# NEW PERSPECTIVES ON THE JUDICIAL CONTROL OF ANTITRUST CLAIMS IN INTERNATIONAL ARBITRATION: A COMPARATIVE AND INTERNATIONAL APPROACH

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## I. INTRODUCTION

The discussion of the arbitrability of antitrust-related claims, that is, whether such disputes are suitable for resolution through arbitration, is of significant importance in international arbitration, as arbitrability is one of its cornerstones. Subject-matter arbitrability can be construed more broadly or narrowly depending on the jurisdiction, and it designates the subject matters that can be settled through arbitration,[1] illustrated by Article II(1) of the New York Convention on the Recognition

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1. GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 182 (Cambridge University Press 2011).

and Enforcement of Foreign Arbitral Awards ("New York Convention"). The designation conditions the recognition of an arbitration agreement on a legal relationship concerning "a subject matter capable of settlement by arbitration."[2]

Over the years, the question of whether a dispute involving antitrust law could and should be submitted to arbitration, mainly due to the inherent public interest nature of that area of law, has been much discussed. The contemporary debate in most jurisdictions, however, is fairly settled on the affirmative—that antitrust claims can generally be submitted to arbitration.[3]

In the United States, the Supreme Court's decision in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) defined the arbitrability of antitrust claims. There, the Court rejected the core principles of the so-called "American Safety" doctrine, coined in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), which highlighted the "pervasive public interest" that permeates antitrust law to hold that antitrust claims should not be arbitrable.

One of the key considerations in *Mitsubishi* was that national courts, at the award-enforcement stage, can still ensure that arbitrators duly consider the public interest associated with the antitrust analysis because courts could refuse the enforcement of the arbitral award based on Article V(2)(b) of the New York Convention, which grants signatory countries the authority to refuse recognition or enforcement of an award if it is contrary to their public policy.

This Commentary analyzes the context of the judicial review of arbitral awards dealing with antitrust-related claims, given the apparent contradictions between antitrust law and the arbitral procedure. In most jurisdictions, judicial control over arbitral awards happens at two specific moments: when the defeated party opposes the recognition and enforcement of the arbitral award; or when there is a claim to set aside the arbitral award at the seat of arbitration.[4]

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2. Domenico Di Pietro, *General Remarks on Arbitrability Under the New York Convention in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 70 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

3. Alexis Mourre, *Arbitrability of Antitrust Law from the European and US perspective in* EU AND US ANTITRUST ARBITRATION. A HANDBOOK FOR PRACTITIONERS 15–18 (Gordon Blanke & Philip Landolt eds., 2011).

4. VÁRADY, ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL APPROACH 1014 (7th ed. West, 2019).

The question arises: are these mechanisms sufficient to mitigate the contradictions between antitrust law and arbitral proceedings? What improvements can be proposed to the judicial review of arbitral awards dealing with antitrust law? Section II provides a comparative overview of the debate. Section III explores the possibilities of judicial review of arbitral awards dealing with antitrust-related claims. Section IV discusses the main issues of incompatibility between antitrust law and the arbitral proceeding and presents suggestions to mitigate said problems, especially within the purview of the judicial control of arbitral awards.

## II. The debate over the arbitrability of antitrust-related claims

The arbitrability of antitrust claims is admitted in most jurisdictions. However, the importance of this debate should not be understated due to the apparent dissonance between antitrust law and its underlying purpose of safeguarding competitive conditions in markets and arbitration, which consecrates party autonomy as its cornerstone.[5]

Antitrust law and arbitration have a significant interplay, as antitrust questions can arise before arbitrators in several ways. For instance, contractual disputes within the purview of long-term contracts, disputes between shareholders and other relevant stakeholders, and disputes arising from vertical (e.g., distribution agreements) or horizontal (e.g., joint-venture agreements) relations are commonly submitted to arbitration.[6] Nevertheless, those who defend the non-arbitrability of antitrust disputes tend to rely on the incompatibilities between the two areas of law.

