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Reviewing Arbitration Awards for Competition Law Violations: A Playbook for Courts Implementing the New York Convention

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**REVIEWING ARBITRAL AWARDS FOR COMPETITION LAW VIOLATIONS:
A PLAYBOOK FOR COURTS IMPLEMENTING THE NEW YORK CONVENTION**

William R. Schubert¹

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INTRODUCTION:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) makes international dispute resolution easy, but this can come at the expense of effective competition law enforcement. Specifically, the Convention creates a risk that parties can break national competition laws under the guise of enforceable arbitral awards. The Convention framework provides the tools necessary to anticompetitive agreements legal force, while keeping the underlying competition law issues hidden from the award itself and the merits of the case. Further, the flexibility of the Convention regime makes it rather easy for parties to evade judicial scrutiny of the award in the jurisdiction where an underlying competition law violation takes place.

From the perspective of national courts implementing the New York Convention, protecting national competition law from these sorts of “hidden” violations is difficult. This article will discuss how national courts implementing the New York Convention have tried to mitigate this risk, and will recommend the best ways to do so going forward.

This article consists of four Parts. Part I provides an overview of the New York Convention framework for recognizing and enforcing international awards. Part II discusses the key national court decisions – mostly in the United States and the European Union – regarding the interface of the Convention and the interests of competition law. It specifically discusses the case law on: the arbitrability of competition law; the limited application of the public policy exception as a tool to

protect competition law interests; and the standard of review applicable to awards that allegedly authorize competition law violations. Part III discusses the extent to which international commercial arbitrators are able to uncover “hidden” competition law problems. Part IV offers a set of conclusions and policy recommendations for national courts seeking to protect competition law from “hidden” violations in a manner consistent with the Convention.

I. FRAMEWORK UNDER THE NEW YORK CONVENTION

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention” or “Convention”) requires signatory states to honor written agreements to resolve disputes by arbitration² and to give effect to international arbitration awards,³ subject to a limited set of exceptions defined in the treaty.⁴

The Convention applies to international awards, defined as arbitral awards “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought [,]” or “arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”⁵ The Convention generally applies to awards meeting these criteria, although there are two

² See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), June 10 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046, 21 U.S.T. 2517, Art. II(1) (“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”)

³ See New York Convention, Art. III.

⁴ See *id.* Art. V (enumerating limited exceptions to the duty to enforce awards.)

⁵ *Id.* Art. I(1).

possible reservations that signatory states can make in their arbitration legislation to potentially narrow this scope.⁶

The Convention framework is said to have a strong bias in favor of recognizing and enforcing arbitral awards as binding and final.⁷ This is consistent with two important expectations cited by private parties as reasons for contracting to arbitrate under the Convention: (1) having a presumably neutral forum to decide the dispute (rather than a national court located where one party resides); and (2) receiving an award that will be enforceable at law.⁸ Under the Convention framework, parties can demand that national courts protect these contract-based expectations by: (1) ordering the parties to resolve arbitrable subject matter pursuant to an agreement covered by the Convention⁹; and (2) recognizing and / or enforcing an arbitral award covered by the Convention.¹⁰

⁶ The first possible reservation is based on reciprocity: a signatory State may specify that the Convention only applies to awards presented for recognition or enforcement within its jurisdiction that were made in the territory of another contracting State. New York Convention, Art. I(3). The second potential reservation is based on subject matter: a State may condition recognition and enforcement in its national courts on a determination that the underlying legal relationship meets the definition of a “commercial” relationship under national law. *Id.*

⁷ See, e.g., ALAN REDFERN, J. MARTIN HUNTER, et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 11.39 (5th ed. Oxford Univ. Press 2009) (“Enshrining as it does a strong pro-enforcement policy, the New York Convention provides for the recognition and enforcement of foreign arbitral awards by national courts subject to a handful of procedural and substantive grounds for objecting to enforcement that are intended to be limited in scope.”); JULIAN D. M. LEW, LOUKAS A. MISTELIS, et al., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION § 26.2 (Kluwer Law Int’l 2003) (“There is an international policy favouring enforcement of awards.”)

⁸ See Christian Buhring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes*, in CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION 31 (2005).

⁹ See New York Convention, Art. II(2) (“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”)

¹⁰ See *id.* Art. IV (setting forth procedure for recognition and enforcement of award upon presentation of award and arbitration agreement to the court in a signatory state) and Art. V (enumerating limited exceptions to duty to recognize and enforce awards).

This Part contains two sections. The first section will review the Convention’s general framework requiring recognition and enforcement of international arbitral awards, and the limited grounds for challenging awards (or resisting recognition and enforcement). The second section will specifically review the “public policy” exception to the duty to recognize and enforce awards under the Convention. It will outline how treaty and national law define the public policy exception, and discuss how the national courts reviewing international awards under the Convention tend to apply it.

A. RULES FOR NATIONAL COURTS REVIEWING AWARDS

This section will provide an overview of the New York Convention framework for recognition and enforcement of international arbitral awards, and the limited defenses that can be used to challenge or resist enforceability of awards.

1. Recognizing and Enforcing International Arbitral Awards

As stated above, national courts in signatory states must recognize and enforce international arbitral awards consistent the Convention’s requirements.¹¹

Recognizing and enforcing an arbitral award essentially means treating it as legally binding and executable under same procedures used to enforce court judgments under national law.¹² Although practitioners sometimes use the terms “recognition” and “enforcement” as if they were interchangeable (for example, “enforcement proceedings” often refer to situations where petitions “to recognize and enforce” arbitral awards are before the national courts), the two terms have distinct legal meanings.¹³ When a court recognizes an arbitral award, it declares that the award is valid and binding on the parties.¹⁴ Recognition of an award establishes that the issues decided in the arbitration proceedings (i.e., the issues underlying the award) have *res*

¹¹ *See supra* notes 2-3.

¹² MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 211-212 (2d. ed. 2012)

¹³ *See id.*

¹⁴ *Id.* at 212.

judicata effect and cannot be relitigated or rearbitrated.¹⁵ The exact meaning of “enforcement” may vary by jurisdiction.¹⁶ In some jurisdictions, enforcement is the legal action taken by the court to reduce the arbitral award to a judgment against a person over which a court has jurisdiction.¹⁷ Some jurisdictions use the term to refer to the subsequent execution of the award – for example, the actions taken to collect the losing party’s funds in order to satisfy the judgment.¹⁸ In simplified terms, recognizing and enforcing an award refers to making the award legally binding and executable against the party-debtor under the laws and procedures of the forum.¹⁹

The strength of the general duty to recognize and enforce international arbitral awards appears to be underscored by a high rate of voluntary compliance and (to the extent necessary) judicial recognition and enforcement. One empirical study estimated, for example, that “voluntary compliance combined with court enforcement results in 98 percent of international arbitration awards being paid or otherwise carried out.”²⁰ Further, commentators have noted that voluntary compliance – without the need for the winning party to initiate enforcement proceedings – seems widely expected as a matter of common practice.²¹

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ MOSES, *supra* note 11 at 217 & n. 34 (citing Michael Kerr, *Concord and Conflict in International Arbitration*, ARB. INT. 121, 128, n. 24 (1997)).

²¹ GARY B. BORN, INTERNATIONAL ARBITRATION 2893 (2d ed. 2014) (“the vast majority of awards in international commercial arbitrations are voluntarily complied with, without the need for post-award enforcement proceedings.”); *but see* REDFERN & HUNTER, *supra* note 6 § 11.02 (stating that although the available statistics suggest that voluntary compliance is the norm in practice, gauging the reliability of these statistics is difficult because arbitration is inherently private and arbitral tribunals do not necessarily know whether or not their awards are eventually carried out).

In the event that voluntary compliance does not occur, the Convention framework allows a party-creditor to initiate enforcement proceedings before a national court in any country that can assert jurisdiction over the award²² and the party-debtor (e.g., based on the party-debtor's reachable assets in the jurisdiction)²³. As discussed below, the rules and procedures for achieving recognition or enforcement of an international award in a national court are designed to be simple and non-discriminatory. The party-creditor seeking recognition or enforcement of the international award must supply the national court with: "(a) [t]he duly authenticated original award or a duly certified copy thereof; [and] (b) [t]he original agreement . . . or a duly certified copy thereof."²⁴ It must also produce a certified translation of the award if it is not in the official language of the country in which the petition is brought.²⁵ National legislation may impose additional form requirements for arbitral awards,²⁶ but these are generally non-controversial and will not preclude eventual

²² In other words, the national court must be in a country that has signed the Convention and the award must be governed by the Convention (and not subject to either of the two reservations permitted under national law). See notes 4-5, *supra* and accompanying text.

²³ See REDFERN & HUNTER, *supra* note 6 § 11.14 ("Enforcement usually takes place against assets.") See also MOSES, *supra* note 11 at 214. ("Presence of the award debtor's assets in that state will usually suffice to provide a jurisdictional basis for the enforcement of the award under the Convention." There is some questionable precedent in United States courts that has required that the losing party's assets be connected to the dispute to assert jurisdiction. See *Base Metal Trading Ltd. V. OJSC ("Novokuznetsky Aluminum Factory")*, 283 F.3d 208 (U.S. Court of Appeals, 4th Cir. 2002), *cert. denied*, 537 U.S. 822 (2002). The reasoning in *Base Metal* has been widely criticized, however. See MOSES, *supra* note 11 at 214-15.

²⁴ New York Convention, Art. IV(1).

²⁵ *Id.* Art. IV(2).

