INTERNATIONAL ARBITRATION AND DOMESTIC ANTITRUST: NATURAL PROGRESSION OR RANDOM ALLIANCE?

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I. INTRODUCTION

Arbitration of antitrust disputes remains a viable but largely unknown possibility for antitrust and arbitration practitioners alike. For a small group of initiated lawyers and economists, the possibility of encountering and making antitrust arguments in arbitration comes as no surprise. They have seen antitrust defenses and claims in arbitration and know of antitrust-related arbitration awards. For most antitrust and arbitration practitioners, the story is entirely different. They are either bluntly unaware of antitrust arguments being raised in arbitration, or do not see arbitration as a proper forum for enforcement of antitrust laws. And it is easy to understand why.

Antitrust seeks to protect public interest by preserving free competition in the markets. Globally antitrust relies largely on public enforcement by state's authorities designated to investigate and prosecute violations of antitrust laws. Only a few countries, such as the United States, rely extensively on private enforcement of antitrust laws — lawsuits by businesses and individuals seeking damages for violations of antitrust laws. In turn, arbitration is a private dispute resolution method, which derives its jurisdiction from the arbitration agreement between the parties and calls upon private individuals — instead of public courts — to resolve their dispute.

As a private forum of dispute resolution, arbitration simply does not fit into the predominantly public enforcement framework of domestic antitrust laws. After all, if there is an antitrust violation, a victim of such violation would normally bring it to the attention of public antitrust authorities, instead of bringing a claim for damages in court or arbitration. It is only *if* private antitrust enforcement is available, a victim of antitrust violation can find itself in arbitration instead of litigating in court. And it can only happen *if* there is a valid arbitration agreement between the victim and the alleged antitrust law violator, which is broad enough to allow antitrust claims to be submitted in arbitration. When these conditions are met, antitrust *claims* — such as those under Article 102 of the Treaty on the Functioning of the European Union ("TFEU") or Section 2 of the Sherman Act — can be brought in arbitration. Claimants can bring these claims individually or jointly with others. For instance, U.S. courts have allowed class-action arbitrations against an alleged monopolist even where the arbitration agreement prohibited treble damages, class-action arbitration, and fee-shifting.[2]

More commonly, however, antitrust is raised in arbitration as a *defense* by a party in breach of its contractual obligations. Under this scenario, once an arbitration is commenced and a claim is brought in arbitration for a breach of contract, a defendant raises an antitrust defense, seeking to invalidate a contract as incompatible with antitrust laws. Naturally, most of these disputes involve anti-competitive agreements, such as vertical agreements with restrictions of competition between a supplier of goods and its distributor, or a franchisor and its franchisee. Depending on the applicable antitrust law, defendants in these arbitrations frequently rely on Article 101(2) of the TFEU or Section 1 of the Sherman Act.

2 See, e.g. *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

Apart from bringing antitrust claims or defenses, parties invoke antitrust in arbitration to challenge arbitral jurisdiction or to challenge arbitral awards in setting aside or enforcement proceedings. These are distinctly arbitration-related purposes. Jurisdictional challenges reflect parties' disagreement as to whether a dispute should be resolved in court or in arbitration. Post-award challenges may represent a losing party's attempt to revisit the outcome of arbitration in courts. The resultant arbitration-related litigation is perhaps more interesting for arbitration than antitrust practitioners. It fuels the debate about the jurisdictional divide between courts and arbitral tribunals and the role of domestic courts in supporting international arbitration. But it also raises important questions for the antitrust community and enforcement authorities: *Is arbitration a proper forum for enforcing antitrust laws? What role should arbitral tribunals play in the enforcement of domestic antitrust laws? Should the courts which are called upon to review arbitral awards in setting aside and enforcement proceedings go a step further to ensure that antitrust laws are properly considered and applied in arbitration?* These concerns are particularly acute in cases of international commercial arbitration, which by contrast to domestic arbitration involves choice-of-law determinations and competing interests of national antitrust authorities in enforcement of their antitrust laws.

II. ARBITRATION: DOMESTIC AND INTERNATIONAL

Arbitration is an alternative to litigation, private and binding method of dispute resolution. The cornerstone of arbitration is the arbitration agreement — an agreement between the parties to submit their dispute to arbitration. The parties can limit the scope of their submission to a particular type of disputes (e.g. disputes about the price of the goods), or agree on arbitration of all disputes arising out of or in connection with their contract.

