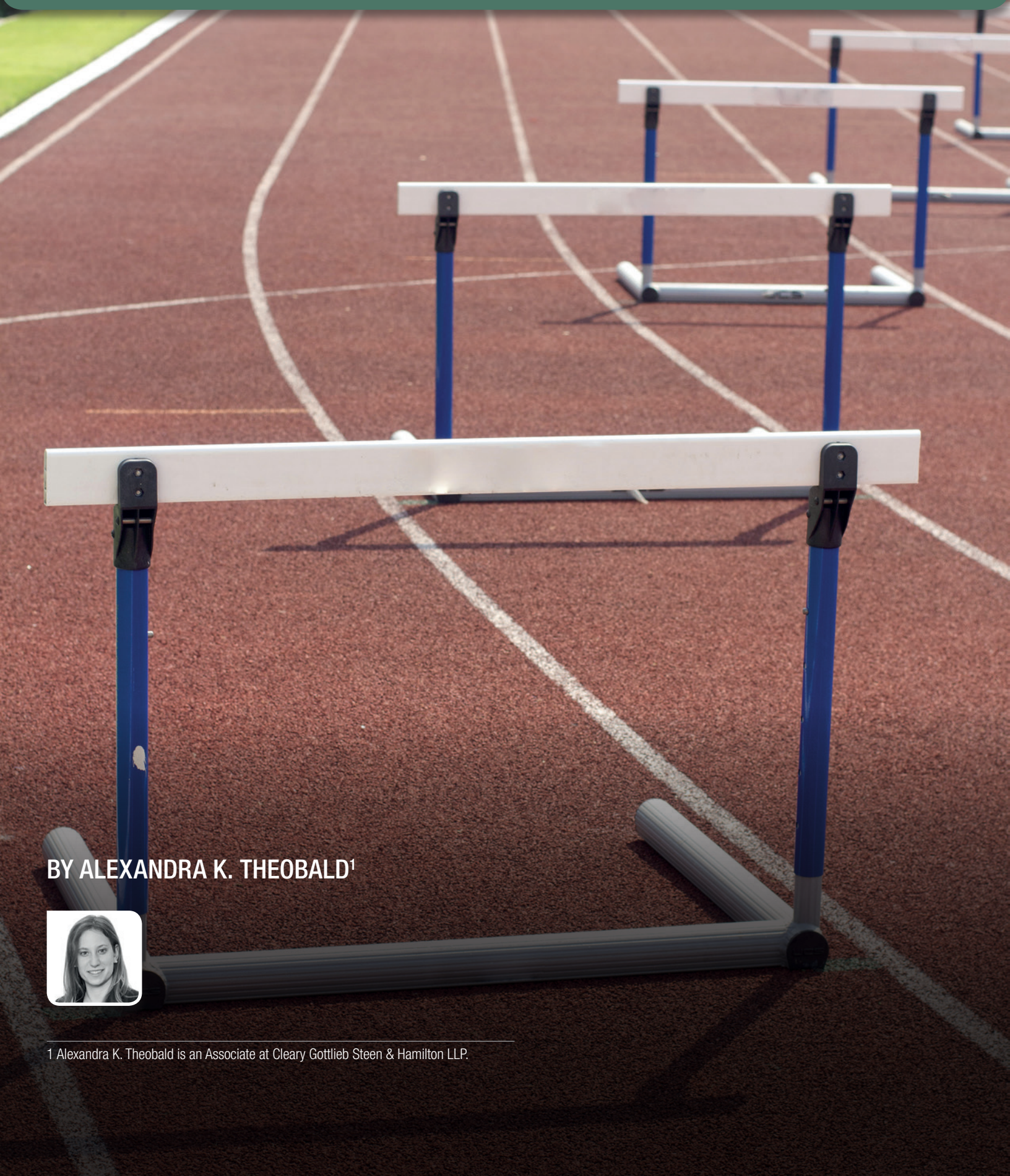


BARRIERS TO ENTRY: ON EVIDENCE IN COMPETITION LAW ARBITRATION



BY ALEXANDRA K. THEOBALD¹



¹ Alexandra K. Theobald is an Associate at Cleary Gottlieb Steen & Hamilton LLP.