²⁶ See, e.g., United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1302 (1985) (with amendments as adopted in 2006), available at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html ("UNCITRAL Model Law"), Art. 31. Article 31 UNCITRAL Model Law provides that the award: (1) "be made in writing" and "be signed by the arbitrator or arbitrators[;]" (2) "state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms[;]" and (3) "state its date and the place of arbitration . . . [;]" and (4) be delivered to each party after the final award has been made.

enforcement in practice.²⁷ As for the procedures used by the court, Article III of the Convention contains a “national treatment” standard.²⁸ Specifically, Article III requires national courts implementing the Convention to recognize and enforce international arbitral awards “in accordance with the rules of procedure of the territory where the award is relied upon” without imposing any “substantially more onerous conditions or higher fees or charges . . . than are imposed on the recognition or enforcement of domestic arbitral awards.”²⁹

2. Limited Defenses to Awards

The grounds and procedures for defending against an award – i.e., petitioning a national court to recognize an exception that could make the award unenforceable at law – under the Convention are discussed below.

a. Defenses

Defenses to awards generally include the seven exceptions to the duty to recognize and enforce awards specified in Article V of the Convention. (These seven exceptions appear in almost identical form in Articles 34(2) and 36(1) of the UNCITRAL Model Law, which enumerate limited grounds for annulment and denial of recognition and enforcement, respectively).

The first five of these exceptions are found in Article V(1) of the Convention. In sum, the Article V(1) defenses are that: (a) the agreement to arbitrate is invalid or the parties lacked capacity; (b) a party has not been given fair notice of the arbitration or opportunity to present its case; (c) the arbitrator has exceeded its authority; (d) the proceedings have been carried out inconsistently with the parties’ agreement; and (e)

²⁷ See BORN, *supra* note 20 at 3031 (“states have in practice virtually never invoked the form requirements of the arbitral seat (or of the judicial enforcement forum) as grounds for denying recognition to foreign arbitral awards.”)

²⁸ See BORN, *supra* note 20 at 3407 (describing Article III as adopting “a general non-discrimination principle, requiring that Contracting States treat Convention awards no less favorably than domestic awards.”)

²⁹ New York Convention, Art. III.

the award is not yet binding or has been set aside.³⁰ The five Article V(1) exceptions are defenses per se, as the language makes clear that the exceptions can only apply if the party resisting recognition or enforcement “furnishes [to the court] . . . proof” establishing an exception.³¹

Article V(2) of the Convention provides two other exceptions, which relate to the lawfulness of the arbitration proceedings. It states that a national court also may refuse recognition or enforcement if “[the court] finds that” either: “(a) [t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) [t]he recognition or enforcement of the award would be contrary to the public policy of that country.”³²

b. Procedures for raising defenses

Attacks on arbitral awards can come in two distinct ways: (1) in a petition to annul the award (before the national court in the same jurisdiction in which the arbitration took place); and (2) as a defense raised in enforcement proceedings (before the national court reviewing a petition seeking recognition and / or enforcement of the award). As discussed below, annulment proceedings are legally distinct from enforcement proceedings and annulment does not necessarily preclude subsequent recognition and enforcement.

i. Annulment vs. refusal to recognize / enforce

Because the Convention identifies the limited grounds for refusing recognition or enforcement but does not expressly state the grounds for annulment, the scope of the

³⁰ See New York Convention, Art. V(1)(a)-(e), respectively.

³¹ See *id.* Art. V(1) (“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that”)

³² *Id.* Art. V(2). Uniquely, the language implies that national courts can recognize the two Article V(2) exceptions *sua sponte*, and not just upon the motion of a party that furnishes proof of an exception.

grounds for annulment permitted under the Convention is open to some debate.³³ In many cases, national arbitration laws recognize limited grounds for annulling awards that parallel the bases for refusing recognition or enforcement under Article V of the Convention identified above.³⁴ Over 70 states follow the UNCITRAL Model Law,³⁵ under which the permissible grounds for annulment parallel the permissible grounds for recognition and enforcement enumerated in Article V of the Convention.³⁶ Further, many national courts have concluded that the New York Convention *impliedly* limits the bases for annulment to issues of jurisdiction and procedural fairness.³⁷ However, in national courts, the grounds for annulling awards in national courts could potentially be broader than the potential grounds for denying recognition and enforcement.³⁸

ii. *Effect of annulment on enforcement proceedings unclear*

In cases where the court in the seat of the arbitration annuls an award, the annulment does not necessarily prohibit courts in other jurisdictions from recognizing or enforcing the award. Some national court decisions (for example, in France, Austria,

³³ For thorough discussion of how national courts have distinguished between the permissible grounds for annulling awards and the permissible grounds for refusing recognition or enforcements, see BORN, *supra* note 20 at 3164-72.

³⁴ *Id.* at 3163. For example, over 70 states follow the Model Law (MOSES, *supra* note 11 at 203), under which the permissible grounds for annulment parallel the permissible grounds for recognition and enforcement based on Article V of the New York Convention (*see* UNCITRAL Model Law, Art. 34).

³⁵ MOSES, *supra* note 11 at 203.

³⁶ *See* UNCITRAL Model Law, Art. 34. This provision provides that six of the seven grounds enumerated in Article V of the Convention (as grounds for refusing to recognize or enforce an award) are also grounds for annulment in the seat of arbitration. Naturally, Article 34 of the UNICITRAL Model Law leaves out the ground stated in Article V(1)(e) of the Convention (“The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”).

³⁷ BORN, *supra* note 20 at 3168 (“[A]lthough it is true that the Convention does not expressly limit the scope of national court review of awards in annulment actions, in Article V or elsewhere, the correct view is that the Convention does so indirectly by requiring Contracting States to recognize agreements to arbitrate (in Article II) and to treat awards consistently with the basic attributes of such instruments.”)

³⁸ BORN, *supra* note 20 at 3164.

Belgium, and the United States) have recognized and enforced awards notwithstanding prior annulment in the seat of arbitration.³⁹ Other decisions (including decisions in the United States) have declined recognition and enforcement in light of prior annulment in the seat of arbitration.⁴⁰ It is beyond the scope of this article to attempt to distinguish between the circumstances in which national courts should defer to prior annulment decisions and when they should offer no such deference. That is a complex issue best addressed in other literature.⁴¹ For purposes of this article, it suffices to say that a party could still enforce an international award notwithstanding annulment, and that the likelihood of doing so may turn on the legal position adopted in the jurisdictions of possible enforcement (e.g., in countries in which the losing party has assets).

B. THE PUBLIC POLICY EXCEPTION

This Section will discuss the “public policy” exception specifically, as the application of this exception in national courts is a major part of the analysis in Parts II, III, and IV of this article. It will introduce the key sources of the exception under the Convention and national law. It will then explain the approaches that the national courts take when applying the exception to international awards (i.e., awards governed by the Convention⁴²). As discussed below, national courts overwhelmingly tend to interpret the exception narrowly in cases involving international awards. However, issues such as the proper standard and scope of review remain relatively unsettled among national courts.

³⁹ *Id.* at 3621-22 & n.1146 (collecting cases).

⁴⁰ *Id.* at 3622 & n.1148 (collecting cases).

⁴¹ See, e.g., Francisco González De Cossío, *Ejecución de Laudos Anulados: Hacia una Mejor Aproximación Analítica*, 21 REVISTA DEL CLUB ESPAÑOL DEL ARBITRAJE 37 (2014); Christopher Koch, *The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience* 26 J. INT’L ARB. 267 (2009); BORN, *supra* note 20 at 3621-3645.

⁴² For purposes of this article, one can presume that the term “international award” refers to an award governed by the Convention.

1. Sources of Exception

a. Treaty Law

The public policy exception appears in the language of Article V(2)(b) of the Convention. Article V(2)(b) of the Convention states that recognition and enforcement of an international arbitral award may be refused where the court “in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country.”⁴³ As discussed below, the national courts tend to define the public policy exception narrowly and to apply it sparingly in the context of both annulment proceedings and enforcement proceedings.⁴⁴

b. National law

National arbitration laws and court decisions may further define the public policy exception on the national plane.

In jurisdictions that use the UNCITRAL Model Law provisions, the public policy exception is defined almost identically as in Article V(2)(b) of the Convention. Specifically, the UNCITRAL Model Law, like the Convention, defines the public policy exception through the lens of national law (it requires an award to be in conflict with “the public policy of *this State*”).⁴⁵ The UNCITRAL Model Law also makes clear that the same formulation of the public policy exception applies as a defense in both annulment proceedings (where a court finds that the arbitral award entered within its jurisdiction

⁴³ New York Convention, Art. V(2)(b).

⁴⁴ BORN, *supra* note 20 at 3316-17. (The concept of public policy in the two settings clearly has close parallels, and some authorities have held that the two concepts are identical. . . . Nonetheless, there is a substantial argument that public policy, for purposes of recognition under the New York Convention, should be even more circumscribed than that in an annulment action under national law.”) At least one national court has expressly stated that the public policy exception is identical in both contexts. *See also* *AJU v. AJT*, [2011] SGCA 41, ¶37 (Singapore Ct. App. 2011) (“there is no difference between these two regimes as far as the concept of public policy is concerned[.]”)

⁴⁵ *See* UNCITRAL Model Law, Arts. 34(2)(b)(ii) & 36(1)(b)(ii). *Compare* New York Convention, Art. V(2)(b) (stating that the national court may refuse recognition or enforcement of the award when it finds that doing so “would be contrary to the public policy of that country.”)

“is in conflict with the public policy of this State”⁴⁶) and enforcement proceedings (where the court finds that recognition or enforcement “would be contrary to the public policy of this State.”⁴⁷).

National law may, of course, add to the formulation of the “public policy” exception within the Convention framework. One rather interesting illustration of this is the development of so-called “international public policy” in some national arbitration laws,⁴⁸ and in an overwhelming number of national courts.⁴⁹ At first glance, recognizing “international public policy” as distinct from “domestic public policy” might seem inconsistent with Article V(2)(b) of the Convention (which requires a conflict with “the public policy of *that country*”). In practice, however, the recognition of “international public policy” (as distinct from “domestic public policy”) tends to limit the reach of the public policy exception under the Convention.⁵⁰ This phenomenon is discussed in more detail in the next subsection.⁵¹

2. Restrictive application of the exception

Showing that an international arbitral award violates public policy so as to justify annulment or refusal to recognize or enforce an award is extremely difficult, and the vast majority of attempts to do so fail in practice.⁵² Given the pro-enforcement policy

⁴⁶ UNCITRAL Model Law, Article 34(2)(b)(ii).