The United States was among the first jurisdictions to admit the arbitrability of antitrust issues[7] in *Mitsubishi v. Soler*. Among the arguments advanced by the Supreme Court was the notion that national courts should subordinate domestic notions of

5. OECD, Arbitration and Competition: Hearings, at 53, Working Party N. 3, DAF/COMP(2010)40 (Dec. 13, 2011), https://www.oecd.org/daf/competition/49294392.pdf [hereinafter OECD].

6. Gordon Blanke, Arbitrating Competition Law Issues 91 (Kluwer Law International, 2008).

7. Mourre, *supra* note 4, at 9.

arbitrability to the international policy favoring commercial arbitration,[8] following the precedent of *Scherk v. Alberto-Culver Co.*[9] Influenced by concerns of international comity, respect for the capacities of foreign tribunals, and the needs of international trade for predictability in dispute resolution, *Mitsubishi* effectively overruled the "American Safety" doctrine.[10]

Footnote 19 in *Mitsubishi* is one of its most overlooked features. In it, the Court states that should the arbitration agreement lead to a waiver of the right of the parties to seek remedies for antitrust violations, it would not hesitate to condemn it on the grounds of violating public policy.[11] Nonetheless, U.S. courts have consistently upheld the arbitrability of antitrust claims[12] and established that the validity of an arbitration agreement does not depend on the arbitrators' effective application of antitrust provisions.[13]

In *Eco Swiss China Time Ltd. v. Benetton International NV*,[14] the Court of Justice of the European Communities ("ECJ") determined that a violation of E.U. competition law by an arbitral award warranted its set aside on the preservation of public policy grounds based on Article V(2)(b) of the New York Convention.[15] This decision adds a new layer to the U.S. approach, as the ECJ effectively recognized the arbitrator's duty to raise and address any antitrust law issues related to the dispute at issue[16] on the basis that the safeguard of E.U. competition law is presumed as public policy.[17]

In France, where restrictions were once imposed on the arbitrability of antitrust issues,[18] courts now admit the arbitrability

8. *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 (1985).

9. 417 U.S. 506, 515–20 (1974).

10. *Id.* at 632.

11. *Id.* at 636–37 n.19.

12. Cases like *Kotam Electronics, Inc. v. JBL Consumer Products, Inc.*, 93 F.3d 724 (11th Cir. 1996) and *Baxter International Inc. v. Abbott Laboratories*, 325 F.3d 954 (7th Cir. 2003) are some examples. For a full list, *see* MOURRE, *supra* note 4, at n.141.

13. *George Fischer Foundry Systems v. Adolph H. Hottinger Maschinenbau*, 55 F.3d 1206 (6th Cir. 1995).

14. *Eco Swiss China Time Ltd. v. Benetton International NV* (C-126/97), 1999.

15. VÁRADY ET AL., *supra* note 5, at 375–76.

16. *Eco Swiss China Time Ltd. v. Benetton International NV*, para. 38 (C-126/97), 1999.

17. MOURRE, *supra* note 4.

18. ICC Award no. 1422, Recueil des sentences arbitrales de la CCI, t.I, 185.

of antitrust claims after cases like *Almira Films v. Pierrel* and *Ganz v. Société Nationale des Chemin de Fers Tunisiens*. These cases ruled that arbitrators had the power to grant redress measures in case antitrust provisions were disrespected, subject to judicial review.[19] Eventually, courts in France started to admit the arbitrability of indemnity and nullity requests in the face of contracts with intrinsic antitrust-related questions.[20]

Switzerland, Italy, Germany, England, the Netherlands, and Sweden have also affirmed the arbitrability of antitrust law.[21] Belgium, one of the few jurisdictions where the issue was not settled, saw in April 2022 its Cour de Cassation decide that disputes over the termination of distribution agreements with exclusivity provisions could be arbitrated, irrespective of whether the eventual application of foreign law would offer a similar level of protection as domestic law.[22]

Beyond Europe and the United States, the influence of *Mitsubishi* is also remarkable. In Australia, courts have hinted at the arbitrability of claims relating to antitrust rules.[23] The New Zealand High Court, by its turn, reasoned that *Mitsubishi*'s transnational concept of arbitrability with regard to the needs of international comity and international trade was also applicable in the country.[24]

Other jurisdictions provide paradoxical guidance on the arbitrability of antitrust claims (China) or no guidance at all (Brazil). China's Supreme People's Court, in the recent *Shell v. Huili* case,[25] ruled in favor of the non-arbitrability of antitrust claims, emphasizing the need of resolution by courts or

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19. CA Paris, 29 Mar. 1991, *Ganz v. Société Nationale des Chemin de Fers Tunisiens* Rev. Arb. [1991], 478.

