Should the Cobbler Stick to His Last? Antitrust Law and Arbitration

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Antitrust law was born within the public law paradigm. Its justification seems to be based on the power to limit private activity for the public interest. On that basis, the application of antitrust law has customarily been entrusted to judicial courts or administrative authorities, usually specialized state agencies.

The emergence of antitrust-focused arbitration tribunals—usually composed of lawyers engaged in private practice (in commercial law or contracts) without any state appointment or authorization—is striking. They decide on the problems and possible impact that potentially anticompetitive behavior could cause to markets and consumers, despite the fact that neither consumers, nor competitors, nor the state participate in the proceedings. This has generated divergent reactions. Antitrust specialists, who see their territory threatened, are astonished, but they confront the enthusiasm of arbitration experts, who see their area of practice expanding.

The use of antitrust arbitration is not just an increasingly common topic of discussion, but a real change in antitrust practice. Even though the arbitrability of antitrust claims has become almost universally accepted, there are still some issues for which the correct legal answer is not clear, such as the standard of review that courts should follow when an arbitration decision is appealed, or the grounds upon which an award may be set aside or its enforcement paused. This paper analyzes those topics in the context of international arbitration, considering each in relation to the public interest and in context of the incentives and externalities that could be generated in each.

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Introduction

Among the reasons for honoring George Priest, there is one that has not been mentioned: his Peruvian nationality.

George is Peruvian not because he was born in Peru, nor because he married a Peruvian (although Kathy, his wife, could also be considered Peruvian) nor because he lived many years in that country. He is an honorary Peruvian because of the great contributions he has made academically, professionally, institutionally, and personally to the country. Nearly two dozen Peruvians have studied in the Yale Law School. All were adopted by the Priests. They have been either students, or at least disciples, of George.

He visited Peru about ten times, and his influence is felt across the nation. He and his followers have introduced law and economics courses into Peruvian universities, at perhaps a higher frequency than any other Ibero-American country, and brought law and economics to the State. Most notably, he supported INDECOPI, the government agency in charge of promoting free market institutions, including through application of antitrust law and elimination of bureaucratic barriers, and COFOPRI, the state agency in charge of titling informal property.[1] And Peru is possibly the country where you can find the largest number of George's articles translated into another language.[2] But above all, he has made friends who love him and his family for everything he has done for our country and, most importantly, for being a good person. George always invited us to be curious and to train, in a scientific way, our common sense. That invitation inspired the idea of writing this paper.

Together with the Universidad del Pacifico, the law firm to which the authors belong organizes an international moot competition focused on antitrust law (the "Moot").[3] In the Moot, teams of law and economics students compete before mock juries and tribunals composed of one antitrust expert, one specialist in arbitration or contract law, and one economist. The cases assigned to the students often combine arbitration and antitrust issues, such that the scope of the tribunal's power to hear and decide the

1. One of the authors of this paper, Prof. Alfredo Bullard, directly witnessed Prof. George Priest's participation in the improvement of both INDECOPI and COFOPRI through meetings with public officials and, in general, the influence of his work. His dedication to this subject and his influence is reflected in the various interviews he has given regarding these topics and the number of articles translated. *See e.g.*, Gabriel Arrisueño & María Inés Vásquez, *Educando al mercado. Reflexiones en torno al INDECOPI y la protección del consumidor. Entrevista a George L. Priest*, 8 IUS ET VERITAS 87 (1997); George Priest interview. Oscar Súmar Albújar, "*Cuanto más globalización tengamos más importante será el análisis económico del derecho". Entrevista a Geoge L. Priest*, 49 THEMIS 287 (2004).

2. *See* George L. Priest. Reconstruyendo la libertad (2011) (a book including eleven of Prof. Priest's articles and four original papers prepared by Peruvian professors who were also his former students).

3. Bullard Falla Ezcurra, *Moot de Libre Competencia*, https://bullardfallaezcurra.com/en/academic-commitment/ (last visited Sept. 12, 2025).

matter before it is at issue.[4] The Moot has become an interesting laboratory for simulating real-world antitrust issues, giving the authors of this article the opportunity to attend and adjudicate dozens of mock hearings on those issues and to appreciate the strength and weaknesses of each position on them.

Two findings emerge from that observation. The first is that panel members who specialized in arbitration or contract law were usually in favor of the arbitrability of the case, while antitrust specialists were conceptually and practically resistant to the arbitrability of such disputes. It is almost as if one was telling the other to keep to his last. Economists, for the most part, did not take part in these discussions because they saw them as a legal matter.

The second and the most important observation is that the teams that have to argue that a dispute is not arbitrable or that the powers of the arbitrators are limited have serious difficulties in presenting their position. This is primarily because the international case law from different countries and legal systems (civil law or common law) that support their position tend to be very old, going as far back as the 1960s.[5] By contrast, teams defending the arbitrability of a case tend to cite more recent cases and from more representative or relevant jurisdictions.[6]

This is not surprising. International case law shows a clear tendency towards abandoning the non-arbitrability of antitrust issues, while still subjecting the powers of arbitrators to certain limits—among others, that of respecting and applying the applicable rules of public policy. This is representative of broader shifts in the doctrine in favor of the arbitrability of antitrust issues.

