certain contractual restrictions on the other in a way that the contracts' terms and the choice of arbitration can ultimately hamper and even prevent the other party from guaranteeing and protecting its competition rights. Thus, the attempt to end this strategy seems to be the main motivation behind the inclusion of antitrust disputes in the *Arbitration Fairness Act of 2013*. This has generated a new discussion on the arbitrability of such matters, seen from a different standpoint: that of interparty relations, rather than of public policy.

It can be noted that the bill establishes only the invalidity of predispute arbitration agreements which force the weaker party to go to arbitration, while safeguarding the right to subsequently opt for arbitration. Even so, the changes that would be introduced by the bill may indeed considerably impact the arbitrability of competition disputes, since, according to the *Arbitration Fairness Act of 2013*, consumer, competition, labor and civil rights disputes, based on predispute arbitration agreements, must be considered invalid, unless the most vulnerable part makes a subsequent and express choice for arbitration. One must also note that the referred bill does not propose an analysis of the unfairness of the arbitral clause based on the specific circumstances of the case, but an automatic invalidation of predispute arbitration agreements that impose arbitration of competition claims, thereby affecting the arbitrability of this category of controversies.[91]

However, it is important to clarify that, even though the new discussion concerning the arbitrability of Antitrust Law may be compared to the one regarding Consumer Law, there is a fundamental difference between them. In regards to consumer disputes, the lack of balance between the parties is more evident, since the consumer is generally considered to be the inferior party, for adhering to the terms established by the supplier. Therefore, the possible problem created by the choice of arbitration becomes more plausible, since arbitration is a private procedure and it somewhat implies an equality of bargaining power between the parties. Similarly, the discussion concerning the arbitrability and the imposition of restrictions to the resolution of consumer disputes through

[91] It may be said that the bills which promote a case by case analysis, according to the specific terms of the contract, imposing only certain restrictions to the arbitrability consist of a more proportional and constructive way of protecting vulnerable parties and they tend to be more successful; BORN, *supra* note 2, at 1023.

arbitration seems to be a natural consequence of the peculiarities of this kind of controversy.

By contrast, in antitrust disputes, the imbalance between the parties is not so obvious and, consequently, the identification of the party considered to be more vulnerable is a lot less clear. Therefore, although the discussion regarding the arbitrability is based on the same premise, it becomes more complex, since it requires a case by case analysis according to the specific circumstances and characteristics of the parties and of the contract.

Finally, one cannot say for sure whether the *Arbitration Fairness Act of 2013* will be approved by the United States Congress. Considering the principle of compliance with contractual terms and the pro-arbitration tendency seen in U.S. Law and extracted from the FAA, many believe that the *Arbitration Fairness Act of 2013* is unlikely to be enacted[92] Even if the act passes, it is impossible to predict its ancillary and perhaps unannounced consequences; in particular, whether it will influence similar legislations in other countries. However, despite all the uncertainties, it is safe to say that the matter is extremely controversial and that it is far from being definitively settled.

[92] The main website designed for the monitoring of bills in the United States, for example, indicates a probability of only 6% regarding the enactment of the Arbitration Fairness Act of 2013. Arbitration Fairness Act of 2013, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/s878.