Antitrust issues can arise both in purely national — or domestic — arbitration and international commercial arbitration. Domestic arbitration involves disputing parties coming from the same jurisdiction and, as a rule, no choice-of-law determinations. Take, for instance, a sale of goods contract between a Dutch seller and a Dutch buyer that conduct business primarily in the Netherlands. Assume that the contract provides for arbitration under the rules of the Netherlands Arbitration Institute. If a dispute arises out of such contract, the tribunal will apply Dutch law to the substance of the parties' dispute, including its mandatory law provisions (such as EU and Dutch competition law). In essence, arguing antitrust in domestic arbitration is no different than litigating in courts, although arbitration offers their participants the flexibility and confidentiality of the arbitration process.

International arbitration — more specifically, international commercial arbitration which is an arbitration that derives from international business transactions — adds complications to resolution of antitrust disputes in arbitration. Generally, arbitration is international if it involves a dispute between two parties that are foreign to each other, or the nature of a dispute is international, although both parties share the same nationality. For instance, it is an international commercial arbitration if it involves a contractual dispute between a U.S. seller and a Dutch buyer which arose out of their international sale of goods contract.

International commercial arbitration involves a complex interaction of laws. In every international commercial arbitration, at least five different systems of law play a role in the arbitration process: (1) the law governing the parties' capacity to enter into an arbitration agreement; (2) the law governing the arbitration agreement; (3) the law governing the arbitration (most commonly, the law of the seat of arbitration, i.e. the *lex arbitri*); (4) the law governing the substance of the parties' dispute; (5) the law governing the recognition and enforcement of arbitral awards.[3]

The need to consider several systems of law in international arbitration renders the process of applying antitrust laws more complex. At least *four* domestic systems of law — not all of them identified in the list above — might have a bearing on application of antitrust law in international arbitration. They are (i) the governing law; (ii) the law that would apply in the absence of the choice of law by the parties; (iii) the law of the seat of arbitration; and (iv) the law of every jurisdiction where recognition and enforcement of the award might be sought. Each of these systems of law might have its own antitrust laws with competing interests in their application. The task of choosing which antitrust laws to apply ultimately rests with the arbitrators. Their ability to conduct an antitrust analysis and anticipate the place of enforcement of an award will determine whether such award is able to survive any challenges in setting aside and enforcement proceedings.

3 Nigel Blackaby et al., Redfern and Hunter on International Arbitration ¶ 3-07 (6th ed. 2015).

III. INTERNATIONAL COMMERCIAL ARBITRATION: BEYOND ANTITRUST CLAIMS AND DEFENSES

Apart from bringing antitrust claims — a feasible but random possibility — and raising antitrust defenses — to invalidate a contract and avoid contractual obligations — how and why do the parties invoke domestic antitrust in international commercial arbitration?

International commercial arbitration does not exist in isolation from litigation in domestic courts. As the empirical data suggest, international arbitration increasingly relies on assistance of national courts at the three stages of the arbitration process — before an arbitration is commenced, during the arbitration, and after the arbitration is complete.[4] What is relevant for our purposes is that parties use courts to compel arbitration or to challenge the jurisdiction of arbitral tribunals. They also rely on courts to set aside or enforce arbitral awards. In this arbitration-related litigation, parties invoke antitrust laws to make non-arbitrability, mandatory law, and public policy arguments. In doing so, they essentially argue that arbitration is not a proper forum for antitrust disputes (arbitrability), or seek to persuade the tribunal or the court to apply some other antitrust law (not the antitrust law of the governing law), or argue in court that an arbitral award has to be reviewed, cancelled, or refused enforcement because antitrust law was not raised or (properly) considered in arbitration.

The doctrine of ***arbitrability***, in its narrow sense, limits the subject matter of disputes that can be resolved in arbitration. In the past, antitrust claims were non-arbitrable because they involve public interest and public policy concerns. To challenge the tribunal's jurisdiction, it was sufficient to argue non-arbitrability of antitrust claims, whereupon the parties could proceed in arbitration only on their contractual claims. Antitrust claims would have to be submitted in court.