20. Albert A. Foer & Jonathan W. Cuneo, The International Handbook of Private Enforcement of Competition Law 321 (Edward Elgar Publishing, 2010).

21. Mourre, *supra* note 4.

22. Pascal Hollander & Maarten Draye, *Belgium's Supreme Court Overturns Decades-Old Precedent and Allows Disputes About the Termination of Exclusive Distribution Agreements to be Settled by Arbitration*, Kluwer Arbitration Blog (Sep. 15, 2023), https://arbitrationblog.kluwerarbitration.com/2023/09/15/belgiums-supreme-court-overturns-decades-old-precedent-and-allows-disputes-about-the-termination-of-exclusive-distribution-agreements-to-be-settled-by-arbitration/.

23. John Beechey, *Arbitrability of Antitrust/Competition Law Issues – Common Law*, International Arbitration 12(2) Kluwer Law International 179, 179–89 (1996).

24. *Attorney General of New Zealand v.Mobil Oil* [1989] 2 NZLR 64d.

25. *Shell v. Huili* (Supreme People's Court, No 47, Aug. 29, 2019).

administrative authorities.[26] As for Brazil, there are no cases dealing with the arbitrability of antitrust claims, and neither its Competition Law nor its Arbitration Law features provisions on the issue. However, most scholars agree that the country regards antitrust claims as generally arbitrable, with some caveats regarding the nature of the antitrust claim.[27]

What the Chinese[28] and the Brazilian cases demonstrate is that there are still relevant arguments for the non-arbitrability of antitrust claims in certain jurisdictions, and others do not present conclusive legal provisions or case law indicating that these disputes can be submitted to arbitration. This leads to juridical insecurity and a lack of predictability for economic agents.

## III. Judicial review of arbitral awards related to antitrust issues

Judicial review of antitrust-related arbitral awards occurs at two key moments: during a claim to set aside at the seat of arbitration; or in opposition to recognition and enforcement under Article V(2)(b) of the New York Convention, which safeguards the public policy of the state recognizing the award—the so-called "Second Look" doctrine. Due to the limited scope set aside in the domestic law of the seat and restrictions on the Convention's public policy escape mechanism, courts set aside or refuse to enforce arbitral awards only in exceptional circumstances.[29]

In *Mitsubishi* and *Baxter Int'l*, the U.S. Supreme Court emphasized that courts should "verify that the legitimate interest in the enforcement of the antitrust law has been addressed" and that the efficacy of the arbitration proceeding depended

26. Qingxiu Bu, *The Arbitrability of Antitrust Disputes: a Chinese Perspective*, 10 Journal of Antitrust Enforcement, 303, 324 (2022).

27. Bruno Bastos Becker, Concorrência e Arbitragem no Direito Brasileiro. Hipóteses de Incidência de Questões Concorrenciais em Arbitragens [Antitrust and Arbitration in Brazilian Law. Hypothesis of Incidence of Antitrust Issues in Arbitrations], Revista Jurídica Luso-Brasileira, No. 2, 2015, at 255.

28. Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, Vol. 16 No. 1, Indiana Int'l. & Comp. L. Rev. 37, 72 (2005).