⁴⁷ UNCITRAL Model Law, Article 36(1)(b)(ii).

⁴⁸ BORN, *supra* note 20 at 3655 & nn. 1327-28 (citing national arbitration law provisions recognizing “international” public policy in France, Portugal, Algeria, Romania, and Lebanon).

⁴⁹ *Id.* at 3655 (stating that national courts have overwhelmingly developed concepts of “international public policy” through case law, even in the absence of national legislation recognizing the term).

⁵⁰ *See id.* at 3655. *See also* Mary Lu, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 ARIZ. J. INT’L & COMP. L. 747, 772 (2006) (“In practice, courts are more likely to recognize the public-policy defense if the award is domestic rather than foreign.”)

⁵¹ *See* Part I(B)(2)(b), *infra*.

⁵² *See* MOSES, *supra* note 11 at 229.

underlying the Convention, most national courts use the exception very sparingly when asked to review international arbitral awards.⁵³ As discussed below, this is due to both the narrow definition of “public policy” and additional international considerations tending to limit the use of the exception against international arbitral awards.

a. Narrow definition: policy must be clear, mandatory, and fundamental

National courts define violations of public policy in very limited terms. Generally speaking, national courts will not conclude that a violation of public policy occurred unless the policy supposedly violated by the international arbitral award meets three requirements, which are discussed below: (i) the public policy should be clearly defined based on real sources of law; (ii) it should be mandatory in application; and (iii) it should be part of the forum’s fundamental conceptions of justice.

Turning to the first of these three requirements, the public policy supposedly violated should have a clear legal basis. It is not enough for the court to conclude that enforcing the arbitral award will produce a fundamentally unfair result; instead, the violation of public policy needs to be apparent based on real sources of law.⁵⁴ For example, in the words of the U.S. Supreme Court, violations of public policy must be “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”⁵⁵

Second, only mandatory legal norms can constitute “public policy.” In other words, enforcing the arbitral award would need to violate a legal rule that the parties were not free to disregard by private contract.⁵⁶ Many rules of national public law – for example, tax law requirements, environmental regulations, and criminal statutes – may

⁵³ *Id.* at 228; Lu, *supra* note 49 at 772.

⁵⁴ See BORN, *supra* note 20 at 3663-64.

⁵⁵ *WR Grace & Co. v. Rubber Workers*, 461 US 757, 766 (U.S. Supreme Court, 1983) (quoting *Muschany v. United States*, 324 U. S. 49, 66 (U.S. Supreme Court, 1945).

⁵⁶ See BORN, *supra* note 20 at 3327.

be mandatory, as long as the national law does not allow private parties otherwise subject to the rules to contractually exclude their application.⁵⁷

Third and perhaps most importantly, it is not enough to violate a mandatory norm; the norm must also be part of the forum country's basic or fundamental notions of justice.⁵⁸ National court decisions have stressed this point. For example, the U.S. Court of Appeals for the Second Circuit has stated that the public policy exception only applies "where enforcement would violate the forum state's most basic notions of morality and justice."⁵⁹ Similarly, the Hong Kong Court of Final Appeal has defined violation of public policy as one that is "contrary to the fundamental conceptions of morality and justice of the forum."⁶⁰

b. International considerations and limits

As noted above, the language in the Convention and the Model Law appear to define the public policy exception through the lens of the forum's national law.⁶¹ However, this does not mean that the national courts implementing the Convention apply the exception solely based on domestic law, without weighing international considerations favoring the enforcement of foreign awards. Based on international considerations, national courts have tended to apply the public policy exception in cases

⁵⁷ See *id.* (stating the same proposition inversely) ("provisions of commercial (or other) law out of which the parties are free to contract will not provide the basis for a public policy objection to an award.").

⁵⁸ See *id.*

⁵⁹ *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969 (U.S. Court of Appeals, 2d Cir. 1974).

⁶⁰ *Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co.*, XXIVa Y.B. Comm. Arb. 652, 667 (Hong Kong Court of Final Appeal, 1999).

⁶¹ See New York Convention, Art. V(2)(b) (national court may refuse recognition or enforcement of the award when it finds that doing so "would be contrary to the public policy of that country."); UNCITRAL Model Law, Art. 34(2)(b)(ii) (exception applies in annulment proceedings where the court finds that the arbitral award "is in conflict with the public policy of this State."); UNCITRAL Model Law, Art. 34(3)(1)(b)(ii) (exception applies as a defense in enforcement proceedings where the court finds that recognition or enforcement "would be contrary to the public policy of this State.").

involving international awards (i.e., those governed by the Convention), than in cases involving domestic awards.⁶²

Several formulations of the term “international public policy” exist, but most of them – perhaps with the exception of “transnational public policy” or “truly international public policy”⁶³ – fit within the definition that appears in Article V(2)(b) of the Convention. Generally speaking, “international public policy” tends to be a narrower concept than “domestic public policy.”⁶⁴ For example, one formulation of “international public policy” limits the exception only to violations of mandatory norms that are “consistent with international principles recognized in various nations as constituting vital public policies.”⁶⁵ A second formulation of “international public policy” with a limiting effect requires that the norm being violated is sufficiently important to warrant rejection of an award in the international context.⁶⁶ As a decision by the Hong Kong Court of Final Appeal stated, this would mean extending the exception only to:

“[T]hose elements of a State’s own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to

⁶² See BORN, *supra* note 20 at 3655; REDFERN & HUNTER, *supra* note 6 § 10.84; Lu, *supra* note 49 at 772.

⁶³ “Transnational public policy” refers to a body of norms that would supposedly apply based on universal acceptance on the international plane. See BORN, *supra* note 20 at 3656-3657; Lu, *supra* note 49 at 772. Without something more to anchor its application to the national level (i.e., the “public policy” recognized by the appropriate judicial forum), this proposed definition seems to expand the scope of the public policy exception beyond what the Convention contemplates. Accord Lu, *supra* note 49 at 772 (stating that transnational public policy is difficult to apply because “international consensus is debatable at best[,]” and that consequently, [t]he New York Convention refers to the public policy of the country where enforcement is sought rather than to transnational public policy.”)

⁶⁴ See BORN, *supra* note 20 at 3655; REDFERN & HUNTER, *supra* note 6 § 10.84; Lu, *supra* note 49 at 772.

⁶⁵ BORN, *supra* note 20 at 3657.

⁶⁶ See *id.* at 3658. Born has suggested that a sound approach, consistent with the Convention, would be to limit the exception to “only those national public policies which mandatorily demand application to international matters[.]” *Id.*

purely internal matters but even to matters with a foreign element by which other States are affected.”⁶⁷

Third and finally, “international public policy” may be defined to reach violations of the law of another jurisdiction, provided that allowing the foreign law to be violated would undermine the forum state’s own fundamental notions of justice.⁶⁸ In practice, courts using this third formulation may combine it with elements from the first and second formulations described above to produce a limiting effect.⁶⁹

3. Standard of Review

National courts do not agree on what standard of review applies when awards governed by the Convention allegedly conflict with public policy. For example, the courts (and commentators) have reached different conclusions on whether a court must defer to an arbitral tribunal where the arbitral tribunal has reached the public policy issue being raised before the court.⁷⁰ On one end of the spectrum, many national courts have given a high level of deference to the conclusions of the arbitral tribunal on the merits of the case, including decisions as to whether the award itself violates public policy.⁷¹ A simple explanation of this approach is that so long as the arbitral tribunal

⁶⁷ *Hebei Imp. & Exp. Corp. v. Polytek Eng’g Co.*, XXIVa Y.B. Comm. Arb. 652, 675 (Hong Kong Court of Final Appeal, 1999).

⁶⁸ See BORN, *supra* note 20 at 1365-66 (concluding that this approach is consistent with the Convention, although it must be applied carefully).

⁶⁹ For example, in the case of *Tensacciai v. Freyssinet Terra Armata*, 24 ASA Bull. 550, 555 (Supreme Court of Switzerland, March 8, 2006) the Swiss Supreme Court defined “international public policy” as encompassing “those essential and widely recognised values which, according to the prevailing values in Switzerland, should be the founding stones of any legal order.” The case is discussed in Part II(C)(2), *infra*.

⁷⁰ The discord among national courts about the appropriate standard of review is discussed in Part II(D) *infra* in the context of alleged competition law violations underlying awards.

⁷¹ See BORN, *supra* note 20 at 3692-93 & nn. 1511-1512 (and cases cited therein). A good illustration of this approach is found in *Baxter Int’l v Abbott Laboratories*, 315 F.3d 829 (U.S. Court of Appeals, 7th Cir. 2003). Other cases in which national courts reviewed legal issues pertaining to public policy with a high level of deference are discussed in Part III(D)(1)(a) *infra*, as illustrations of the “minimalist” approach to reviewing competition law issues.

has reached an issue and made a decision on it, the court must accept that decision.⁷² On the other end of the spectrum, some decisions in national courts have reviewed *de novo* the conclusions of arbitrators regarding public policy issues.⁷³

4. Scope of Review

Despite disagreement over the standard of review, it is clear enough that mere errors by the arbitral tribunal in its decision-making do not – without more – invoke the public policy exception.⁷⁴ Instead, the test is whether the actual enforcement of the award would violate the forum’s recognized public policy.⁷⁵ Given this requirement, however, there is some ambiguity about the permissible scope of review – i.e., what evidence a national court may consider to ascertain whether enforcing the award would violate public policy.

There seem to be two ways in which a court could ascertain a public policy violation: (1) by looking solely at the relief granted in the award itself (without considering any other part of the arbitral tribunal’s record); and (2) by determining the effect of the award based on the context of the parties’ substantive positions and the relevant parts of the record. Turning to the first possibility, in some cases a court could ascertain a public policy violation based on the remedy ordered in the arbitral award, alone.⁷⁶ For example, an award could violate public policy by ordering punitive damages when the relevant forum (i.e., in the seat of the arbitration or the place of

⁷² See *Baxter*, 315 F.3d at 831.