In Part I, we review the evolution of the case law on the arbitrability of antitrust disputes in the last five decades, mainly in the United States and the European Union, but with some focus on Latin America. In Part II, we introduce the concept of public policy and argue that it could constitute an effective ground for the review in the context of a petition for set-aside, recognition, or enforcement of an award. Finally, in Part III, we develop the different positions on the scope and extent of this ex post review that courts may conduct and argue in favor of the minimalist approach, in which only egregious violations of international public policy could constitute grounds for setting aside an award. Our analysis considers the

4. For example, the 2024 Moot case included a dispute between an investment fund that owned a stake in three football clubs competing in the same tournament, and a minority shareholder of one of those clubs. The case involved domestic and international antitrust prohibitions, and invocation of an arbitration clause by the minority shareholder. The investment fund challenged the arbitral tribunal's jurisdiction.

5. For example, the most cited case by those parties was *American Safety v. JP. Maguire & Hickok*, 391 F.2d 821 (2d Cir. 1968).

6. Among others, students cite *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985) and Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, 1999 E.C.R. I-03055.

incentives and externalities that could be generated by such an approach and propose alternatives to mitigate risks, such by increasing the publicity of these kinds of cases.

I. Background

The application of arbitration to antitrust law began half a century ago, mostly promoted by the case law. Arbitration has its roots in contract law, as the enforcement of an agreement between the parties not to resort to the courts to resolve certain disputes.[7] Because of arbitration's origins in private law, it was initially believed that arbitration was not an appropriate forum for antitrust disputes. Over time, this would change.

A. The American Experience

In the U.S., the leading case was *American Safety Equipment Corp. v. J.P. Maguire & Co.*[8] The dispute revolved around a contract wherein Hickok granted American Safety (ASE) a license to use the "Hickok" trademark in connection with safety devices to be used inside vehicles. ASE had the right to grant sublicenses subject to Hickok's approval, but only if the sublicensee was not a competitor of Hickok or any of its licensees and the parties agreed not to compete with each other.[9]

In 1966, ASE sued Hickok and J.P. Maguire, an assignee of Hickok's royalty rights, alleging that the license agreement violated the Sherman Act by unlawfully extending Hickok's monopoly and unreasonably restricting ASE's business.[10] Both Hickok and Maguire responded by invoking the original contract's arbitration clause and requesting that the court proceedings be stayed pending arbitration.[11]

The district court held that the arbitration clause was sufficiently broad to apply to antitrust claims and that allowing arbitration of the antitrust claims was not contrary to public policy.[12] The Court of Appeals reversed that decision:

> A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest. Antitrust violations can affect hundreds of thousands -perhaps millions- of people and inflict staggering economic damage. We do not believe that Congress

7. *See* GARY BORN, *Legal Framework for International Arbitration Agreements*, *in* INTERNATIONAL COMMERCIAL ARBITRATION 272-80 (3d ed. 2021).
8. *American Safety*, 391 F.2d 821 (2d Cir. 1968).
9. *Id.* at 822.
10. *Id.* at 823.
11. *Id.*
12. *Id.*

> intended such claims to be resolved elsewhere than in the courts.[13] . . . [T]he 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 short, we conclude that the antitrust claims raised here are inappropriate for arbitration.[14]

The court also noted that the complexity of the issues, as well as the extent and diversity of evidence proffered, would be better-suited to judicial resolution rather than arbitration proceedings. Moreover, "[s]ince commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of *great public interest*."[15]

Almost 20 years later, the U.S. Supreme Court modified this line of reasoning in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[16] Soler, a Chrysler-Plymouth car dealership in Puerto Rico, had entered into a distributor agreement with Chrysler and a sales procedure agreement with Mitsubishi Motors Corp., a joint venture between Mitsubishi Heavy Industries and Chrysler International. Under these agreements, Soler was made the sole distributor of Mitsubishi in Puerto Rico under a minimum sales commitment. After selling successfully for several years, the market for Mitsubishi products in Puerto Rico declined, and Soler requested that certain orders be cancelled or, alternatively, that he be permitted to resell them in the United States and Latin America. Mitsubishi refused and, after negotiations failed, brought an action to compel arbitration according to the sales agreement, which referred disputes to the Japan Commercial Arbitration Association.

In response, Soler argued that Mitsubishi and Chrysler conspired to divide markets, in violation of the Sherman Act, by refusing to grant permission for Soler to sell the products throughout the Americas and by planning to replace him and other dealers with a subsidiary that would serve as the exclusive distributor in Puerto Rico.

The District Court ordered the parties to arbitrate most of the claims in dispute. The Court of Appeals partially reversed that decision, relying on *American Safety*. The Supreme Court reversed the decision of the Court of Appeals, concluding that antitrust disputes are arbitrable:

> Respondent's antitrust claims are arbitrable pursuant to the Arbitration Act . . . . The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted. So too, the potential complexity of antitrust matters does not suffice to ward off arbitration; nor does an

13. *Id.* at. 826-27 (internal citations omitted).
14. *Id.* at. 827-28.
15. *Id.* (emphasis added).
16. 473 U.S. 614 (1985).