Things have long changed. Both the EU and U.S. courts have since stated that antitrust laws can be argued in arbitration, i.e. they are arbitrable. The groundbreaking decision came from the U.S. Supreme Court, which in its 1985 decision in *Mitsubishi*[5] expanded the arbitrability to federal antitrust claims. The U.S. Supreme Court thus expressed its trust in the ability of arbitral tribunals to recognize antitrust violations and to apply U.S. antitrust law, even in cases where U.S. courts do not have supervisory power over an arbitration because it has its seat outside of the United States.[6]

Competition law issues are also generally arbitrable in the European Union and most of its Member States, where it is no longer disputed that private parties may address in arbitration the civil law consequences of violations of EU competition law. The European Court of Justice ("ECJ") has never expressly dealt with the issue of arbitrability of EU competition law in a case equivalent to *Mitsubishi*.[7] However, such inference is commonly drawn from the ECJ's decision in *Eco Swiss*.[8]

At the national level, courts of EU Member States have also recognized the arbitrability of antitrust law. For instance, in France the arbitrability of antitrust issues was recognized in the decision of the Court of Appeal of Paris of 1993.[9] In Sweden, the arbitrability of competition law claims was established by statute: the 1999 Arbitration Act, as amended, provides that "arbitrators may rule on the civil law effects of competition law as between the parties."[10] The Law on Commercial Arbitration of Lithuania defines a "commercial dispute" that can be submitted to arbitration as "any disagreement of the parties over a fact and/or matters of law arising out of contractual or non-contractual legal relations, including but not limited to . . . payment of damages caused by breach of rule of competition law."[11]

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4 See generally Vera Korzun & Thomas H. Lee, *An Empirical Survey of International Commercial Arbitration Cases in the U.S. District Court for the Southern District of New York, 1970-2014*, 39 Fordham Int'l L.J. 2 (2015).

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

6 Vera Korzun, *Arbitrating Antitrust Claims: From Suspicion to Trust*, 48 N.Y.U. J. Int'l L. & Pol. 867, 903 (2016).

7 Phillip Landolt, *Arbitration and Antitrust: An Overview of EU and National Case Law*, *in* 2013 Competition Case Law Digest - A Synthesis of EU and National Leading Cases, 231, 233 (Nicolas Charbit et al. eds.).

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

9 See Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., May 19, 1993, 1993 Revue De L'Arbitrage [Rev. Arb.] 645, note Jarrosson (Fr.).

10 1 § Swedish Arbitration Act (SFS 1999:116, as amended by SFS 2018:1954) (Swed.).

11 Republic of Lithuania Law on Commercial Arbitration, June 21, 2012, No. I-1274 (as last amended on June 21, 2012, No. XI-2089), art. 3(11).

Notwithstanding the importance of the doctrine of arbitrability which opened the doors of arbitration to antitrust, arbitrability is likely the least problematic issue for antitrust arbitration today. With a few exceptions, most major arbitral jurisdictions recognize the arbitrability of antitrust claims. In a purely domestic arbitration in these countries, parties can submit their claims or raise antitrust defenses in arbitration, and the courts will recognize the resultant awards. However, the power of arbitral tribunals to make antitrust determinations may still be questioned in international commercial arbitration, *if* the arbitration finds itself under the supervisory power of domestic courts whose law does not yet recognize the arbitrability of antitrust claims. This may happen if the law governing the arbitrability (likely, the law governing the arbitration agreement), the law of the seat, or the place of recognition and enforcement does not recognize the arbitrability of antitrust claims. In this case the court may prevent arbitration from going forward on antitrust issues, or the award may be set aside or refused enforcement due to non-arbitrability of antitrust claims.