⁷³ See BORN, *supra* note 20 at 3692-93 & nn. 1510, 1513 (and cases cited therein). Other cases in which national courts reviewed legal issues pertaining to public policy without deferring to the arbitral tribunal are discussed in Part III(D)(1)(b) *infra*, as illustrations of the “maximalist” approach to reviewing competition law issues.

⁷⁴ BORN, *supra* note 20 at 3667 (collecting cases) (national courts have “repeatedly made clear that erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.”) The same principle holds with respect to erroneous findings of fact. *Id.* at 3668.

⁷⁵ *Id.* at 3319.

⁷⁶ See BORN, *supra* note 20 at 3689-90.

enforcement proceedings) considers such damages to be unconstitutional. Assuming the illegal remedy is apparent on the face of the award, the court would not need to examine anything other than the award to ascertain the public policy violation. In a second type of situation, however, the violation would need to be ascertained based on the context of the parties' legal positions and how the arbitral tribunal decided them.⁷⁷ For example, an award could order expectation damages based on the losing party's failure to perform criminal conduct as required by contract. Assuming there is nothing on the face of the award indicating the illegality of the underlying performance, the court would need to consider other parts of the record to conclude that the award violates public policy. The prevailing view appears to be that the scope of review may extend to the substantive positions of the parties and the reasoning of the tribunal, as necessary to cover the second type of scenario.⁷⁸ However, interpreting the scope of review in this way arguably blurs the line between examining the merits of the case (which, in theory, the arbitral tribunal decides without judicial interference) and merely determining the result of recognizing or enforcing the award (which is the responsibility of the national court).⁷⁹

⁷⁷ See *id.* at 3689-90.

⁷⁸ See *id.* at 3690 ("[T]he better view is . . . [that] an award cannot be recognized if it rests on substantive claims or decisions which are fundamentally contrary to mandatory legal principles of the forum: any other result would require the recognition and enforcement of awards based on abhorrent laws (e.g., permitting slavery, drug trafficking or bribery), which is unacceptable.") Accord Reinmar Wolff, *Article V(2)(b)*, in *NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: COMMENTARY* 402, 414 (R. Wolff ed. 2012) ("The recognition and enforcement of an award can violate public policy not only because of the award's operative part but also because of its reasoning and/or the underlying dispute."). See also 2012 *Schieds VZ*, 161, 165 (Oberlandesgericht Köln, June 28, 2011) (violation of public policy occurs where award was rendered in proceedings that "obviously differs from the fundamental principles of German procedural law" and "violate the fundamental foundations of the legal system").

⁷⁹ See Paolo Michelle Patocchi, *The 1958 New York Convention: The Swiss Practice*, in *THE NEW YORK CONVENTION OF 1958* 145, 187 (M. Blessing ed. 1996) ("[I]t is neither the reasons stated in the award, nor the legal principles applied in the award which are relevant, but solely the practical consequences brought about by enforcement[.]")

II. COURT DECISIONS ON ARBITRATION AND COMPETITION LAW

This Part discusses the case law on the power of national courts reviewing international arbitral awards to interfere with enforceability in order to protect the interests of competition law.

Typically, the national arbitration statutes implementing New York Convention obligations do not specifically address how courts must treat competition law issues arising from arbitral awards. The UNCITRAL Model Law, for example, does not answer these questions:

- What are the situations in which competition law violations may underlie arbitral awards (and which situations are most dangerous to competition law enforcement)?
- Are competition law issues arbitrable subject matter?
- When an award authorizes conduct that violates a mandatory rule of a country's competition law, does it violate public policy?
- What standard of review, if any, applies to an arbitral tribunal's determinations of competition law issues?

This Part will discuss the case law, particularly in the European Union and the United States, addressing these types of questions.

The discussion in this Part is divided into four sections. The first section will identify and discuss the two distinct contexts in which competition law violations could underlie international arbitration awards. The second section will discuss the case law in national courts recognizing that competition law issues are arbitrable. The third section will discuss the case law in national courts regarding treatment of competition law as public policy under the Convention. The fourth section will discuss the case law on the applicable standard of review when a party alleges that an award conflicts with public policy based on an underlying violation of competition law.

A. INTRODUCTION / CONTEXT

Arbitral awards may authorize conduct that violates competition law for two distinct reasons: (1) incorrect decision-making; or (2) unraised or "hidden" violations.

As discussed below, the second possibility seems to pose a much greater danger to the interests of enforcing competition law than the first.

Turning to the first possibility, a competition law violation could result from the arbitral tribunal's incorrect rejection of a claim or defense that alleged the violation (or a "false negative").⁸⁰ However, there is little reason to assume that arbitrators lack the ability to resolve competition law issues correctly, or that they statistically tend to err on the side of rejecting meritorious competition law claims or defenses raised by the parties. To the contrary, the idea that international arbitral tribunals are able to resolve complex competition law issues competently and in a manner consistent with the parties' expectations has been stressed by commentators⁸¹ and even national courts⁸².

Second, a competition law violation underlying an award may be "hidden." In other words, the award may authorize a violation of competition law without the tribunal ever having decided a competition law claim or illegality defense. While it is

⁸⁰ Of course, incorrect decisions can cut both ways; arbitral awards may also be premised on "false positives" (which incorrectly conclude competition law violations have taken place) as well as "false negatives." A "false positive" does not permit a violation of competition law, although it may cause anticompetitive effects.

⁸¹ See generally Luca G. Radicati di Brozolo, *Competition Law and Arbitration*, COMPETITION LAW INT'L (November, 2011) 12-15 (explaining that international commercial arbitrators must apply competition law rules from extra-contractual sources as necessary to ensure enforceability of the award, and that as a result, they have become skilled in resolving complex competition law issues); see also David Mamane and James U. Menz, *Practical Challenges in Arbitrating Antitrust Claims*, COMPETITION LAW INT'L (November 2011) 12, 13 (arguing that arbitrators are not necessarily at a noticeable disadvantage compared to national courts in terms of their ability to determine facts and collect evidence given the breadth of information on national competition law and the availability of evidentiary and procedural rules suitable for resolving complex disputes in arbitration).

⁸² See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (U.S. Supreme Court, 1985) (reasoning that when a party has raised a private claim under U.S. antitrust law, the parties may elect an arbitration panel and a set of procedural rules that are amicable to the resolution of that issue) ("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."); See also *Gilmer v. Interstate Johnson Lane Corporation*, 500 U.S. 20, 31 (U.S. Supreme Court, 1991) (quoting *Mitsubishi Motors*, 473 U.S. at 628) ("Although . . . [arbitral] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'")

practically impossible to estimate how often “hidden” violations come to pass in practice, commentators consider this as a risk intrinsic to international commercial arbitration.⁸³ This is especially true with respect to the risk that cartel activities could be authorized pursuant to a contract enforceable in international arbitration.⁸⁴ European commentators have even used the term “cartel arbitration” (or *kartellschiedsgerichtsbarkeit*) to describe cartels that self-regulate through contracts that are enforceable in arbitration.⁸⁵ In the words of Gordon Blanke, a leading commentator on the interface of commercial arbitration and competition law:

“Cartel arbitrations are arbitrations in which recourse to arbitration in accordance with an underlying, pre-existing arbitration agreement is designed to serve the medium to long-term maintenance and enforcement of an existing cartel. Essentially, the arbitrator is mandated to sanction any cartel-deviant behaviour by any one of the cartel members and bring a non-compliant member back into line to preserve and strengthen the existence and operation of the cartel.”⁸⁶

⁸³ Pierre Heitzmann, *Arbitration and Criminal Liability for Competition Law Violations in Europe*, in EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS, 1251, 1274-75 (Gordon Blanke & Phillip Landolt eds., 2011) (“Some practitioners have pointed out . . . that parties may attempt to evade EC competition law by resorting to arbitration. The privacy of arbitral proceedings conducted often in locations beyond the reach of the relevant judiciary courts may be a very tempting set-up for such action.”) (Internal citations and quotations omitted).

⁸⁴ See Gordon Blanke, *International Arbitration and ADR in Remedy Scenarios Arising under Articles 101 and 102 TFEU*, in EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS, 1055, 1074-83 (Gordon Blanke & Phillip Landolt eds. 2011) (identifying the concept of “cartel arbitrations” [*Kartellschiedsgerichtsbarkeit*] and providing illustrations of attempts by EU industries to establish horizontal anticompetitive agreements that could be enforceable through arbitration). The illustrations in the aforementioned article involved trade associations or professional organizations which intended to make their internal rules enforceable against each industry member via recourse to arbitration. *Id.* at 1075. These were not cases of “hidden” violations (which would be impossible to identify and report on unless they were eventually discovered anyway); instead these were unique situations in which industries disclosed the agreements to enforcement authorities in order to apply for exemptions from EU competition law. See *id.* at 1074-75. Some of the applications for exemptions were accepted and others were rejected. See *id.* at 1075-83.

⁸⁵ See *id.* at 1074-75.

⁸⁶ *Id.*

Why is the international commercial arbitration framework susceptible to “hidden” violations and cartel activities? One reason is the private and confidential nature of arbitral proceedings.⁸⁷ Another factor, which is discussed further in Part III of this paper, is the ease of using arbitration to enforce anticompetitive conduct in jurisdictions that have no connection to the arbitration, and no legal influence over whether the award will be enforced.⁸⁸

It is this author’s position that “hidden” competition law violations – whether they result from deliberate collusion or not – represent the most serious threat to enforcing competition law while upholding the interests of efficient arbitration under the Convention.