> arbitration panel pose too great a danger of innate hostility to the constraint on business conduct that antitrust law imposes.[17]

The fact that the dispute in question involved international trade and international arbitration was of particular relevance to the Supreme Court. Therefore, considering "the need of the international commercial system for predictability in the resolution of disputes," the parties' agreement to arbitrate was to be privileged, even though that outcome might have been different in the domestic context.[18]

Furthermore, the Supreme Court remarked that arbitration was at least as suitable a mechanism for resolving these disputes as the judicial one, and therefore the idea that arbitrators were less qualified should be abandoned:

> In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal . . . .[19]

> For similar reasons, we also reject the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly. We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.[20]

Finally, the Supreme Court specified that arbitral tribunals are obligated to apply the appropriate nation's antitrust rules, and that that nation's courts would then have the opportunity to confirm that the legitimate interest behind their application has been addressed:

> Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim . . . .[21]

> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws

17. *Id.* at 615.
18. *Id.* at 629.
19. *Id.* at 633.
20. *Id.* at 634.
21. *Id.* at 636-37.

> has been addressed. The [New York] Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country."[22]

Thereafter, the arbitrability of antitrust-related disputes became increasingly common. For example, in 2019, the U.S. Department of Justice Antitrust Division agreed to use arbitration to settle a contested issue in a challenged merger in *United States v. Novelis*, in accordance with the Dispute Resolution Act of 1996.[23] There, the arbitrator was in charge of defining the relevant product market. The Justice Department prevailed, and accordingly, the District Court entered a final order requiring Novelis to divest the contested operations, in line with the arbitrator's decision. [24]

B. The International Experience

The rest of the world followed a similar trajectory. In Europe, for example, decisions against the arbitrability of antitrust disputes are also old and rare. For example, in 1975, a Brussels court held that if, upon review, a court found a violation of Article 85 (now Article 101 of the Treaty on the Functioning of the European Union), such a violation would cause the arbitral tribunal to lose jurisdiction.[25] More generally, the European Commission has rejected the arbitrability of some disputes in the past, especially as they created the possibility that the arbitration could be used to circumvent the application of mandatory rules.[26]

This initial rejection of arbitration did not last. As early as 1975 (ten years before the United States), Switzerland conceded the arbitrability of these disputes.[27] In France, arbitrability was permitted as early as 1989 and confirmed in 1993 in *Labinal v. Mors*.[28] This case revolved around a bidding procedure, in which Mors accused Labinal (a competitor) and Westland (a former joint venture partner) of attempting to reach agreements contrary to antitrust rules. The Paris Commercial Court found that

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22. *Id.* at 638.

23. In re Arbitration of United States v. Novelis, No. 1:19-cv-02033-CAB (March 9, 2020, referred from N.D. Ohio).

24. Competitive Impact Statement, United States v. Novelis Inc., No. 1:19-cv-02033-CAB, 85 Fed. Reg. 31221, 31222 (May 22, 2020).

25. Alexis Mourre, *Arbitrability of Antitrust Law from the European and US Perspectives*, *in* EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 43 (Gordon Blanke & Phillip Landolt ed., 2011) (citing JEAN-FRANÇOIS POUDRET & SEBASTIAN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 297 (2d ed. 2007)).

26. Mourre, *supra* note 25, at 45 (citing ROBERT KOVAR, *Droit Communautaire de la Concurrence et Arbitrage*, *in* LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ETUDES OFFERTES À BERTHOLD GOLDMAN 110 (P. Fouchard, P. Khan & A. Lyon-Caen eds., 1982)).

27. *Id.* at 40. The Swiss courts recognized that an arbitral tribunal could decide the validity of a contract.

28. Labinal v. Mors & Westland Aerospace, Cour d'appel [CA] [regional court] de Paris, civ., May 19, 1993).

it had jurisdiction and held that the contract was null and void and that the dispute was therefore not arbitrable. The Court of Appeal reversed that decision on the grounds that "if the character of law of economic policy of the EC competition law prohibits arbitrators from pronouncing injunctions or levying fines, they may nonetheless draw the civil consequences of behaviors judged to be illicit with respect to public policy rules."[29]

In *Eco Swiss China Time Ltd v. Benetton International NV*, the arbitrability of antitrust disputes was confirmed in the European Union. Eco Swiss entered into a contract for the manufacture and sale of watches under the brand name "Benetton by Bulova," which was terminated early by Benetton. Benetton initiated arbitration and was ordered to pay damages for the premature termination of the contract.[30]

Benetton then initiated annulment proceedings in which it argued that the license agreement was null and void under Article 81 of the EC Treaty (now Article 101 of the TFEU).[31] In order to resolve this issue, the Dutch Supreme Court raised certain queries to the European Court of Justice. The second question presented was: Must the court annul an award for contravening Article 81 of the EC Treaty even if the violation of free competition rules would not justify an annulment under domestic arbitral rules?[32] The European Court of Justice answered this question in the affirmative:

> A national court to which application is made for annulment of an arbitration award must grant the application if it considers that an award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.[33]

Note that the possibility of arbitrating these disputes was not questioned by the Dutch Supreme Court or the European Court of Justice, either directly or indirectly. Instead, the ECJ simply answered the question concerning the subsequent control that could be exerted by courts over the awards settling these disputes.

In Italy, the Milan Court of Appeals has also ruled on several occasions in favor of the arbitrability of these disputes:

> [A]ny doubts are now superseded by the evolution of legal thinking, as well as by case law, both at the national and community level . . . . [T]he

29. *Id.* at 37-38 (citing Labinal v. Mors & Westland Aerospace, Cour d'appel [CA] [regional court] de Paris, civ., May 19, 1993).

30. *See* C-126/97, *Eco Swiss*, 1999 E.C.R. I-03086.