29. Organization for Economic Co-Operation and Development [OECD], *supra* note 6, at 12–13.

on minimizing substantive review of awards, with no necessity to inquire whether antitrust provisions were correctly applied.[30] The scope of review is similarly restricted in applications to set aside under the Federal Arbitration Act, Section §10(a), which limits vacatur to procedural grounds, excluding errors of law or fact.[31]

In the European Union, *Eco Swiss* held that competition law is generally considered a matter of public policy under the New York Convention. While courts in E.U. countries have varying limits on characterizing public policy, it does not entail a review of the substance of the case, despite E.U. countries establishing different limits. For instance, the Swiss Tribunal Fédéral sustained that a determination of whether an award violates E.U. public policy requires a review of the operative part of the award and the grounds for the decision.[32] Conversely, the Italian Corte di Cassazione asserts that only the operative part needs review.[33] In *SNF v. Cytec*, the French Cour de Cassation held that an award alleged to be in violation of E.U. competition law would be enforced unless there was a flagrant violation of E.U. competition law.[34] However, the Paris Court of Appeal held that a court should analyze all relevant factual and legal aspects necessary to assess compatibility between the award and public policy.[35]

When applying the "Second Look" doctrine, courts have a limited scope of review and are not entitled to a substantive review of the antitrust law portions of the award. This leads to the conclusion that the judicial control mechanisms available are insufficient to tackle the latent issues mentioned in Section II, as: (i) there is no possibility to review substantive antitrust law issues decided by arbitrators; (ii) the incompatibility of the confidentiality of arbitral proceedings and the public nature of antitrust cannot be mitigated during those

30. *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Baxter Int'l v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003).

31. Thomas F. Bush, *Arbitration in Antitrust cases*, at 13, Lexis Practice Advisors (2018), https://www.freeborn.com/sites/default/files/arbitration_in_antitrust_cases_-_freeborn.pdf.

32. *Tribunal Fédéral*, judgment of 5 November 1991, (1993) *ASA Bull.*, at 9.

33. *See, ex multis, Corte di Cassazione*, judgment of 8 April 2004, no. 6947.

34. *SNF v. Cytec*, Cour de cassation, chambre civile 1, no. 06-15320 (June 4, 2008).

35. *See*, the Paris Court of Appeal's judgment of 30 September 1993, *European Gas Tubina*, (1994), 359.

opportunities, as courts generally cannot delve into questions of fact; (iii) courts cannot guarantee that specific questions of antitrust law that were of exclusive competence of antitrust authorities or the Judiciary have not been handled by the arbitrators; and (iv) antitrust authorities play a limited role in the process.

## IV. Challenges of the interplay between antitrust and arbitrations and mitigation proposals

### A. *Addressing the limited scope of review and characterization of public policy*

The first challenge is the limited scope of judicial review of arbitral awards dealing with antitrust law issues, as there is no avenue for reviewing substantive antitrust law issues decided by arbitrators. What about frontier cases where a review of substantive antitrust law is necessary beyond the limited scope of review?

A possible mitigation mechanism may hinge on whether parties should be permitted to expand the grounds for setting aside an arbitral award in the arbitration agreement. This could assist in mitigating the concerns regarding the erroneous application of antitrust laws by arbitrators.

In the United States, the Court in *Hall Street Associates, L.L.C. v. Mattel, Inc* ruled that set-aside grounds cannot be expanded due to statutory construction and policy considerations under the Federal Arbitration Act, whose grounds for set-aside are exclusive and cannot vary by contract in the context of a national policy favoring arbitration with a confined scope of judicial review.[36] However, the Court hinted at the possibility of "more searching review based on authority outside the statute," suggesting alternative routes for an expanded judicial review of arbitral awards.[37] This interpretation finds support in the dissenting opinions in *Hall Street* and state-specific laws allowing for expanded review grounds.[38]

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36. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581-84 (2008).

37. Várady et al., *supra* note 5, at 1099.

38. See *Cable Connection, Inc. v. DIRECTV, Inc.* 190 P.3d 586 (2008), where the California Supreme Court rejected the *Hall Street* approach to extended review.

Other jurisdictions have explored different approaches to judicial review: Angola,[39] Italy (allowing challenges of awards for violation of substantive law on a contractual basis),[40] and Israel (allowing extended review in cases where the parties agree that a fundamental error has occurred, with the potential of a miscarriage of justice).[41] Germany allows parties to agree upon a *de novo* litigation, which is even more controversial.[42]

As for the refusal of recognition and enforcement, courts enjoy certain discretion in defining what qualifies a public policy violation, recognizing that not all antitrust law violations may be construed as such.[43] This uncertainty could be mitigated by an effort to craft standards for the clear definition of which antitrust law issues are part of the national public policy, if not all, and a definition of the standard that may trigger a violation of public policy.