B. ARBITRABILITY

As noted in Part I, a national court may annul or refuse recognition or enforcement of an award if, under the forum’s law, the subject matter of the dispute is not capable of settlement by arbitration.⁸⁹ This section will discuss the jurisprudence pertaining to whether competition law issues are arbitrable subject matter. Consistent with the policy of the New York Convention favoring arbitration, many national courts allowed parties to submit traditionally public law issues to arbitration unless doing so is prohibited by the national arbitration legislation.⁹⁰ As discussed below, courts in the

⁸⁷ See *id.* at 1075 (“Due to its private and confidential nature as a dispute resolution forum, arbitration presented an ideal enforcement mechanism for cartels, keeping their existence and operation concealed from public scrutiny.”); see also Heitzmann, *supra* note 82 at 1274-75 (“The privacy of arbitral proceedings conducted often in locations beyond the reach of the relevant judiciary courts may be a very tempting set-up for [the evasion of mandatory competition law].”) (Internal citations and quotations omitted).

⁸⁸ See *infra* Part III(B)(2)(a).

⁸⁹ See New York Convention, Art. V(2)(b)(i). See also UNCITRAL Model Law, Arts. 34(2)(b)(i) & 36(1)(b)(i) (which respectively list inarbitrability as a ground for annulment and for refusing recognition or enforcement).

⁹⁰ See Roque J. Caivano, *La Expansión de la Materia Arbitrable, en Dos Recientes Ejemplos que Ofrece el Derecho Comprado*, published in: EL DERECHO (ED), 23/08/2013, n° 13.306.

U.S. and EU have overwhelmingly accepted that parties can submit private competition law issues (i.e., claims and / or defenses) to arbitration.

1. U.S. law (from *American Safety to Mitsubishi Motors*)

Since the decision by the U.S. Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁹¹, U.S. courts have uniformly recognized that parties may arbitrate issues of competition law.

Prior to the *Mitsubishi Motors* decision, however, many U.S. courts had prohibited arbitration of private antitrust issues under the so-called *American Safety* doctrine. In the case of *American Safety Equipment Corp. v. J.P. Maguire & Co.*,⁹² the claimant, a merchant of seat belts and other vehicle accessories, sought a declaratory judgment in court that several provisions in a licensing agreement were void *ab initio* because they violated U.S. antitrust law.⁹³ Among the provisions challenged by the plaintiff (a licensee of the defendant), were royalty payment requirements and provisions purportedly restricting the plaintiff's ability to sell to competitors of the defendant.⁹⁴ The defendant argued that the plaintiff's claims were covered by the agreement's arbitration clause and therefore needed to be made in arbitration proceedings.⁹⁵ While trial court had compelled arbitration of the plaintiff's antitrust claims, the U.S. Court of Appeals for the Second Circuit reversed this part of the decision, concluding that the courts must retain jurisdiction over any antitrust issues.⁹⁶

The Second Circuit concluded that courts – not arbitrators – must decide antitrust issues because the public interest favoring adequate enforcement of the U.S. antitrust

⁹¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (U.S. Supreme Court, 1985).

⁹² *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (U.S. Court of Appeals, 2d Cir. 1968).

⁹³ 391 F.2d at 822-23.

⁹⁴ *Id.* at 822.

⁹⁵ *Id.* at 823.

⁹⁶ *See id.* at 828.

laws outweighed the public interest in favor of facilitating binding arbitration of private disputes.⁹⁷ Even though U.S. antitrust law uniquely allows parties to assert *private* antitrust claims (such as those of the plaintiff in *American Safety*), the court maintained that allowing private arbitration of these claims was inappropriate.⁹⁸ It assumed, in the absence of express statutory language to the contrary, that the legislature had *not* intended to allow arbitration of private antitrust claims because this would upset the public economic order that the antitrust laws protected.⁹⁹ The court asserted:

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 intended such claims to be resolved elsewhere than in the courts.¹⁰⁰

Accordingly, the court ordered the lower court to retain jurisdiction over any antitrust issues in the dispute.¹⁰¹

A decade later, in the landmark *Mitsubishi Motors*¹⁰² decision, the U.S. Supreme Court reversed the *American Safety* doctrine insofar as it applied to international awards.¹⁰³ The Court's decision in *Mitsubishi Motors* required the trial court to submit

⁹⁷ *Id.* at 826.

⁹⁸ *See id.* at 826-27.

⁹⁹ *See id.* at 826-27.

¹⁰⁰ *Id.* at 826-27 (internal citations omitted).

¹⁰¹ *See id.* at 828.

¹⁰² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (U.S. Supreme Court, 1985).

¹⁰³ *Id.* at 629.

antitrust counterclaims to an international commercial arbitration tribunal.¹⁰⁴ It also introduced a new presumption (which applied to international arbitrations): that agreements to arbitrate antitrust issues before international arbitral tribunals are valid.¹⁰⁵

In *Mitsubishi Motors*, a Japanese auto manufacturer (Mitsubishi) alleged that an auto distributor (Soler) had breached a sales agreement between the two parties.¹⁰⁶ Among other things, Mitsubishi alleged that Soler cancelled orders and failed to meet sales volume requirements set forth in the parties' sales agreement.¹⁰⁷ Pursuant to an arbitration clause in the sales contract, Mitsubishi requested a court order compelling arbitration and commenced arbitration proceedings.¹⁰⁸

Soler responded by bringing counterclaims in court, including U.S. antitrust claims against Mitsubishi and CISA (a Swiss auto company wholly owned by Chrysler America).¹⁰⁹ Soler's antitrust claims alleged that Mitsubishi had refused to let Soler meet its sales goals by selling outside of Puerto Rico, and that this was part of a broader conspiracy between Mitsubishi and CISA to territorially divide the auto sales market in violation of the antitrust laws.¹¹⁰

The U.S. Supreme Court ruled that compelling arbitration pursuant to written agreement was required – at least in the context of international commercial arbitration agreements covered by the New York Convention – to give effect to the strong international policy underlying the Convention in favor of final arbitration.¹¹¹ It stated:

¹⁰⁴ *Id.* at 640

¹⁰⁵ *See id.* at 638-40.

¹⁰⁶ *Id.* at 618-19.

¹⁰⁷ *Id.* at 618-19 & n.2.

¹⁰⁸ *Id.* at 618-19.

¹⁰⁹ *Id.* at 619-20.

¹¹⁰ *Id.* at 620.

¹¹¹ *Id.* at 629.

"[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [to arbitrate.]"¹¹²

The Court in *Mitsubishi Motors* also questioned the assumption in *American Safety* that the national courts are superior to international arbitrators in terms of their ability to resolve issues of national competition law.¹¹³ The Court opined that the "potential complexity [of antitrust law issues] should not suffice to ward off arbitration."¹¹⁴ It suggested that parties had the power to select competent arbitrators and agree upon proceedings that were amicable to the efficient resolution of the parties' competition law issues.¹¹⁵ For example:

"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."¹¹⁶

Finally, the Court rejected the argument that U.S. courts should retain the power to adjudicate private antitrust claims based on the strong public interest in private enforcement of the U.S. antitrust statute.¹¹⁷ The Court concluded that "[t]here is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism."¹¹⁸ It explained:

¹¹² *Id.*

¹¹³ See *id.* at 633-34.

¹¹⁴ *Id.* at 633.

¹¹⁵ See *id.*

¹¹⁶ *Id.*

¹¹⁷ See *id.* at 635 (citing *American Safety*, 391 F. 2d, at 826).

¹¹⁸ *Mitsubishi Motors*, 473 U.S. at 636.

“The [arbitral] tribunal . . . is bound to effectuate the intentions of the parties. 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. So long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” (Internal citations omitted.)¹¹⁹

Importantly, although *Mitsubishi Motors* requires U.S. courts to send antitrust issues to arbitration when this is contemplated by written agreement covered by the New York Convention, this case does not completely divest the U.S. courts of jurisdiction in these contexts. A second rule resulting from the *Mitsubishi Motors* decision is that U.S. courts must retain jurisdiction to review arbitral awards for competition law issues that potentially conflict with public policy.¹²⁰

2. EU law

Competition law is widely considered to be arbitrable within the EU. The ECJ has implicitly recognized that issues of EU competition law may be resolved in arbitration, although it has not expressly ruled on the issue.¹²¹

¹¹⁹ *Id.* at 636-37. The arbitration agreement in *Mitsubishi Motors* required arbitration in Japan and was governed by Swiss law. *See id.* at 637 n.19. However, the U.S. Supreme Court assumed that U.S. antitrust law would be applied by the arbitral tribunal based on the amicus brief of the International Chamber of Commerce and the admission of Mitsubishi. *See id.*

¹²⁰ *See id.* at 638. This point is discussed in Part II(C), *infra*.

¹²¹ *See* Gordon Blanke, *Actions under Articles 101 and 102 TFEU in International Arbitration*, 22 SINGAPORE ACADEMY OF LAW J. 539, 549-550 (2010) (concluding that the ECJ has “implicitly recognized” the arbitrability of EU competition law issues, given that: the International Chamber of Commerce has regularly issued awards resolving EC competition law issues; and although the ECJ has reviewed several of these awards, it has refrained from analyzing the threshold question whether EU competition law is arbitrable. *See also* Phillip Landolt, *Arbitration and Antitrust: An Overview of EU and National Case Law*, published in: CONCURRENCES – Bulletin E-Competitions Arbitration & Antitrust, 13 Avril 2012, Art. N° 45083 at 2 (“By inference . . . in *Eco Swiss* the ECJ, and with it the EU legal order, accepts the arbitrability of EU competition law.”)

While the ECJ has not stated that EU Member States *must* allow parties to arbitrate competition law issues, Member States have overwhelmingly accepted that competition law is arbitrable, with very little exception.¹²²

3. Note on jurisdictions without private competition law claims

As discussed above, courts in the U.S. and EU have widely agreed that competition law issues are arbitrable. As a result, parties can agree to arbitrate private claims arising under the competition laws of these jurisdictions.

In jurisdictions where private competition law claims do not exist, the arbitrability issue is unlikely to be controversial. In these jurisdictions, the only competition law issues that could arise under the forum's competition law in private arbitrations would be illegality defenses. The trend in national courts has been to permit arbitration of illegality defenses, except in unusual situations (e.g., where an allegedly illegal contract provision cannot be severed from the agreement to arbitrate).¹²³

C. PUBLIC POLICY

As noted in Part I, a national court can annul or refuse recognition and enforcement of an award that conflicts with the public policy of the forum.¹²⁴ This section will discuss the case law on the extent to which arbitral awards authorizing violations of competition law may trigger the "public policy" exception under the Convention framework. It contains two sub-sections, which discuss the case law on whether the public policy exception can be triggered by a violation of: (i) the

¹²² See Blanke, *supra* note 120 at 549 ("[I]t is safe to say that with rare exceptions only, there is a Europe-wide consensus on the arbitrability of competition law, in particular of Arts 101 and 102 of the TFEU.")