31. Treaty on the Functioning of the European Union art. 101, Oct. 16, 2012, 2012 O.J. (C 326) 47.

32. *See Eco Swiss*, 1999 E.C.R. at I-03090.

33. *Id.* at I-03094.

> possibility to arbitrate antitrust claims . . ., that is to say claims that need, in order to be resolved, that a substantive antitrust rule be applied, is recognized.[34]

Most of the European countries have followed the same evolution, slowly shifting towards the acceptance of the arbitrability of antitrust disputes.[35] In Part III, we will specifically address contemporary cases of other European countries, such as Spain.

This trend in favor of arbitrability in antitrust matters has also manifested in Latin America. For example, in Chile, the National Economic Prosecutor's Office, the agency in charge of defending and promoting competition law, enables the use of arbitration clauses in merger agreements as a mitigation measure against competition risks. For example, the competition authority looked to reduce the risks to competition due to the acquisition of Time Warner by AT&T in 2017 through inclusion of an arbitration clause in the merger agreement that allowed "paid TV operators" to opt for this mechanism in the event of disputes arising during the negotiation of licensing agreements with the merging party. A similar strategy was adopted during HBO's acquisition of exclusive control of the HBO Ole in 2020.[36]

The worldwide trend is, thus, to allow antitrust issues to be fully arbitrable in cases where there was a prior arbitration agreement.

II. Public Policy as a Ground to Review an Award

Even though there has been an increase in the acceptance of arbitrability of antitrust issues, there are currently different opinions and case law on the subsequent control that courts can exert over the awards issued by arbitral tribunals.

Arbitration's contractual origin suggests that it can be subject to control by judicial courts. However, in practice, this control is always exerted ex post, once the arbitration has been completed, and has been limited to specific grounds and linked to formal aspects. The reason for this is the principle of inevitability of arbitration. In the context of international

34. Javier Tapia & Jose Corvalan, *En defensa de la arbitrabilidad de las cuestiones de libre competencia en el derecho chileno*, CENTRO COMPETENCIA 12 (March 2022) https://centrocompetencia.com/wp-content/uploads/2022/06/Javier-Tapia-Jose-Luis-Corvalan_En-defensa-de-la-arbitrabilidad-de-las-cuestiones-de-libre-competencia-en-el-derecho-chileno_2022.pdf [https://perma.cc/QVW6-ZA8L] (discussing Corte d'Appello [appellate court] di Milano, 13 September 2002, n. 2090 (lt)).

35. *See* Mourre, *supra* note 25, at 36-44.

36. Fiscalia Nacional Economica, Rol FNE F-81-2017, *Informe de aprobación* (Aug. 30, 2017), https://www.fne.gob.cl/wp-content/uploads/2017/11/inap_F81_2017.pdf [https://perma.cc/UWT6-HSV7]; Fiscalia Nacional Económica, Rol FNE F-222-2019, *Informe de aprobación con medidas* (Apr. 15, 2020), https://www.fne.gob.cl/wp-content/uploads/2020/04/inap1_F222_2019.pdf [https://perma.cc/BN2P-5TFP].

arbitration, the ex post review may take place by application of the New York Convention:

> Article V. . . 2. 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:
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> (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country.[37]

The UNCITRAL Model Law on International Commercial Arbitration, on which the arbitration statutes of hundreds of countries are based, includes virtually identical grounds for review:

> Article 36. Grounds for refusing recognition or enforcement
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: . . .
>
> (b) if the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.[38]

There is a clear difference between the concepts of arbitrability and public policy: that a matter implicates public policy does not automatically mean that it is not arbitrable. This is reflected in the Convention and the Model Law, which have offered arbitrability and public policy concerns as two separate grounds upon which to challenge an arbitration award.

In the first case, review is proper when a party alleges that the arbitration agreement was executed contrary to a mandatory rule limiting the arbitrability of a dispute in the state where it was decided or in which it is intended to be enforced. In the second case, a party could challenge an award that is contrary to the public policy of a state, but not because public policy demands that the issue is not arbitrable at all. To understand this scenario, then, it is necessary to define public policy.

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37. New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 30, 1958, 330 U.N.T.S. 4739.

38. Report of the United Nations Comm. on Int'l Trade Law on the Work of the Eighteenth Session, June 3-21, 1985, U.N. GAOR Supp. (No. 17) at 82-94, U.N. Doc. A/40/17 (1985) (as amended in 2006).

At the domestic level, it has been pointed out that public policy is used to establish certain rules which "parties may not contract out of"[39] or "from which the parties cannot derogate."[40] In other words, public policy is a concept that justifies and is embodied by the establishment of mandatory rules that form a sort of baseline for contractual agreements between parties.

However, not every regulation amounts to public policy. In other words, awards that are "contrary to the public policy" are only those which challenge the core values and principles that a given rule seeks to protect. Thus, not every aspect of a mandatory rule nor every factual situation in which it a mandatory rule is not respected will imply a breach of public policy.

This explanation allows us to fully differentiate the two grounds on which an award could be challenged or left unenforced under the Convention or International Arbitration Acts of different countries. On the first, the problem is a formal one, since the matter in dispute was a non-arbitrable matter: the issue should not even have been discussed in arbitration. On the second, it is the content of the decision (or the way in which the decision was made) that contradicts public policy—that is, a decision that contradicts the intrinsic values and principles of a society.