The doctrine of ***mandatory law*** raises more pressing issues for antitrust arbitration today. Commonly, it is application of the governing law — the law that applies to the merits of the parties' dispute — that leads to the mandatory law discussion. Recall that international commercial arbitration results from international business transactions. According to the principle of party autonomy, the parties in international business contracts have the freedom to choose the law for themselves. Such law — known as "the governing law," or "the applicable law" — governs the formation, validity and interpretation of the international business contract, the rights and obligations of the parties, as well as performance and the consequences of breach of contract. In the absence of the choice, the court or the arbitral tribunal will determine the governing law before applying it to the facts of the case. To make such choice-of-law determinations, an international tribunal with the seat in the European Union will likely apply the Rome I Regulation on the law applicable to contractual obligations.[12]

However, party autonomy is not absolute. Generally, the law chosen by the parties to govern the merits of their dispute cannot override mandatory law provisions otherwise applicable to the parties or their transaction. In international commercial arbitration, arbitral tribunals may apply such mandatory law provisions even if they contradict to the governing law. The tribunal may also need to consider mandatory law of the governing law chosen by the parties or the law determined by the tribunal itself. After all, if the parties have selected the governing law, they probably want this law, including its mandatory law (such as antitrust), to govern their transaction. The same argument applies to the governing law determined by the arbitral tribunal.

Additional layer of mandatory law provisions may come from domestic law of the courts that would have jurisdiction over a dispute in the absence of the arbitration agreement. The facts of *Mitsubishi* illustrate this scenario. There, a U.S. court had jurisdiction to hear a contractual dispute between a Puerto Rican company and a Japanese and a Swiss entities. If the dispute would wind up in court, the court would apply Section 1 of the Sherman Act raised by the defendant (U.S. mandatory law) in addition to applying Swiss law chosen by the parties. Assume now that a dispute like this proceeds to international arbitration. Also assume that the seat of arbitration is not in the United States, but in Japan (as it was in *Mitsubishi*). Does the arbitral tribunal in Japan have to ensure compliance with U.S. antitrust law while resolving a parties' dispute?

The answer to this question is not as clear cut as expected. National antitrust authorities have vested interest in the enforcement of their antitrust laws in international arbitration. The U.S. Supreme Court warned in *Mitsubishi* against agreements where the choice-of-law and choice-of-forum provisions work in tandem to remove a transaction from otherwise applicable mandatory laws.[13] It also reserved for U.S. courts the right to have a "second look" at the award at the enforcement stage to ensure compliance with U.S. antitrust laws.[14] But many relevant arbitral awards never end up in U.S. courts because they are either complied with voluntarily or are enforced outside of the United States. Not surprisingly, in the period of nearly thirty-five years since *Mitsubishi*, the second look doctrine has hardly been invoked in U.S. courts.[15]

However, the role of international arbitral tribunals is different from the role of domestic antitrust authorities. Parties select and appoint arbitrators to resolve their disputes, not to ensure compliance with mandatory laws. But failure to apply antitrust law in arbitration may invalidate the award in setting aside proceedings, or allow the courts to refuse its recognition or enforcement based on the New York Convention.[16] This may also be a breach of the arbitrator's fundamental duty to the parties — the duty to produce an enforceable award. In turn, it may negatively impact the reputation of arbitrators and reduce their future appointments. And so, as I have previously argued, it may be in the best interest of

12 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).

13 See *Mitsubishi*, 473 U.S. 636-37 n.19.

14 *Id.* at 638.

15 See Korzun, *supra* note 6, at 926.

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

arbitrators to ensure compliance of the award with relevant antitrust laws, even on their own motion in cases where the parties do not address antitrust implications of their dispute in arbitration.[17] Relevant laws in this respect include antitrust laws of the seat of arbitration and antitrust laws of anticipated places of enforcement of an award.

Recall here that antitrust laws have their own rules of application, commonly determined by the object or effect of the allegedly anticompetitive agreements or practices on trade or competition in the markets.[18] In addition, both EU competition law (Articles 101 and 102 of the TFEU) and U.S. antitrust law (in particular, Sections 1 and 2 of the Sherman Act) are of extraterritorial application. In the case of EU competition law, such extraterritoriality requires, for instance, application of EU competition law to an international business contract between two non-EU businesses, if their contract in its effect restricts competition within the internal market. EU competition law should apply even if the parties submit their dispute to international arbitration with the seat outside of the EU and choose the law of the third country as the governing law. Of course, if the parties willingly proceed to arbitration and comply with an arbitral award, they may escape the supervisory power of EU courts and avoid the application of EU competition law all together.