¹²³ LEW & MISTELIS, *supra* note 6 § 9-68 ("In conjunction with the acceptance of the doctrine of separability it has become increasingly accepted that allegations of illegality of the main contract do not necessarily lead to the non arbitrability of the dispute. This is only where the provisions which lead to illegality are of such kind that they require the dispute to be decided by state courts.")

¹²⁴ See New York Convention, Art. V(2)(b)(ii); UNCITRAL Model Law, Arts. 34(2)(b)(ii) & 36(1)(b)(ii) (which identify public policy violations as grounds for annulment and refusing recognition / enforcement, respectively).

competition law applicable in the court’s jurisdiction; and (ii) the competition law outside the reviewing court’s jurisdiction.

1. Same-jurisdiction competition law (*lex fori*)

In most of the leading cases on point, the party asserting a public policy challenge based on competition law asserts that the arbitral award violated the competition law of the forum (the *lex fori*). This subsection discusses the key cases in the U.S. and the EU involving such allegations.

a. EU law - Eco Swiss (ECJ decision)

The leading ECJ case on this issue is *Eco Swiss China Time Ltd. v. Benetton International NV*.¹²⁵ This decision has made clear that when an arbitration award violates EU competition law, it is a violation of “public policy” and consequently subject to annulment or refusal to enforce in EU Member State courts.¹²⁶

In *Eco-Swiss*, Benetton, the losing party in international arbitration proceedings, challenged the award in the seat of the arbitration (the Netherlands) by bringing an annulment petition.¹²⁷ The arbitration award had ordered Benetton to pay damages for breach of contract based on wrongful early termination of an agreement for the manufacturing and sale of watches.¹²⁸ In its petition to annul the award, Benetton raised for the first time the argument that the underlying agreement violated Article 85(1) of

¹²⁵ *Eco Swiss China Time Ltd. v. Benetton International NV.*, ECR 1999 I-03055 (European Court of Justice, June 1, 1999).

¹²⁶ See Luca G. Radicati di Brozolo, *Court Review of Competition Law Awards in Setting Aside and Enforcement Proceedings*, in *EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS* 755, 758 (Gordon Blanke & Phillip Landolt eds., 2011) (“Following the *Eco Swiss* judgment, it is recognized by the case law of Member States that community law mandates that these states should consider EU competition law as a part of the public policy that must be taken into consideration by courts when reviewing arbitral awards. [T]he violation of the competition rules of the *lex fori* of the court requested to annul or enforce an arbitral award (which, in EU Member States, include the rules of EU competition law) may be a ground for annulment or refusal of enforcement of an award.”)

¹²⁷ *Eco Swiss*, ECR 1999 I-03055 ¶ 14.

¹²⁸ *Id.* ¶12.

the EC Treaty¹²⁹ [which is presently codified in the EU treaty framework as TFEU 101¹³⁰]. Ultimately, the case went to the Hoge Raad der Nederlanden (the Supreme Court of the Netherlands), which submitted several questions to the ECJ in order to ensure consistency with the law of the European Community (now the European Union).¹³¹ Among the questions submitted were whether a national court has the obligation to annul an arbitration award that is contrary to EC 81.¹³²

The ECJ ruled that national courts must do so, at least to the extent their procedural rules require an annulment petition to be granted upon the finding of a public policy violation.¹³³ The ECJ stated:

“where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.”¹³⁴

Thus, the ECJ determined in *Eco Swiss* that EC Art. 81 was so fundamental to the common values of the EC that violating it triggers the otherwise-narrow “public policy” exception. In support of this conclusion, the ECJ noted that the EC Treaty itself recognized the competition rule as “a fundamental provision which is essential to the

¹²⁹ *Id.* ¶ 14.

¹³⁰ As noted in the *Eco Swiss* decision, EC Article 85 later became EC Article 81. It is now codified in the Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, Art. 101 (as “TFEU 101”). TFEU 101 governs competition law – specifically, anticompetitive agreements.

¹³¹ See *Eco Swiss*, ECR 1999 I-03055 ¶ 31.

¹³² See *id.*

¹³³ *Id.* ¶ 41.

¹³⁴ *Id.* ¶ 37.

accomplishment of the tasks entrusted to the Community, in particular, for the functioning of an internal market.”¹³⁵

The effect of the ECJ’s decision in *Eco Swiss* is that all EU Member State courts must treat awards that enforce anticompetitive agreements in violation of TFEU Art. 101 as violations of the forum’s public policy.¹³⁶ Subsequent ECJ case law has established that the public policy in EU Member State courts extends to violations of both EU competition law provisions (including TFEU Art. 102, which covers unilateral conduct or “abuse of dominance”).¹³⁷

b. U.S. law - Mitsubishi Motors

As discussed below, the U.S. Supreme Court’s decision in *Mitsubishi Motors* appears to support the basic idea that U.S. antitrust law is important enough to be defined as “public policy.” But *Mitsubishi Motors* differs from *Eco Swiss* significantly because it does not contemplate that a national court has the responsibility of rejecting an award if the underlying conduct violates competition law.

After deciding that sending the antitrust claims to arbitration was required under the Convention, the Court in *Mitsubishi Motors* added (gratuitously) that national courts would still have jurisdiction determine that the award violated U.S. public policy at the enforcement stage.¹³⁸ The Court stated:

¹³⁵ *Id.* ¶ 36. In this part of the opinion, the ECJ cited to EC Art. 3(1)(g). For comparable language in the current EU treaty law, see TFEU Art. 3(c) (which gives the EU exclusive competence for “the establishing of the competition rules necessary for the functioning of the internal market.”)

¹³⁶ See *Eco Swiss*, ECR 1999 I-03055 ¶ 36. The uniform treatment of EU competition law as public policy within the EU makes the question whether a given EU Member State’s *domestic* competition laws are public policy less critical. That said, EU Member State court decisions have overwhelmingly affirmed that their *domestic* competition laws, in addition to EU competition law, fits within the definition of public policy. *Radicati di Brozolo*, *supra* note 125 at 757-58 (collecting cases from France, England, Germany, and Italy).

¹³⁷ See *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v. Fondiaria Sai SpA*, *Nicolò Tricarico* and *Pasqualina Murgolo v. Assitalia SpA*, [2006] E.C.R. I-06619 (European Court of Justice, July 13, 2006).

¹³⁸ See *Mitsubishi Motors*, 473 U.S. at 637-38.

“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 has been addressed. The 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. Art. V(2)(b)[.]”¹³⁹

In a footnote, the Court gave some indication of *how*, in theory, the ultimate arbitral award in the case at bar could violate public policy.¹⁴⁰ In doing so, the Court emphasized the rights of Soler (the party bringing the antitrust claim), stating that: “in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”¹⁴¹

The Court acknowledged that the scope of any subsequent judicial review of a public policy challenge would be narrow.¹⁴² Specifically, it stated that “[w]hile 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.”¹⁴³

The public policy discussion in *Mitsubishi Motors* seems prone to misinterpretation. For example, one could arguably cite the case for the proposition that a court should refuse to enforce an award which violates U.S. antitrust law. But

¹³⁹ *Id.* at 638.

¹⁴⁰ *See id.* at 637 n.19.

¹⁴¹ *Id.*

¹⁴² *See id.* at 638.

¹⁴³ *Id.*

that would stretch the meaning of the decision beyond the situation that the *dicta* in *Mitsubishi Motors* specifically contemplates. Unlike the ECJ's decision in *Eco Swiss*, the *Mitsubishi Motors* decision *does not* contemplate that a national court will need to determine whether an arbitral award authorizes conduct that violates the competition law of the *lex fori*.¹⁴⁴ Instead, *Mitsubishi Motors* contemplates that a court may need to determine whether the resolution of a plaintiff's *antitrust claim* in an arbitration "effectively waived" the plaintiff's mandatory rights arising under the U.S. antitrust statute.¹⁴⁵

The focus in *Mitsubishi Motors* on the plaintiff's statutory rights under the U.S. Sherman Act (a statute that uniquely requires treble damages to be awarded to successful plaintiffs) has created a variety of other unsettled legal questions. For example, U.S. courts have reached different conclusions about whether, assuming that U.S. antitrust law applies to the facts and the arbitral tribunal decides for the plaintiff on the merits, the public policy exception applies to an arbitral award that does not provide treble damages.¹⁴⁶ The answers to these sorts of questions are not directly related to the policy discussion in this paper (i.e., how to control the threat of "hidden" competition law violations in arbitral awards without undermining efficiency of arbitration under the New York Convention).

In sum, *Mitsubishi Motors* supports the idea that U.S. antitrust law may be classified as "public policy" in some contexts. But it is less clear about when a court

¹⁴⁴ Notably, *Eco Swiss* involved a situation where the parties had not raised the competition law issue before the arbitral tribunal. Neither *Mitsubishi Motors* nor *Baxter* involved this type of situation.

¹⁴⁵ See *Mitsubishi Motors*, 473 U.S. at 637 n.19.

¹⁴⁶ Compare, e.g., *PPG Industries, Inc. v. Pilkington Plc*, 825 F. Supp. 1465, 1483 (U.S. District Court for the District of Arizona, 1993) (retaining "second look" jurisdiction based on *Mitsubishi Motors*, and expressly stated that the arbitral tribunal must apply U.S. law to the antitrust claims and allow recovery of treble damages based on such claims in spite of a choice-of-law clause designating the substantive law of England as applicable to disputes arising under the arbitration agreement); and *Simula, Inc. v. Autoliv, Inc.* 175 F.3d 716, 723 (U.S. Court of Appeal, 9th Cir. 1999) (referring case to arbitration and determining that even if the arbitral tribunal did not apply U.S. law and did not award treble damages, the international arbitral award would be presumably valid so long as the challenging party had "sufficient protection" under some form of competition law.)

would be justified in invoking the exception based on a conflict between an arbitral award and antitrust law. Importantly, the decision does not expressly discuss the possibility of that a court would review whether an award violates public policy by authorizing anticompetitive conduct.