Of course, the issue of public policy begs the question: whose policy? And whose values? Domestic public policy is not the same as international public policy. Domestic public policy refers to a specific nation and, as such, varies in each state. On the other hand, international public policy, according to the Committee on International Commercial Arbitration, includes:

> (i) Fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as *lois de police* or "public policy rules"; and (iii) the duty of the State to respect its obligations towards other States or international organizations.[41]

So, we must determine for purposes of the ex post review of international arbitral awards that may be carried out by the courts under the Convention (or similar instruments): must national, or international public policy must be considered?

39. YVES DERAINS, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 227 (Pieter Sanders ed., 1987).

40. PIERRE LALIVE, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 260 (Pieter Sanders ed., 1987).

41. REINMAR WOLFF, *New York Convention, Article V(2)(b) [Public Policy]*, *in* NEW YORK CONVENTION: ARTICLE-BY-ARTICLE COMMENTARY 512 (2019) (citing Committee on International Commercial Arbitration of the International Law Association, Final Report on Public Policy).

If we seek an interpretation that is favorable to the validity and enforcement of arbitral awards—meaning, an interpretation which minimizes the reasons for which those awards can be invalidated—we argue that only international public policy, not domestic public policy, should be used as the preferred ground for setting aside an award.[42] This interpretation is also consistent with other authorities. Regarding Article V, paragraph 2(b), of the New York Convention, Fouchard, Galliard and Goldman said: "The provision certainly refers to international public policy, and not domestic public policy."[43] And the U.S. Supreme Court agreed in *Mitsubishi* when it pointed out that "sensitivity to the need of the international commercial system for predictability in the resolution of disputes require[s] that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."[44]

III. Ex-Post Review

It has been stated that courts may review decisions made by arbitral tribunals on disputes involving antitrust matters to ensure that they do not contravene international public policy, in accordance with the Convention or similar statutes. Therefore, it is inevitable that at least certain aspects of the merits of the decision must be subject to review, in order to verify that they do not contradict international public policy.

However, the question of the appropriate scope of review has not yet been clearly answered. There are two different positions, which we discuss below.

A. The Maximalist Position

Under the maximalist position, an award can be reviewed for factual and legal error. This permits the reviewing court to verify that the arbitral tribunal properly recognized the antitrust dispute, correctly determined which law it should have applied, and correctly interpreted and applied that law. Otherwise, arbitration could interfere with the public interest protected by antitrust law.[45]

In European judicial practice, it is possible to observe certain judicial decisions where this standard has been applied. As discussed in Part II.B,

42. *Id.* at 200.

43. PHILIPPE FOUCHARD ET AL., FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 996 (Emmanuel Gaillard & John Savage eds., 1999).

44. Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 629 (1985).

45. LUCA RADICATI DI BROZOLO, *Court Review of Competition Law Awards in Setting Aside and Enforcements Proceedings*, *in* EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 761 (2011).

the Spanish case *Cabify v. Auro* is particularly relevant.[46] In 2017, Cabify, a ride-hailing company, financed the purchase of private-hire vehicle (VTC) licenses by Auro, a private-hire vehicle company. In exchange, among other things, Auro agreed operate exclusively through Cabify's app. However, in 2019, Auro terminated the contract and started operating both from its own platform and with Uber. According to Auro, the exclusivity clause in its contract with Cabify implied a breach of competition regulations. This led Cabify to initiate multiple arbitrations.

The arbitral tribunal found that the exclusivity clause was indeed contrary to antitrust law and, consequently, declared it null and void. In response, Cabify successfully challenged that decision before the courts. In 2021, the Superior Court of Justice of Madrid, analyzing the merits of the case, declared the award null and void for erroneously selecting and applying the antitrust regulation:

> The Award incurs in a manifest error in the selection of the applicable law . . . . The consequence of the foregoing is that the principles of primacy and direct effect of Union Law have been disregarded from the point and time at which the Award does not take into account, as it should have done, Article 101 TFEU expressly invoked . . . nor the case law of the ECJ which authentically interprets this legislation and specifies what the Court, whether jurisdictional or arbitral, has to verify and reason before concluding that an agreement is collusive by reason of its object . . . .[47]

> In short, the Final Award must be partially annulled in the terms requested by the plaintiff . . . on the grounds that the error iuris in the selection of the applicable law fundamentally vitiates the premises of judgment assumed by the Arbitral Tribunal, and that it entails as a consequence an absolute lack of reasoning, derived from the exclusion of the European Union's preferential law and the doctrine of the ECJ applicable to the case, and from the failure to justify said exclusion in terms of rules and case law.[48]

The court made an explicit reference to *Eco Swiss* and held that "antitrust law is part of the transnational public order" and that "improper application of it entails a clear violation of the public economic order . . . when such non-application is based on a reasoning that is not in line with . . . clear case law of the ECJ."[49]

For the Superior Court of Justice of Madrid, in this particular case, the review of the award required a review of whether the arbitral tribunal had determined the correct rules and had applied them in accordance with the case law of the ECJ. Otherwise, to endorse such a decision would

46. Maxi Mobility Spain S.L.U. v. Auro New Transport Concept S.L., S.T.S.J., Dec. 2, 2024 (No. 2956-19/AM-SG) (Spain).

47. *Id.* at 31.