Antitrust law is also deemed so fundamental that it is often considered to be part of the ***public policy*** of a given jurisdiction. In the world of international commercial arbitration, the doctrine of the public policy holds a special place. Public policy is one of the few grounds of the New York Convention which allows a court to refuse recognition and enforcement of an arbitral award. To constitute a public policy violation, an award must go against fundamental notions of a legal system, its "most basic notions of morality and justice."[19] Losing parties in arbitration regularly invoke public policy arguments in the enforcement proceedings, but rarely succeed. Their chances of winning on the public policy ground are much higher in the EU, where after the ECJ's decision in *Eco Swiss*[20] courts and commentators generally agree that EU competition law is an integral part of the public policy of the European Union.[21] And so, courts in the EU will likely refuse to enforce an arbitral award under the New York Convention if a violation of EU competition law was not recognized and properly dealt with in international arbitration.

In view of the mandatory and (arguably) public policy nature of domestic antitrust law, the question arises how to deal with the multiplicity of antitrust laws in international commercial arbitration. Where multiple mandatory laws come into the discussion, the arbitrator will have to choose which mandatory law to apply. The duty to produce an enforceable award may require the tribunal to apply antitrust law of the seat of arbitration and/or anticipated place(s) of enforcement. This task may be difficult to achieve where antitrust laws of relevant jurisdictions take diverging or opposing views on the antitrust issue at stake.[22] Ultimately, arbitrators may need to consider the consequences of choosing one antitrust law over another, and the resultant non-application of relevant mandatory law in light of particular circumstances of the case and anticipated place(s) of enforcement.

In international commercial arbitration with the seat in the European Union, arbitral tribunals will have to apply EU competition law as part of the public policy of the EU Member State to avoid setting aside of the award at the seat as contrary to the state's public policy. By contrast, in international commercial arbitration with the seat outside of the European Union, failure to apply EU competition law will generally not result in setting aside of the award on the public policy ground. Nevertheless, arbitral tribunals sitting outside the European Union may apply EU competition law when it is the law of the contract.[23] They may also apply EU competition law to ensure enforcement of the award in the European Union, where failure to assess questions of EU competition law may result in denial of enforcement of an award based on the New York Convention's public policy ground.

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17 See Korzun, *supra* note 6, at 925.

18 See Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Oct. 26, 2012, 2012 O.J. (C 326) 1. See also Sherman Act § 1, 15 U.S.C. §§ 1–7.

19 *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

20 See Case C-126/97, *Eco Swiss China Time Ltd v. Benetton Int'l*, 1999 E.C.R. I-3093 at ¶ 39 (holding that "provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention").

21 See, e.g. Laurence Idot, *The Role of Arbitration in Competition Disputes*, *in* The Reform of Competition Law: New Challenges 75, 91 (Ioannis Lianos & Ioannis Kokkoris eds., 2010).

22 For instance, under U.S. federal antitrust law vertical minimum resale price maintenance ("RPM") is no longer *per se* illegal. By contrast, EU competition law still views such arrangements as hard-core restrictions of competition prohibited under Article 101 of the TFEU.

23 Hans van Houtte, *The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission*, 19 Eur. Bus. L. Rev. 63, 66-68 (2008).

IV. ANTITRUST ARBITRATION: THE ROLE OF ARBITRATORS AND SUPERVISORY COURTS

A look inside international commercial arbitration provides a mixed picture of the role of arbitration in the enforcement of antitrust laws. On the one hand, since the expansion of arbitrability, arbitration has seen a growing number of antitrust claims. Because of its private nature and flexibility, arbitration may even be a better forum than courts for resolution of antitrust disputes. After all, arbitration allows the parties to appoint arbitrators with expertise and prior experience in antitrust, as well as to tailor arbitration procedure and evidence submission to the needs of antitrust dispute resolution. However, one should not forget that as a binding dispute resolution method arbitration serves as an alternative to litigation in courts. Hence, an increase of antitrust arbitrations often means a decrease of private antitrust litigation, in particular, where parties use antitrust as a "sword" to bring antitrust claims for damages in arbitration.