CPI ANTITRUST CHRONICLE

JULY 2019

EU Competition Arbitration: A Reliable Forum for Private Enforcement

By Dr. Gordon Blanke



Does Arbitration Offer an Effective Forum When Fighting for Competition Damages?

By William Towell



Arbitration Clauses and Antitrust Damages in the EU: Where are We Now?

By Yves Botteman & Camille Keres



Barriers to Entry: On Evidence in Competition Law Arbitration

By Alexandra K. Theobald



International Arbitration and Domestic Antitrust: Natural Progression or Random Alliance?

By Vera Korzun



The Private Enforcement Directive's Toolkit in Arbitration

By Emilio Paolo Villano



Arbitration and Competition – A Swiss Perspective

By Dr. Hubert Orso Gilliéron & Jean Marguerat



Visit www.competitionpolicyinternational.com for access to these articles and more!

CPI Antitrust Chronicle July 2019

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

I. INTRODUCTION

Good lawyers focus on the elements of their claim, great lawyers also think about how they're going to prove it. The availability of evidence and ability to maintain confidentiality is an important consideration when bringing competition law claims. Although arbitrating competition law claims poses unique evidentiary challenges, doing so can be advantageous from a confidentiality perspective.

Competition claims suitable for resolution through arbitration generally emanate from a contractual dispute between parties.² For example, a party may make an argument based on competition law (e.g. alleging a conspiracy to fix prices in a dispute concerning a supply contract), or the arbitration may be the result of a successful competition claim brought by a regulator.³ In either case, the party must have a private right of action to seek dispute resolution on the basis of the allegedly anticompetitive conduct. Given that questions of arbitrability of competition law claims are still unsettled in many jurisdictions, a potential claimant could have good arguments in favor of choosing either arbitration or court adjudication for such claims.

II. RELEVANT EVIDENCE

Identifying relevant sources of evidence in advance is particularly important when considering arbitrating a competition law claim, as the mechanisms for obtaining discovery and the available confidentiality protections will vary. A party considering bringing a competition law claim in arbitration will need to consider whether non-parties to the potential arbitration are likely to have necessary documents or information, and whether such evidence can be obtained in arbitration. Where sensitive commercial information is involved, parties may benefit from heightened confidentiality protections that may be available in arbitration.

Relevant evidence in a competition law arbitration will largely be the same as in a court proceeding, with the additional requirement that the party seeking to arbitrate must prove the existence of a binding arbitration agreement between the parties. By way of example, monopolization claims will generally require showing (1) market definition; (2) unlawful restraint of trade; (3) damages; and (4) causation. Most of this evidence will either be in the public domain, or in the possession or control of one of the

² Cf. Alexis Mourre, *Arbitrability of Antitrust Law from European and US Perspectives*, in EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 6-8 (Gordon Blanke & Phillip Landolt eds., 2011) (describing various country's approaches to arbitration).

³ See, e.g. *FTC v. Qualcomm*, 5:17-cv-00220 (N.D. Cal 2019) (injunction requiring chip-maker to renegotiate SEP licenses obtained through coercive market practices, and absent agreement, to agree to litigate or arbitrate an appropriate FRAND rate); *Matter of Motorola Mobility LLC and Google Inc.*, No. C-4410 (U.S. Federal Trade Commission 2013) ("2013 Google Consent decree") (ordering licensor to offer to potential licensees to submit determination of royalty rate for Standards Essential Patents (SEPs) to arbitration); *In re Alleged Abuse of Market Dominance of Qualcomm Incorporated*, No. 2017-0-25, (Korea Fair Trade Commission 2017) (ordering licensor to renegotiate SEP licenses, potentially in arbitration).

parties, but some helpful information may be held by others.⁴ To establish market definition, testifying experts may compile evidence on price elasticity and the substitutability of products from public sources, but may not have access to sensitive sales data unless it is provided by a party. Likewise, the parties may have most of the relevant evidence regarding alleged conduct and causation (particularly where contract negotiations between the parties are at the heart of the dispute), but will not have access to internal discussions of their counterparty. Allegations of conspiracy may require evidence from one or more non-parties to the arbitration. The claimant is likely to have access to some evidence necessary to prove damages, but some relevant evidence may be held by third parties. In such cases, the potential claimant may prefer litigation to arbitration, as additional avenues for obtaining evidence may be available. However, as discussed below, there nevertheless are some opportunities in arbitration to compel disclosure from other parties or, in limited circumstances, from non-parties.