2. Foreign competition law

Very little guidance exists as to whether a violation of foreign jurisdiction's competition law can be a basis for annulling or refusing to enforce an arbitral award in a national court. This author has found just one case addressing this issue: the decision of the Swiss Supreme Court in *Tensacciai v. Freyssinet Terra Armata*, which concluded that EC [now EU] competition law was outside the definition of public policy recognized in Swiss forums.¹⁴⁷

In *Tensacciai*, two Italian companies working jointly on a railway construction project had a contract with an exclusivity clause.¹⁴⁸ One company claimed that the other had breached the exclusivity clause (by contracting with third parties) and, pursuant to written agreement, initiated arbitration in Switzerland with the International Chamber of Commerce.¹⁴⁹ The arbitral tribunal determined that the defendant had breached the agreement and awarded contract damages.¹⁵⁰ The defendant sought annulment of the award in Switzerland, arguing that the award violated public policy because the exclusivity provision upon which the award was based violated Italian and EC competition law.¹⁵¹

¹⁴⁷ *Tensacciai v. Freyssinet Terra Armata*, 24 ASA Bull. 550 (Supreme Court of Switzerland, March 8, 2006).

¹⁴⁸ *Id.* (See the section entitled "facts" in the beginning of the opinion. There is no paragraph or page citation for the statement of facts in the opinion).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* ¶ 1.2.1, 24 ASA Bull. at 550.

The discussion of the Swiss Supreme Court began by determining, based on the Swiss arbitration statute, how to define so-called “international public policy” with respect to violations of foreign legal norms:

“Assuming a definition is needed, one could say that an award is inconsistent with public policy if it disregards those essential and widely recognised values which, according to the prevailing values in Switzerland, should be the founding stones of any legal order.”¹⁵²

The Court recognized that the legal necessity to use competition law to prevent restrictions to competition “is not [only] a Swiss prerogative[.]” and that “[t]he majority of industrialized states share the same concerns and some developing countries are not insensitive to it[.]”¹⁵³ But the Court concluded that the existence of Swiss competition law and the widespread presence competition laws in other countries was still not enough to bring EC competition law within the definition of public policy:

“This being said, it would be presumptuous to take the view that European or Swiss concepts in the field of competition law should evidently be imposed to all the states of the planet as a panacea, because such concepts are tied to a certain type of economy and to a certain regime. Swiss law itself acknowledges that not all restrictions to competition are damaging and it excludes certain goods or services from free competition.”¹⁵⁴

It continued:

“Other models, based on a more planned economy and emphasizing the intervention of the State in the economy, existed in the past and still exist. No one would hold them out as immoral or contrary to the fundamental principles of law for the simple reason that they depart from the Swiss model. Actually, it appears that despite the efforts made to

¹⁵² *Id.* ¶ 2.2.3., 24 ASA Bull. at 555.

¹⁵³ *Id.* ¶ 3.1, 24 ASA Bull. at 555.

¹⁵⁴ *Id.* ¶ 3.1, 24 ASA Bull. at 555.

emphasize a convergence of the various solutions adopted in the field of competition law, it is an area which hardly lends itself to an analysis in terms of universal morals[.]”¹⁵⁵

The Swiss Supreme Court’s ruling in *Tensacciai* is a novel one because it specifically rejects the argument that a violation of another jurisdiction’s competition law violates public policy, even though it adopts a formulation of “international public policy” designed to capture certain violations of law in other jurisdictions.

Commentators in the EU have criticized the decision, arguing that EU competition law ought to fit within the Court’s definition of “international public policy”¹⁵⁶ – i.e., as one of “those essential and widely recognised values which, according to the prevailing values in Switzerland, should be the founding stones of any legal order.”¹⁵⁷

Interestingly, even though the reasoning in *Tensacciai* is controversial, its outcome (rejection of the public policy challenge) clearly is not. As the next section will illustrate, a court in the U.S. or an EU Member State would have likely rejected the same challenge, even if it had been raised under the competition law of the *lex fori*, based on deference to the arbitral tribunal’s determinations on the merits.

¹⁵⁵ *Id.* ¶ 3.1, 24 ASA Bull. at 555-56.

¹⁵⁶ For criticism of the *Tensacciai* decision’s conclusion that EU Competition law is outside the Court’s adopted definition of “public policy,” see: Phillip Landolt, Note: *8 March 2006 Swiss Supreme Court*, in EBLR SPECIAL EDITION: ARBITRATING COMPETITION LAW ISSUES 128, 135-36 (Gordon Blanke & Phillip Landolt eds. 2008).

¹⁵⁷ *Tensacciai*, ¶ 2.2.3., 24 ASA Bull. at 555.

D. STANDARD OF REVIEW

The ECJ's opinion in *Eco Swiss* and the U.S. Supreme Court's opinion in *Mitsubishi Motors* both support (albeit in very distinct ways) the basic idea that the interests of competition law are important enough to be protected by the public policy exception.¹⁵⁸ These decisions say much less about the standard of review applicable to arbitration awards that potentially authorize competition law violations. For example: what deference does the court owe to the arbitral tribunal's determinations regarding an alleged competition law violation? Further, what is the standard of review in cases where the arbitral tribunal has *not* decided the competition law issue before the court? This section will discuss the jurisprudence related to these questions.

1. EU law (standard of review unsettled in Member State courts)

In the absence of clear guidance from the ECJ, EU Member State courts have reached different conclusions on the proper standard of review applicable to competition law issues underlying arbitral awards. Some EU Member State courts take what has been called the "minimalist" approach, under which judicial review of the merits is not allowed and review of the record tends to be limited.¹⁵⁹ Other decisions, although they appear to be in the minority, employ a "maximalist" approach that allows courts to revisit the merits of the case and scrutinize the record in greater detail.¹⁶⁰

a. EU - "minimalist" decisions in Member State courts

Several decisions in EU Member State courts illustrate the so-called "minimalist" approach to reviewing awards for alleged competition law violations. As discussed below, these decisions stress that the court must give a high level of deference to the

¹⁵⁸ See the discussion in Part II(C)(1), *supra*.

¹⁵⁹ For a comparison of the policy arguments favoring the "minimalist" and "maximalist" positions, with citations to the underlying jurisprudence, see: Radicati di Brozolo, *supra* note 125 at 759-65.

¹⁶⁰ See *id.*

arbitral tribunal's legal and factual conclusions, and refrain from independently weighing new issues of disputed fact.

i. French decisions

Several of the leading cases illustrating the "minimalist" approach to reviewing awards for alleged competition law violations come from French courts.

The Paris Court of Appeal's decision in *Thales v. Euromissile*¹⁶¹ was the seminal case on this issue in France. In this case, one party (Thales) challenged an award ordering it to pay damages for breaching an exclusive licensing agreement with Euromissile.¹⁶² In annulment proceedings at the seat of arbitration, Thales contended that the agreement violated Article 81 of the EC Treaty [now TFEU Art. 101]¹⁶³, although it had not made this argument during the arbitration.¹⁶⁴ The Paris Court of Appeal dismissed the annulment petition.¹⁶⁵

Applying the standard of review to the alleged violation of public policy under French procedural law – that the violation must be "flagrant, effective and real"¹⁶⁶ – the court concluded that it "cannot pronounce judgment on the merits of a complex case regarding the mere possibility of certain contractual provisions being unlawful if it has not yet been pleaded before, or decided by, an arbitrator."¹⁶⁷

Based on the arguments of the parties, the court rejected (with little difficulty) Thales's argument that the contract had a plainly anticompetitive objective.¹⁶⁸ Without

¹⁶¹ *Thales v. Euromissile*, [2006] E.C.C. 6 (Paris Court of Appeal, Nov. 18, 2004). Quotations from this case are based on the English translation provided by Westlaw (2004 WL 3623882).

¹⁶² *Thales*, [2006] E.C.C. 6 ¶ 1.

¹⁶³ *Id.* ¶ 3.

¹⁶⁴ *Id.* ¶ 13.

¹⁶⁵ *Id.* ¶ 29.

¹⁶⁶ *Id.* ¶ 26 (citing Art. 1502-5 of the New Code of Civil Procedure).

¹⁶⁷ *Id.* ¶ 26.

¹⁶⁸ *Id.* ¶ 25.

proof of a contract with an anticompetitive objective, deciding whether the contract violated competition law would require the evaluation of several complex factual issues (e.g., the relevant market definition; the market presence of the parties and competitors; and the presence of entry barriers in the relevant market).¹⁶⁹ This was something the court could not do in annulment proceedings.¹⁷⁰

The decision in *Thales* stressed the concern that a party should not be allowed to benefit from its own silence on the public policy issue during the arbitration. For example, it stated that:

“There is no reason to permit Thales to benefit from intentional or unintentional gaps in its defence of its case before the arbitrators (whether it did at the time consider it to be probably or even proven that the dispute contractual clauses were compatible with the rules of Community competition law or, on the contrary, whether it purported to avoid sanctions being imposed by the Commission) so as to enable it to reserve its arguments for the subsequent state in the proceedings asking to annul the award pronounced against it.”¹⁷¹

The *Thales* court also cited the ECJ’s *Eco Swiss* decision, considering it as support for the conclusion that judicial review on matters of EC public policy needed to be highly circumscribed.¹⁷²

Subsequent cases in French courts have employed the same standard of review. In *Linde v. Halivourgiki*, the Paris Court of Appeal used similar reasoning to reject a challenge to an award based on similar facts (where the challenging party had not raised the EU competition law issue in arbitration).¹⁷³ Further, in *SNF v. Cyttec*, the *Cour*

¹⁶⁹ See *id.* ¶ 24.