From the arbitration point of view, this may be a welcome development as it attracts more cases to arbitration removing them from courts. However, the impact of arbitration on the volume of private antitrust enforcement actions is ambivalent as it may also foreclose some antitrust claims from binding dispute resolution. For instance, it is unclear whether arbitration provides a meaningful option for consumers who are considering whether to challenge the conduct of the alleged monopolist. The cost for arbitrating for these consumers may well outweigh any damages from the alleged antitrust violation. In the United States, where private antitrust enforcement is common, the issue is addressed with respect to litigation by means of class actions. However, in case of arbitration, U.S. courts have generally been supportive of class-action waivers. Consequently, the victims of antitrust violation may be prevented from going into arbitration as a class but required to arbitrate individually. At least for some antitrust disputes, an arbitration agreement with a class-action waiver may prevent consumers from going into arbitration, but also deprive them of the right to file their lawsuit in court (because of a valid arbitration agreement requiring consumers to submit their dispute to arbitration). As a result, with the expansion of arbitrability to antitrust claims we might have contributed to the overall decrease of private antitrust enforcement.

On the other hand, the role of arbitration in the enforcement of antitrust laws is generally positive where parties use antitrust as a "shield" to bring contractual defenses in arbitration. Adding to the efficiency, the expansion of arbitrability to antitrust issues allows raising antitrust defenses in arbitration itself (instead of arbitrating contractual claims and separately litigating antitrust issues). Antitrust defenses also add to the enforcement of antitrust laws, albeit indirectly by invaliding anti-competitive agreements and practices in arbitration as part of contractual dispute resolution.

In international commercial arbitration, the enforcement of domestic antitrust laws is also impacted by international nature of dispute resolution and choice-of-law determinations. As the critics of antitrust arbitration have pointed out, the parties to international commercial contracts can avoid some antitrust enforcement by submitting their dispute to arbitration. In doing so, such parties can effectively remove their dispute from application of domestic antitrust laws (otherwise applicable to them) by choosing the governing law and arbitrating abroad. They can also keep their dispute private and confidential and avoid raising in arbitration any antitrust implications of their contract. If the parties then comply with an award voluntarily, such arbitrations have the potential to escape the supervisory power of courts, including any screening as to the compliance with relevant antitrust laws.

The arbitral tribunals shall step up in these cases to ensure that mandatory laws are properly applied in international commercial arbitration. The duty to produce an enforceable award and reputational concerns should provide sufficient incentive for arbitrators to enforce domestic antitrust laws, even where the parties are silent about the antitrust implications of their dispute. After all, the arbitrability of antitrust claims is based on the premise that arbitral tribunals are capable of recognizing and applying antitrust laws in arbitration. In turn, the courts are willing to step aside in private antitrust enforcement. To preserve the finality of arbitral awards, the court are also willing to rely on limited review in setting aside and enforcement proceedings, even for antitrust-related awards. If arbitral tribunals are not able or willing to keep their side of the bargain, the courts might be required to step up in their supervisory role to ensure that antitrust laws are complied with in arbitration.

Finally, one should also recognize that the parties to an international contractual dispute often invoke antitrust in arbitration to make mandatory law and public policy arguments. In these cases, they do not go into arbitration because of antitrust — to seek damages for antitrust violations — but having found themselves in arbitration might find it useful to make antitrust-related arguments. They do this to alter the law to be applied to the merits or to revisit the outcome of arbitration in setting aside or enforcement proceedings. Perhaps, this is not traditional antitrust enforcement that antitrust community and authorities have in mind, but the process certainly implicates how antitrust laws are enforced globally as part of private dispute resolution.

V. CONCLUSION

Arbitration of antitrust claims has never been the result of natural progression. Divided along the public-private dichotomy, the goals of antitrust and arbitration policies are too diverse to reconcile entirely. But if the circumstances and the arbitration agreement permit, domestic antitrust and international commercial arbitration may find themselves in a random alliance. Indeed, international arbitral tribunals are well capable of resolving antitrust disputes in arbitration. They may also be better equipped than public courts to address antitrust concerns. But the nature of arbitration is ultimately contractual and arbitrators in international commercial arbitration may consider themselves accountable only to the parties themselves. As such, arbitrators might not see it as their duty to enforce domestic antitrust laws as part of private dispute resolution. Imposing such a duty on arbitrators may lead to mixed allegiances and conflicting awards. And so, until antitrust relies primarily on private antitrust enforcement and the international commercial arbitration embraces transparency, we will have to rely on this random alliance which seeks to satisfy the goals of both private dispute resolution and antitrust laws.

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