48. *Id.*

49. *Id.* at 18-20.

endorse a breach of transnational public policy.[50] This decision, however, has been recently overturned by the Constitutional Tribunal, as is explained in the following subsection.[51]

In another recent case, in 2022, the German Federal Court of Justice decided to annul an award on the grounds that it contravened antitrust rules.[52] The dispute revolved around the lease of a quarry in the Budinger Forest. In 2017, the owner terminated the lease early with the aim of persuading the lessee to sell its facilities to its competitor, creating serious obstacles for the lessee to continue competing.

The Federal Cartel Office sanctioned the owner for the early termination, but in 2020, the arbitral tribunal upheld the termination of the lease. The tenant challenged that finding before the courts and lost: the Frankfurt Higher Regional Court upheld the award, noting that although antitrust rules are part of public policy, their contravention does not automatically permit courts to review an arbitration award. The German Federal Court of Justice reversed that decision and annulled the award.

As part of its reasoning, the Federal Court of Justice held that the principle of non-review on the merits of an arbitration award does not apply to decisions relating to antitrust law and that on review, the court is not limited only to correct clear error, but may identify and right any error in the application of the law.

B. The Minimalist Position

Minimalists seek to uphold the public policy underlying the application of antitrust law and, at the same time, leave intact the characteristics of arbitration that result in minimal judicial intervention. Under this position, courts should limit themselves to verifying that the arbitral tribunal has considered that the dispute was related to antitrust issues and that no clear and serious errors were committed.[53] This position is based mainly on the principle of finality of arbitration, since it assumes as the default that the arbitrators' decision has been made correctly and ought to stand. Indeed, this may be a logical consequence of conceding the arbitrability of antitrust disputes.

Moreover, for the minimalist position, the fact that an arbitral decision is thoroughly and strictly reviewed by the courts does not ensure that there is a greater defense of antitrust law, because there is no guarantee that the decision of the courts is equally or more "correct" than that of the arbitral tribunals. The characteristic of "right" or "wrong," given the

50. This decision, however, has been challenged by Auro before the Constitutional Court of Spain and, even though the challenge has been admitted, a decision has not been issued yet.

51. *See infra* Part III.B.

52. Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 27, 2022, No. KZB 75/21 (Ger.).

53. LUCA RADICATI DI BROZOLO, *supra* note 45, at 762-66.

complexity of antitrust matters, will never be unanimous or clear-cut. As Radicati explains, "it is held to be a pure petition of principle that the findings of the court reviewing the award can be considered a more 'correct' application of competition law than those of the arbitrators."[54]

In our view, this was the correct interpretation of the reasoning expressed in the U.S. cornerstone case, *Mitsubishi*. There, the U.S. Supreme Court noted that courts would have an opportunity to review whether the public's interest in application of the antitrust rules was considered during arbitration. However, it also recognized that this would not involve a strict review, but a more cursory one: simply ensuring that the arbitrator recognized the antitrust dispute and decided on it: "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."[55]

Later, a U.S. Circuit Court of Appeals held, in *Baxter Int'l v. Abbott Laboratories*, that if a full review were allowed, it would have an equivalent effect to reopening the trial such that the dispute had not really been arbitrable in the first place: "Mitsubishi did not contemplate that, once arbitration was over, the federal court would throw the result in the waste basket and litigate the antitrust issues anew. That would be just another way of saying that antitrust matters are not arbitrable."[56]

It seems as if the U.S. courts have adopted the minimalist position when reviewing awards. In the rest of the world, however, the debate continues. Just as there are rulings that adopt the maximalist position, as previously described, there are also rulings that adopt the minimalist position.

In France, in the case of *Thalès v. Euromissile*, the Paris Court of Appeals clearly took a minimalist position.[57] That case was a dispute over the termination of a contract between two missile manufacturers with significant market share. During the arbitration, neither brought any claims under the competition law, and the arbitration culminated in an award for Euromissile. However, Thales then challenged the award on the grounds that the contract was a market partitioning agreement in violation of antitrust law. The Court of Appeals found that the strategic use of antitrust law to challenge a decision only when it is known to be unfavorable was not appropriate and concluded as follows:

> The reviewing court cannot, without affecting the finality of the arbitrators' decision on the merits, and since the alleged violation of a public policy rule does not authorize the contravention of the procedural rule prohibiting a

54. *Id.* at 764.

55. Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 638 (1985).

56. Baxter Int'l, Inc. v. Abbott Lab'ys, 315 F.3d 829, 832 (7th Cir. 2003).

57. Thalès Air Defense v. GIE Euromissile, Cour d'appel [CA] [regional court of appeal] de Paris, civ., Nov. 18, 2004; *see also* RADICATI DI BROZOLO, *supra* note 45, at 768-69.

> review on the merits, in the absence of fraud or, as mentioned above, manifest violation, examine the application of antitrust law to the disputed contract, no annulment being incurred simply because the arbitrators failed to raise the issues of antitrust law on their own motion.[58]

Thus, the Court of Appeals expressly stated that (i) the principle of finality of arbitration must be respected, (ii) the rule prohibiting analysis of the substance of an award must be respected, (iii) failure to invoke the antitrust law *ex officio* does not constitute a ground for annulment of an award, and (iv) an award may be rejected only when the infringement is manifest. A similar reasoning was applied in the cases *SNF v. Sytec*, *Linde v. Halivourgiki*, and *Tamkar v. RC Group*.[59]

The Spanish case of *Cabify v. Cibeles* was similar. In this case, the arbitrator found for Cabify and upheld the validity of its exclusivity clause.[60] Cibeles then questioned the validity of the award, a request that was rejected by the Superior Court of Justice of Madrid in 2022, only a year after the Auro case.[61] In that decision, the court cautioned that it "cannot go into the merits of the case."[62] It must limit itself to perform an external exam of the reasoning and the sufficiency of the procedural guarantees: it cannot execute a reevaluation of the evidence.