Potential defenses should also be considered, as well as any other non-competition law claims or counterclaims which may be brought in the same proceeding. When drafting an arbitration clause, or electing to pursue a claim in arbitration pursuant to a competition-law remedial measure, a party considering arbitration should carefully consider such claims and defenses, and determine whether necessary evidence will be available in arbitration. For example, evidence of “market” practices may be more difficult to obtain in arbitration, where disclosure from non-parties is severely restricted. Likewise, evidence that customers preferred one product over a competitor’s due to certain qualitative attributes (i.e. the product was better than the competitor’s) rather than any anticompetitive conduct of a market participant may benefit from third-party disclosure which may not be available in arbitration. However, depending on the nature of the claims, these evidentiary challenges may be overcome through the creative use of disclosure in arbitration.

III. AVAILABILITY OF DISCLOSURE

Disclosure can be important in the context of competition law claims because the party initiating the proceeding may not have sufficient evidence to prove all elements of their claim, or may anticipate needing evidence held by others to defend against a counterclaim. Arbitration offers more restrictive avenues for obtaining disclosure, which may therefore present a barrier to entry for competition law arbitrations.

Unlike in court proceedings, where particularly in the U.S. judges and attorneys have broad subpoena powers to obtain evidence held by others, an arbitral tribunal or arbitration institution has more limited jurisdiction to compel disclosure of documentary evidence or witness testimony. However, arbitral tribunals nevertheless commonly have authority to order at least some disclosure of necessary evidence between the parties in the context of arbitration (See Table *below*). Competition law claims in arbitration should therefore account for the types of evidence that will likely be available to the parties. For example, a party seeking to resolve a claim of anticompetitive conduct may wish to limit its allegations in arbitration to conduct that directly affected the claimant, rather than alleging broader market effects that may be difficult to prove in arbitration.

Non-parties cannot be bound by an arbitration agreement, so parties must rely on authority outside the contract to obtain disclosure from those non-parties in arbitration. Where multiple market participants have similar claims against a contractual partner, one solution may be to wait to bring an arbitration claim until such time when the other party may be in possession of necessary third-party evidence. For example, in follow-on arbitration to a regulatory action, a Claimant may be able to obtain disclosure of evidence produced to the Respondent by third parties during the regulatory proceeding. Although some of that evidence may be subject to confidentiality orders and nevertheless not subject to disclosure, items such as public trial exhibits may be available for use in future proceedings. Parties should also consider whether relevant evidence might be obtained from government agencies through open records requests.⁵

For arbitrations seated in the U.S., parties may seek to enlist a federal district court to order third-party disclosure either under § 7 of the Federal Arbitration Act or § 1782 of 28 U.S.C. permitting orders for discovery “for use in a proceeding in a foreign or international tribunal.” However, the availability of these means of obtaining document disclosure is limited. Only three U.S. federal circuits have held that the Federal Arbitration Act permits arbitrators to order document discovery from non-parties outside the context of a merits hearing.⁶ Courts are likewise split

⁴ WILLIAM BLUMENTHAL & JAMES D. HURWITZ, *Chapter 42: Alternative Dispute Resolution and Federal Trade Commission Antitrust Enforcement*, in *EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS* (Kluwer Law International 2011).

⁵ See, e.g. CFR Art. 42 and TFEU Art. 15 (EU); 5 U.S.C. 552 (“Freedom of Information Act”) (U.S.).

⁶ *Stolt-Nielsen Transp. Group v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005) (third-party discovery available by holding a special hearing for purposes of obtaining documents or testimony from such third-party); *COMSAT Corp. v. NSF*, 190 F.3d 269, 276 (4th Cir. 1999) (third-party discovery is available in “unusual circumstances” and upon “a showing of special need or hardship.”); *Security Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865, 870-71 (8th Cir. 2000) (permitting arbitrator to order third-party discovery in advance of a hearing); *but see Vividus LLC v. Express Scripts, Inc.*, Civ. No. 16-16187 (9th Cir. 2017) (holding that the Federal Arbitration Act does not permit arbitrators to issue subpoenas for documents outside the context of a hearing).

on whether § 1782 is available for use in private party arbitrations.⁷ While the authority to compel discovery may also be found under state law in some states, others (e.g. California) require that the parties agreed to non-party discovery in the underlying arbitration agreement.⁸ Additionally, one major limitation of these rules is that courts only have authority to compel discovery located within their jurisdiction,⁹ so they will be of little use where non-parties or evidence is located elsewhere.