As to which antitrust law issues should be considered policy questions, important issues to be defined include whether lesser restrictions to competition (such as vertical restrictions with procompetitive effects) can give rise to a public policy violation. Similarly, questions regarding certain types of abuse of a dominant position and the classification of an award deliberately and unjustifiably ignoring competition law as a public policy violation are also relevant. In that sense, some jurisdictions employ the standards of "perpetuation of an anticompetitive behavior" and "effective and concrete public policy violation."[44]

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39. The Angolan Voluntary Arbitration Act (2003), in its article 44, provides that international arbitral awards are not appealable, unless parties have agreed otherwise and have set the terms of that appeal.

40. Italian Code of Civil Procedure (2008), art. 829(3).

41. Israeli Arbitration Act (2008), art. 29(B)(a).

42. Dragana Nikolić, *Agreements Limiting or Expanding Grounds for Annulling International Arbitral Awards*, 4 Belgrade L. Rev. 130, 143–44 (2020).

43. In the case *Tensacciai v. Terra Armata*, for instance, the Swiss Federal Court ruled that competition rules were not part of the concept of public policy under Swiss private international law.

44. Luca di Brozolo, *Arbitration and Competition Law: The Position of the Courts and of Arbitrators in* Organization for Economic Co-Operation and Development [OECD], *supra* note 6, at 40–41.

### B. *Striking a balance between confidentiality and the public nature of antitrust*

Arbitral institutions can play a pivotal role in addressing the incongruence between antitrust law and arbitral proceedings.[45] While some courts argue against any implied duty of confidentiality, some institutional rules feature soft confidentiality obligations. For instance, Article 22 of the ICC Rules and Article 40 of the ICDR Rules establish confidentiality guidelines. On the other hand, various arbitration statutes mandate confidentiality, with some courts recognizing an implied duty of confidentiality, as noted by the U.K. Supreme Court in *Enka Insaat Ve Sanayi AS v. OOO "Insurance Company Chubb" & Ors.*[46]

Under the ICDR Rules, establishing an implied duty of confidentiality is not obligated.[47] In contrast, SIAC Rules offer a more robust framework for confidentiality protection, as parties and the Tribunal shall at all times treat all matters relating to the proceedings and the award as confidential, and the Tribunal is empowered to take appropriate measures, including issuing an order or award for sanctions or costs if a party breaches the confidentiality rule.[48]

The comparison between institution's rules reveals that they treat confidentiality differently. Rules could be updated to include provisions specifically addressing arbitrations involving antitrust issues, such as disclosure of key documents and cooperation with competition authorities.

### C. *Delimitation of the scope of arbitrability amongst the different types of antitrust claims*

Another challenge is the inability of courts to guarantee that arbitrators have not addressed specific antitrust law questions falling within the exclusive competence of antitrust authorities or the judiciary. This concern may arise even indirectly when

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45. Organization for Economic Co-Operation and Development [OECD], *supra* note 6, at 8.

46. Maxi Scherer et al. *The English Approach to the Law Governing Confidentiality in International Arbitration.* Kluwer Arbitration Blog (Aug. 18, 2022), https://arbitrationblog.kluwerarbitration.com/2022/08/18/the-english-approach-to-the-law-governing-confidentiality-in-international-arbitration/.

47. ICDR Rules, art. 40(1).

48. SIAC Rules, arts. 35.1, 35.4.

a contractual claim related to market foreclosure leads arbitrators to consider antitrust law questions typically dealt with within the exclusive purview of antitrust authorities (such as those of administrative and criminal nature).[49]

A potential solution lies in defining the specific scope of arbitrability for such claims, outlining which questions fall within the exclusive competence of the courts and competition authorities. Alexis Mourre proposed a concise guideline for this, suggesting that an arbitral tribunal should refrain from making decisions of a public nature. Instead, "an arbitral tribunal can draw the civil consequences of a violation of antitrust laws by enjoining a party to cease violating the other's rights, awarding damages, or invalidating the contract."[50]

While this general rule provides a foundation, the complexities of each jurisdiction's antitrust law regime require drawing more specific contours. A clearer definition of what antitrust claims are arbitrable would contribute significantly to enhancing predictability and legal certainty.