Interestingly, two of the judges who decided *Auro* participated in *Cibeles*, which adopted a different position. One of the judges was the president of the court and, in the *Auro* case, issued a separate opinion adopting the minimalist position by stating that:

> to confront the reasoning of the arbitrators with a concrete reading of European case law in order to censure the conclusions, the arguments - and even the premises - articulated in the decision of the arbitration panel, is an exercise that we consider goes beyond the reasonable possibilities available to the Court in the judgment of the respect for the material public order.[63]

With this decision, Spain seems to have turned to the minimalist position. Recently, the Constitutional Tribunal confirmed this impression while overturning the Superior Court of Justice of Madrid's ruling in *Cabify v. Auro*. For the Constitutional Tribunal, the lower court "should not have interfered in the debate on the merits, for which it is sufficient to propose its own selection of the applicable rules and give its own interpretation of

58. Cour d'appel [CA] [regional court of appeal] de Paris, civ., Nov. 18, 2004, 2002/60932.

59. *See* RADICATI DI BROZOLO, *supra* note 45, at 770.

60. Álvaro Zarzalejos, *La Exclusividad Entre Cabify y Auro Divide a Los Tribunales*, EXPANSION (Oct. 4, 2023, 3:15 AM), https://www.expansion.com/empresas/2023/10/04/651c5221e5fdea042e8b45a3.html [https://perma.cc/2ASY-68WQ].

61. Á. Zarzalejos, *Reves Judicial para Auro: La Ruptura con Cabify Fue Irregular*, EXPANSION (Jul. 12, 2022, 2:09 AM), https://www.expansion.com/empresas/2022/07/12/62cc6c09e5fdea7e368b4606.html [https://perma.cc/TP8U-XA3U].

62. *Id.*

63. Maxi Mobility Spain S.L.U. v. Auro New Transport Concept S.L., S.T.S.J., Dec. 2, 2024 (No. 2956-19/AM-SG).

them, in a manner different from the awards, which is what has happened here."[64]

C. The Consequences of Each Position

The arguments in favor of one or the other position are various and of different order, since they refer to both normative and practical issues.

The maximalist position advocates for significant judicial intervention in the award because it considers that the way to safeguard the public interest. But we believe this is a question of incentives and impact of the award on third parties.

As recognized in *American Safety*, one of the main problems is that decisions on disputes involving antitrust issues may have an impact on third parties (competitors and consumers) and arbitrators may not have sufficient incentives to take this impact into account when issuing an award. Even worse, it is possible that these third parties may not even be aware that an arbitration took place, due to its confidentiality (if the parties so agreed).

For example, it may occur that two parties have entered into an agreement whereby they fraudulently agreed to a highly complicated price-fixing scheme, thus creating a hard-to-detect cartel. Even though it is highly unlikely, if the parties enter into a dispute because one of them refuses to comply with the agreement, initiate arbitration to compel one party to comply, and receive an arbitral decision that the contract must be enforced, then the market and third parties (including competitors, consumers, and the government's antitrust agency) will be affected even though they could not have participated in the arbitration and may not even be aware that there was an antitrust discussion regarding this matter.

This risk may well be the basis for adopting a maximalist position. A thorough review of awards would generate greater incentives for arbitrators to consider the effects on third parties in the application of antitrust rules while resolving disputes. Otherwise, they would risk having the award annulled or its enforcement rejected, which could undermine their credibility, reputation, and ultimately, their careers as arbitrators.

However, this risk is reduced by considering two fundamental characteristics of arbitration. First, because of its contractual nature, the principle of relativity or privacy is also applicable to arbitration. In practical terms, this means that the award should not have effect under the doctrine of res judicata, and therefore will not be enforceable against third parties in matters that directly impact them under antitrust law.[65] The effect of the award

64. S.T.C., Dec. 2, 2024 (T.C., No. 146/2024, p. 3500) (Spain).

65. MAXIMILIAN PIKA, THIRD-PARTY EFFECTS OF ARBITRAL AWARDS: RES JUDICATA AGAINST PRIVIES, NON-MUTUAL PRECLUSION AND FACTUAL EFFECTS 301-02 (2019) ("Instead, there is a continuous authority that an arbitral award cannot affect third parties that have not been bound by the underlying arbitration agreement.").

will therefore be very limited, if not non-existent, on consumers, competitors, and the antitrust authorities. And the impact on public policy will be restricted to aspects concerning only the parties to the arbitration. Therefore, these third parties will not be prevented from initiating actions to sanction or claim damages for the antitrust practice, even if it has been supported by an arbitration award. From this perspective, the dilemma of public policy, and the supposed externalities that would be generated, is a false dilemma that is resolved by the principle of res judicata.[66]

Second, arbitration is constantly evolving and, as part of this process, there is an evolution towards transparency in those matters that generates a legitimate interest for third parties. For example, in investment arbitrations, which arise between foreign investors and the state in which they invest, the citizenry has a legitimate interest in knowing the outcome.[67] In recognition of this, the International Centre for Settlement of Investment Disputes (ICSID) has recently modified its Arbitration Rules and introduced a presumption of consent of the parties to the publication of the resulting award if it is not objected to within 60 days of receipt.[68]

For these reasons, while arbitrators might not have the same incentives to consider third parties under the minimalist position, the risk involved would not be as great as one might think. Both the impact on third parties and the issue of those affected being able to become aware of the consequences can be addressed by means other than adopting the maximalist position.