Outside the U.S., options for obtaining non-party disclosure are severely limited. This may not necessarily put parties who chose arbitration at a disadvantage, however. Many non-U.S. jurisdictions do not allow comprehensive disclosure even in court proceedings, from parties or non-parties. In such cases, arbitration may put a party seeking disclosure in a *better* position than court litigation if the applicable arbitration rules permit the tribunal to order further disclosure than would be permitted under local court rules. In other cases, arbitration may put the party seeking disclosure in *at least as good* a position as litigation, and the decision whether to pursue arbitration or litigation may be driven by other considerations, such as confidentiality.

IV. CONFIDENTIALITY

Parties entering into commercial contracts containing an arbitration provision should consider whether commercially sensitive information is likely to be implicated, and whether the selected arbitration rules offer adequate protections in the event of a dispute. Arbitration potentially offers greater confidentiality protections than litigation, and may create a barrier to entry for other parties interested in intervening in the dispute.

Confidentiality is particularly important in the context of competition law claims for three reasons: (1) such claims often involve sensitive commercial information including financial and other commercial terms, sales figures, and details of a company's business model, which could be valuable to competitors; (2) regulators or other market participants may bring additional challenges based on the same conduct; and (3) in some of those cases, regulators or one of the parties may seek to stay the arbitral proceedings pending resolution of a parallel case — even if that case was commenced after the initial arbitration,¹⁰ thus depriving the initial Claimant of a speedy resolution of their claim. Thus, maintaining confidentiality of both the fact of and contents of the dispute, as well as related evidence, are important issues in competition law arbitrations.

Courts in both Europe and the U.S. value transparency in court proceedings, and therefore it is more difficult to maintain confidentiality in those forums. Even where protective measures are available, the risk of accidental disclosure endures any time a portion of the court record remains public.¹¹

⁷ Compare *In re Children's Inv. Fund Found. (UK)*, 363 F. Supp. 3d 361, 370 (S.D.N.Y. 2019) (holding that § 1782 could be employed to obtain disclosure for use in arbitrations convened under the auspices of the London Court of International Arbitration) (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258, 124 S. Ct. 2466, 2479 (2004)) with *In re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782*, No. 18-MC-561 (JMF), 2019 WL 917076, at *1 (S.D.N.Y. Feb. 25, 2019) (concluding that the legislative history did not support making discovery available in arbitration, and doing so would undermine one of the advantages of arbitration) (citing *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999)).

⁸ See, e.g. New York Civil Practice Law Rules § 7505 ("An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas"); *but see* California Code of Civil Procedure § 1283.1(b) (third-party discovery in arbitration is unavailable unless included in the arbitration agreement).

⁹ See *Dynergy Midstream Servs. v. Trammochem*, 451 F.3d 89 (2d Cir. 2006).

¹⁰ Cf. Don Baker, Ch. 40: Parallel Proceedings before the Arbitral Tribunal and the Courts, EU AND US ANTITRUST ARBITRATION (Gordon Blanke, Phillip Landolt, eds. 2011); *see also* Julian D. M. Lew, *Does National Court Involvement Undermine the International Arbitration Process*, AM. U. INT'L L. REV. Vol. 24 at 499-500 (noting that common law jurisdictions are more likely to enjoin parallel arbitral proceedings, whereas civil law jurisdictions are more likely to follow the *lis alibi pendens* (first to file) rule).

¹¹ See, e.g. *FTC v. Qualcomm*, No. C-17-00220 LHK (N.D. Cal.), trial transcript at 863:17-24 (discussing the accidental unsealing of the financial terms of an exclusivity agreement). While regulatory actions are not suitable for arbitration, the same sensitive commercial terms could also be relevant in a private dispute between parties.