### D. *Cooperation with competition authorities*

The dynamic between arbitrators, national courts, and competition authorities deserves closer scrutiny, given the role competition authorities could play in arbitration proceedings, particularly in the context of claims for setting aside and recognizing or enforcing arbitral awards. Generally, the confidential nature of arbitral proceedings is often cited as a factor against the participation of competition authorities unless expressly agreed upon by the involved parties.[51]

This principle applies similarly to scenarios where competition authorities might be allowed to participate as *amicus curiae* or third parties—again, contingent upon the parties' mutual agreement.[52] Another conceivable role for a competition

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49. Laurence Idot, *Arbitration and Competition*, *in* Organization for Economic Co-Operation and Development [OECD]; Arbitration and Competition 2010: Hearings, 53, Working Party N. 3, DAF/COMP(2010)40 (December 13, 2011), https://www.oecd.org/daf/competition/49294392.pdf.

50. Mourre, *supra* note 4, at 29.

51. Organization for Economic Co-Operation and Development [OECD], *supra* note 6, at 12–13.

52. Idot, *supra* note 50, at 68.

authority in an arbitral proceeding is to act as an expert witness, providing assistance to the tribunal in that capacity.[53]

Competition authorities can still wield substantial influence in judicial review processes. In jurisdictions like Europe and Brazil, the interaction between courts and competition authorities is a common practice.[54] Even in cases where an arbitral award is subject to judicial review, competition authorities retain the ability to intervene,[55] investigate, and impose sanctions if the arbitration process and award give rise to a substantial and concrete antitrust concern.[56]

Thus, it becomes imperative to incorporate provisions in the rules of arbitral institutions and national laws to better delineate the extent to which competition authorities may assist arbitrators in handling antitrust law issues.

## V. Conclusion

This Commentary explored the intricate aspects of the arbitrability of antitrust-related claims and the judicial review of resultant arbitral awards, addressing the dissonance between antitrust law and the arbitral proceeding. As most jurisdictions converge on the consensus that antitrust claims are arbitrable, several issues arise, calling for a more nuanced examination of the subject.

As to the limited scope of review for arbitral awards involving antitrust claims, expanding the criteria for setting aside arbitral awards could alleviate concerns about arbitrators mistakenly applying antitrust laws. As to the uncertainties stemming from the invocation of public policy to reject the recognition of an award related to antitrust claims, they could be mitigated through the establishment of standards for defining which antitrust law issues fall within the scope of public policy and specification of the criteria triggering a public policy violation.

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53. Van Vechten Veeder QC & Paul Stanley, *Arbitrating Competition Law Issues: The Arbitrator's Perspective in* EU and US Antitrust Arbitration. A Handbook for Practitioners 109–110 (Gordon Blanke & Philip Landolt eds., 2011).

54. Carlos Ragazzo & Mariana Binder, *Antitrust and International Arbitration*, 15 U.C. Davis Bus. L. J. 173, 190 (2015).

55. *See Tensacciai v. Terra Armata* case (Swiss Federal Tribunal, March 6, 2006) and Milan Court of Appeal, July 15, 2006, in *Riv. dell'arbitrato* (2006), 645.

56. Organization for Economic Co-Operation and Development [OECD], *supra* note 6.

Regarding confidentiality, arbitration rules handle confidentiality differently. Rules should include specific provisions related to arbitrations dealing with antitrust issues, which might cover the disclosure of crucial documents and determine some level of engagement from competition authorities. A more straightforward definition of the boundaries of arbitrability could facilitate better clarity on the third issue—the extent of the arbitrability of antitrust claims. Such clarity would contribute to increased predictability and legal certainty.

It is also essential to refine the demarcation between arbitration and antitrust law to solidify the extent to which competition authorities can assist arbitrators in addressing antitrust law issues, which may involve incorporating provisions in the rules of arbitral institutions and national laws.