On the contrary, the maximalist position creates high risk of an issue that does not justify the incentives it generates: if the court gets the final word, then even in cases where the arbitrators perform a "perfect" job, the award may be set aside or not recognized where the court has a different opinion. This would violate the principle of finality of arbitration, as well as the principle of inevitability and the parties' agreement that their contractual dispute should not be resolved by the courts, depriving arbitration of its main usefulness and rendering it a mere first-instance decision.

Cabify v. Auro is the perfect example.[69] In 2020, an arbitral award was issued, declaring certain clauses of a contract null and void because they were considered contrary to antitrust law. In 2022, a court partially annulled the award because it considered that the arbitration failed to

66. *See* Mourre, *supra* note 25, at 44.

67. *See* Gary Born, *Investor-State and State-to-State Arbitration*, *in* INTERNATIONAL ARBITRATION: LAW AND PRACTICE 499 (3d ed. 2021) ("Similarly, investor-state disputes frequently implicate state interests and legislative policies more directly than many commercial disputes. For example, claims that governmental regulatory measures are creeping expropriations or wrongful discrimination involve sensitive issues of national policy and international law in ways that are seldom paralleled in commercial arbitrations.").

68. ICSID Arbitration Rules, § 62.3 (2022).

69. For discussion of these cases, see Josep Galvez, *Ruling Pits EU Competition Law Against Arbital Awards*, LAW360, https://www.4-5.co.uk/assets/law360---ruling-pits-eu-competition-law-against-arbitral-awards.pdf [https://perma.cc/7A3B-Z735].

address a specific antitrust rule of the European Union. In 2024, the Constitutional Tribunal overturned the court decision because the award did in fact address the antitrust rule that the arbitrator was accused of failing to address and, in any case, the court exceeded its powers by interfering with the merits. Now, the lower court has to issue another decision in accordance with the guidelines outlined by the Tribunal. More than four years have passed since the issuance of the award and the parties do not yet have a firm decision that provides them with legal certainty.

In its efforts to protect public policy, the maximalist position carves a significant vulnerability into arbitration, which will reduce the confidence that companies have in it as a conflict resolution mechanism and discourage its use in antitrust law disputes. Furthermore, adopting a maximalist position could generate perverse incentives for the conduct of the parties, who may wish to reserve their allegations of antitrust law infringement (for example, to support the nullity of a contract) to deploy in the event that they do not agree with the arbitral outcome, as was the case in *Thales*. In our view, the balance is clearly in favor of the minimalist.

The possibility for courts to refuse recognition or enforcement of an international award on the grounds that its content is contrary to international public policy should be reserved only for those cases where there is a serious and notorious contravention of antitrust law. It is a tool protected by a glass that should "only be broken in case of emergency." One such emergency would be, for example, that an arbitral tribunal recognized that a dispute involved antitrust issues and yet decided not to consider or apply any of those rules. Or, also, when an award extends, by its own terms, its scope or enforceability to third parties who have not participated in the arbitration.

This conclusion is in line with our position on how to understand the international public policy referred to in the Model Law and the Convention. As we noted, it should be understood as international public policy as opposed to domestic public policy. Only a decision that enforces an agreement or conduct while deliberately ignoring antitrust law, or that extends the antitrust effects of the award to third parties, should be considered contrary to the most basic notions of justice. A mere discrepancy on the interpretation or application of competition law to the specific case should not be considered contrary to international public policy.

This balanced approach allows for the coexistence of arbitration principles and the protection of public policy in antitrust matters. Otherwise, one could engulf the other.

Conclusion

In the previous section, we arrived at what we consider to be the best way to defend public policy in antitrust matters without unduly damaging the arbitration system. Ex post review of international awards should occur

only to the extent that the award violated international public policy, which would happen only in extreme cases. A mere discrepancy between the reasoning of the reviewing court and the reasoning of the arbitral tribunal should not be sufficient evidence of a violation of international public policy and, as a consequence, grounds upon which the arbitral award should be set aside.

Notwithstanding the foregoing, the reader may still have doubts as to whether this is sufficient to protect the interest of third parties not involved in the arbitration but who could be affected by the application (or not) of antitrust law, and what their role should be. As explained before, because of its contractual nature, an arbitral award should only bind the parties of the arbitration agreement. Third parties remain free to bring claims, and state agencies may still initiate action, against conduct that they deem contrary to antitrust law. However, if an arbitral tribunal has already analyzed the case, it would be highly beneficial if these third parties or state agencies could take cognizance of it—particularly if the tribunal has confirmed a breach of antitrust law. Therefore, we consider that, just as investment arbitration is betting on the publicity of its decisions, a similar paradigm could be applied to antitrust law arbitration.

Given the flexibility that characterizes arbitration, tribunals should be empowered to request the opinion of state agencies if they deem it necessary. An evolution of arbitration in this direction could help mitigate the risks of a purely minimalist approach. No system is perfect. But we believe this represents the best solution that balances the competing interests at stake.