A. General Protections in Arbitration

In some jurisdictions, local law¹² protects the confidentiality of documents and evidence produced or introduced in arbitration.¹³ Where confidentiality provisions are not included in domestic arbitration acts, some courts have nevertheless read in an implied right of confidentiality in arbitration.¹⁴

In many jurisdictions, parties can agree to additional confidentiality protections either in their arbitration clause or by selecting one of several institutional rules governing confidentiality (*See Table below*). Arbitral tribunals may also have authority to issue protective orders specifying what, if anything, may be discussed publicly regarding the arbitration and even identifying specific business people who can look at certain documents.¹⁵ In a competition law claim between two competitors, a protective order might be used, for example, to limit the number of people who can view commercially sensitive sales data or to designate certain documents “attorney’s eyes only.”

COMMON ARBITRATION RULES	
AAA	LCIA
<ol style="list-style-type: none"> 1. Tribunal can order exchange of confidential documents, and allocate costs or issue interim awards for non-compliance with procedural orders. 2. Pre-hearing checklist includes confidentiality measures. 3. AAA “takes no position on whether parties should or should not agree to keep the proceeding and award confidential.” 	<ol style="list-style-type: none"> 1. Emergency arbitrator may be appointed to decide urgent issues — including potential impact on document preservation. 2. Tribunal can order production of relevant documents and order compliance with any legal obligation. 3. Parties agree to keep awards and arbitration documents confidential; LCIA does not publish awards.
UNCITRAL	ICC
<ol style="list-style-type: none"> 1. Tribunal can order production of documents, including confidentiality measures. 2. Hearings shall be held in camera unless the parties agree otherwise. 3. Subject to confidentiality provisions, written submissions, transcripts and the award are made available to the public. 	<ol style="list-style-type: none"> 1. Tribunal can require or limit production of documents. 2. Tribunal can make orders concerning the confidentiality of the proceedings or make measures for protecting trade secrets or confidential information. 3. Work of the Court of Arbitration is generally confidential, though some awards may be made available to researchers.

While these types of orders can be effective, particularly where both parties have an equal interest in preserving confidentiality, available remedies for breach may be more limited and more difficult to obtain in arbitration than recourse for violation of a protective order issued by a court. For example, if a protective order issued in arbitration is breached, and the other party becomes aware of the breach during the course of the arbitration, the arbitral tribunal may impose monetary or other penalties — but could not order the breaching party to be jailed, as a judge could do when finding a party in contempt of court for breaches of a confidentiality order. Additionally, a party may need to apply to a court to en-

¹² Cross-border arbitrations can involve complicate choice of law issues, which are beyond the scope of this article. In general, the domestic laws of the arbitral seat, the law of the contract, and the law of any jurisdiction where evidence may be located may be relevant.

¹³ See, e.g. Quebec Civil Code of Procedure, 2014, c. 1, a. 4.; Spanish Arbitration Act 24.2.

¹⁴ See, e.g. *Emmott v. Michael Wilson & Partners*, [2008] EWCA (Civ) 184 (C.A.) (recognizing an “[a]n implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration” [interpreting English Arbitration Act of 1996]); *but see* Boris Kasolowsky and Carsten Wendler, *Commercial Arbitration: Germany*, *Global Arbitration Review* (April 2018) (“German commentators are still divided on whether a duty of confidentiality can be implied into an arbitration agreement.”).

¹⁵ See, e.g. UNCITRAL Art. 3.4; AAA R. 23.

force an order issued by an arbitral tribunal, thus adding to the complexity of obtaining relief. If a party does not become aware of the breach until *after* the arbitration has concluded and the tribunal has been dissolved, the remedies may be even more limited. In such a case the aggrieved party may be able to bring a claim for breach of contract, but damages may be difficult to quantify and the enforcement proceeding itself may pose confidentiality challenges. Moreover, the aggrieved party could not bring its claim in front of the same adjudicator who issued the protective order, and thus may face an authority less sympathetic to the protection of confidentiality.

B. Confidentiality Involving Third-Party Disclosure

One difficulty with non-party disclosure in arbitration is that, although there may be authority to obtain disclosure, the basis for enforcing confidentiality on those documents can be somewhat challenging. In a court proceeding, an interested party may apply directly to the presiding court requesting confidential treatment of sensitive documents and information. Some contracts even specify that one party must notify the other party of an impending disclosure of the agreement or related information so that the other party can seek the necessary confidentiality protections.

In arbitration, the non-party may not recognize the authority of the arbitral tribunal or arbitral institution, and may not even know the identity of the arbitrators, and therefore may be unable or unwilling to obtain relief within the auspices of the arbitration. In such a case, the non-party may nevertheless seek protection from a court. There are two challenges to non-parties to arbitration seeking heightened confidentiality protections from a court: (1) the confidentiality rules in court may differ from those applied in arbitration; and (2) the public nature of the court proceeding on confidentiality may be detrimental to the arbitration.

Common bases for requesting confidential treatment that may be relevant in the context of competition include trade secret protections and contractual agreements such as NDA's, both of which could equally apply in arbitration. The tension here is that a court may apply a different — and potentially higher — threshold for designating information confidential than the arbitral tribunal. This is not only administratively burdensome for the parties, but also risks conflicting orders regarding the level of confidential treatment of the same or similar evidence. This is particularly relevant where the non-party is a competitor, and may be unwilling to forego legally binding confidentiality protections before disclosing documents. In such a case, the parties to the arbitration may consider offering to enter a binding non-disclosure agreement with the non-party, so as to avoid the need for a protective order.

Court proceedings related to confidential matters in arbitration are problematic, because in many cases the fact of the arbitration is itself confidential. A public filing seeking confidentiality protection for documents disclosed in an arbitration may reveal facts related to the arbitration, thereby undermining the expectation of confidentiality of the parties to the arbitration. In the U.S., a non-party to an arbitration seeking to protect confidentiality of certain documents could ask for leave to file their request for a protective order under seal so as not to reveal the existence of the arbitration. However, this puts the onus on a party that is *not* party to the arbitration, and therefore may be less concerned about maintaining the confidentiality thereof. Furthermore, it is not clear that all courts would accept such a request. Courts have in the past required that filings related to arbitrations be filed publicly, even where doing so would reveal the existence of an otherwise confidential arbitration. For example, enforcement proceedings for arbitral awards are usually public¹⁶ (though parties may apply for protective orders for particularly sensitive information contained in the award).

C. Emerging Issues

In recent years, there have been efforts to improve transparency in arbitration.¹⁷ For example, U.S. patent law mandates that notices of arbitral decisions pursuant to a “contract involving a patent or any right under a patent” be filed with the Patent and Trademark Office for inclusion in the prosecution history.¹⁸ 35 U.S.C. 294; 37 CFR 1.335. Some have called for similar publication requirements of arbitral decisions in FRAND rate

¹⁶ See New York Convention Art. IV.

¹⁷ UNCITRAL, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective Apr. 1, 2014).

¹⁸ In practice, these notices are rarely filed. See Mark R. Patterson, *Confidentiality in Patent Dispute Resolution: Antitrust Implications*, 93 WASH. L. REV. 827, n. 50 (2018) (noting an informal inquiry found less than a handful of such filings per year). U.S. federal law does not establish a deadline for filing the notice, and currently the only consequence is that the award is unenforceable *until* such notice is filed. 37 CFR 1.335. Thus, the practical impact of the notice requirement is minimal, given that parties could theoretically wait to file the notice with the PTO if and until enforcement proceedings are filed — at which point the decision would already become public record.

arbitrations, arguing that the information is of critical importance to other market participants.¹⁹ Similar arguments could be made concerning the arbitration of competition law claims. However, efforts to promote transparency have generally recognized the need to protect confidential business information from public disclosure.²⁰ In any case, arbitration still offers greater opportunities to preserve confidentiality than court litigation because generally only the award must be filed, rather than large portions of the pleadings or evidence presented in the proceedings.

V. CONCLUSION

Decisions about dispute resolution forums are not just about the applicable law or the fairness of the adjudicator: there can be serious consequences regarding the evidence necessary to prove a claim. Disclosure from non-parties may be more difficult to obtain in arbitration, whereas the confidentiality of evidence exchanged between the parties may be protected more easily. In any case, evidentiary issues should be considered by parties weighing entering into an arbitration agreement, or considering dispute resolution strategies for competition law claims. Arbitration of competition law claims is still a fairly recent development, and as more such arbitrations occur, parties and practitioners will discover new challenges, and hopefully — solutions.

¹⁹ JORGE L. CONTRERAS & DAVID L. NEWMAN, *Developing a Framework for Arbitrating Standards-Essential Patent Disputes*, 2014 J. DISP. RESOL. 23, 39-41, at 41; Mark Patterson, *Confidentiality in Patent Dispute Resolution*, at 833.

²⁰ *Id.*

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.