¹⁷⁰ See *id.* at 25.

¹⁷¹ *Id.* ¶ 27.

¹⁷² *Id.* ¶ 28.

¹⁷³ *Linde v. Halivourgiki* (Paris Court of Appeal, Oct. 22, 2009) as discussed in: Radicati di Brozolo, *supra* note 125 at 769.

de Cassation (the French Supreme Court) applied rules similar to those articulated in *Thales* in circumstances where the arbitral tribunal had reached the merits of the competition law that was before the court.¹⁷⁴ Specifically, it confirmed that the public policy exception applied to only “flagrant, effective and concrete” violations of EC competition law, and clarified the scope of judicial review under French law is limited to an extrinsic review of the arbitral award (*not* the arbitral tribunal’s underlying reasoning).¹⁷⁵ Applying these rules, the *Cour de Cassation* affirmed a decision of the Paris Court of Appeal enforcing an arbitral award that a Belgian court had annulled.¹⁷⁶

ii. “Minimalist” decisions in other Member State courts

Court decisions in several other EU Member States also appear to follow a minimalist approach roughly comparable to the one taken in French courts.

Support for a circumscribed standard of judicial review appears in two decisions in Italian courts (specifically, the decision of the Court of Appeal of Milan in *Terrarmata v. Tensacciai* and the decision of the Court of Appeal of Florence in *Nuovo Pignone v. Schlumberger*).¹⁷⁷ The first decision, *Terrarmata*, involved a challenge to the enforcement of the same award challenged before the Swiss Supreme Court in *Tensacciai* (discussed above). The Court of Appeal of Milan – where, of course, EU competition law is part of the *lex fori* – stated that it would not refuse to enforce an award based on a violation of the forum’s competition law unless the arbitral award “neglected, failed to apply, or

¹⁷⁴ *SNF v. Cytec*, Pourvoi No. 06-15320 (Cour de Cassation, June 4, 2008) as discussed in: Radicati di Brozolo, *supra* note 125 at 769.

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ *Terrarmata v. Tensacciai*, Riv. dell'arbitrato [2006], 744 (Court of Appeal of Milan, July 15, 2006); *Nuovo Pignone v. Schlumberger*, Riv. dell'arbitrato [2006], 741 (Court of Appeal of Florence, March 21, 2006). The details of these cases are based on the discussions in: Landolt, *supra* note 120 at 4.; and Radicati di Brozolo, *supra* note 125 at 770.

was contrary” to the forum’s mandatory competition law.¹⁷⁸ The decision of the Court of Appeal of Florence in *Nuovo Pignone v. Schlumberger* appears to have followed similar reasoning.¹⁷⁹ Admittedly, these decisions do not appear to proscribe judicial analysis of the merits as unequivocally as the French decisions discussed above, but they both appear to employ a deferential standard of review.¹⁸⁰ In the words of Italian commentator Radicati di Brozolo, “in both cases, the courts were satisfied that the arbitrators had sufficiently taken into account the principles of competition law in their reasoning, without needing to proceed to an in-depth review of the correctness of the decision.”¹⁸¹

Other examples of a “minimalist” standard of review where an award allegedly violated the forum’s competition law include a decision in Germany (by the OLG Thüringen)¹⁸² and in Sweden (by the Svea Court of Appeal)¹⁸³.

b. EU – “maximalist” decisions in Member State courts

Other decisions in EU Member State courts appear to have taken a so-called “maximalist” position, opposite that of the French courts and the decisions discussed above.

One of the leading “maximalist” examples is the decision of the Hague Court of Appeal in *Marketing Displays Int’l v. VR*.¹⁸⁴ In this case, a party had been ordered in

¹⁷⁸ Landolt, *supra* note 120 at 4.

¹⁷⁹ Compare Landolt, *supra* note 120 at 4; Radicati di Brozolo, *supra* note 125 at 770.

¹⁸⁰ Compare Landolt, *supra* note 120 at 4; Radicati di Brozolo, *supra* note 125 at 770.

¹⁸¹ Radicati di Brozolo, *supra* note 125 at 770.

¹⁸² OLG Thüringen, 8 Aug. 2007, *SchiedsVZ*, 2008, 44, as discussed in: Radicati di Brozolo, *supra* note 125 at 770.

¹⁸³ *Republic of Latvia v. Latvijas Gaze* (Svea Court of Appeal, May 4, 2006) as discussed in: Radicati di Brozolo, *supra* note 125 at 770.

¹⁸⁴ *Marketing Displays Int’l v. VR*, 2 Cahiers de ‘arbitrage (Hauge Court of Appeal, 2005), as discussed in: Alexis Mourre and Luca G. Radicati di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, 23 J. INT’L ARB. 171, 179-184 (2006).

arbitration to pay damages and to specifically perform (i.e., to transfer certain information to the licensor) under an intellectual property agreement containing an exclusivity clause.¹⁸⁵ The arbitration had taken place in the United States, and the contract was governed by U.S. private law (the law of the State of Michigan).¹⁸⁶ The party challenged the arbitral award in the place of requested enforcement (the Netherlands), arguing that the award violated EC 81 [now TFEU 101].¹⁸⁷ The Hague Court of Appeal overruled the arbitral tribunal's determination that the arrangement had been exempted from EC 81 at the time it was in effect.¹⁸⁸ Further, the court determined that the license violated EC 81 based on the exclusivity requirement.¹⁸⁹ Accordingly it refused to enforce the award.¹⁹⁰

Another case that has been cited as an illustration of the "maximalist" position is the decision of the Tribunal de Premiere Instance de Bruxelles (the Brussels "TPI" or court of first instance), in the *SNF* case.¹⁹¹ The facts in this case involved a contractual provision that required a chemical company (SNF) to purchase an essential raw material exclusively from the seller over a lengthy span of time.¹⁹² Interestingly, although the arbitral tribunal had reached the competition law issue and found that the term violated EC 81, SNF nonetheless challenged the award based on the allocation of

¹⁸⁵ *Id.* at 179.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* Of course, the party's position assumed that EC competition law had mandatory application, notwithstanding the contractual choice of law, due to the location of the effects of the exclusivity agreement (within the EC).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 180.

¹⁹⁰ *See id.* at 179.

¹⁹¹ *SNF v. Sytec*, 2007 REV. ARB. 303 (Tribunal de Premiere Instance de Bruxelles, March 8, 2007), as discussed in: Pierre Heitzmann and Jacob Grierson, *SNF v. Cytec Industrie: National Courts within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Article 81 EC*, 2007(2) STOCKHOLM INT'L ARB. REV. 39 (2007).

¹⁹² *See id.* at 40.

damages.¹⁹³ It argued that by granting the dominant party (Cytec) more damages than Cytec the benefits that Cytec would have received had the illicit part of the contract been performed,¹⁹⁴ the arbitral tribunal's award effectively violated EC competition law.¹⁹⁵ In the decision on the annulment challenge, the TPI stated that reviewing an award for the alleged competition law violation required it to review the arbitral tribunal's underlying reasoning (although it maintained that it would not rehear or reopen the evidence).¹⁹⁶ Applying this standard, it annulled the award for what it considered to be an improper allocation of damages that conflicted with competition law.¹⁹⁷ (Notably, the Paris Court of Appeal had enforced the same award anyway, and the French Supreme Court ultimately affirmed that decision in the case of *SNF v. Cytec* noted above.¹⁹⁸)

Finally, the decision of a court in Düsseldorf, Germany appears to recognize a "maximalist" approach to the standard of review under facts where the challenger alleged that the award authorized a violation of competition law.¹⁹⁹ In that case, the court stated it was not bound by the arbitrators' findings of fact and of law and referred the decision of the case to a different section of the court with competence in competition law matters.²⁰⁰ After reviewing the merits, however, the court let the

¹⁹³ *See id.* at 41.

¹⁹⁴ *See id.* One explanation for this inconsistency seems to be the tribunal's finding that SNF did not prove damages (against Cytec) resulting from the competition law violation. Specifically, the arbitral tribunal determined that SNF had not shown that but for the unlawful provision, it would have found a better price for the chemical from another supplier. *See id.* at 44.

¹⁹⁵ *See id.* at 41.

¹⁹⁶ *See id.* at 44-45.

¹⁹⁷ *See id.* at 44-45.

¹⁹⁸ *SNF v. Cytec*, Pourvoi No. 06-15320 (Cour de Cassation, June 4, 2008) as discussed in: Radicati di Brozolo, *supra* note 125 at 769.

¹⁹⁹ *Ax 4 Sch 03/06*, (OLG Dusseldorf, Aug. 8, 2007) as discussed in: Radicati di Brozolo, *supra* note 125 at 770.

decision of the arbitrators stand on the merits.²⁰¹ Thus, while the holding by the Düsseldorf court does not conflict with the “minimalist” ruling by the Thüringen court noted above²⁰², the statement of law by the Düsseldorf court indicates that German courts are not in agreement on the proper standard of review.

1. U.S. law – *Baxter* (no substantive review)

There is very little case law in the U.S. discussing the standard of review applicable where an award allegedly authorizes conduct violating antitrust law. The only case squarely on point appears to be the decision of the U.S. Court of Appeals for the Seventh Circuit in *Baxter Int’l, Inc. v. Abbott Laboratories*.²⁰³ This case, while not binding on U.S. courts in other appellate circuits, interpreted *Mitsubishi Motors* as prohibiting the court from substantively reviewing an award for an alleged competition law violation after the arbitral tribunal had already decided the issue.

Recall that in *Mitsubishi Motors*, the U.S. Supreme Court had stated that at the award enforcement stage, “it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”²⁰⁴ If this language is taken literally, it seems to indicate that there is no real “standard of review” to apply; so long as the arbitral tribunal took cognizance of the alleged competition law issue and actually decided it, a court should not interfere with the tribunal’s reasoning based on the public policy exception. At least that is how the decision in *Baxter* interpreted this language regarding the standard of review owed when an arbitral award allegedly authorizes a U.S. antitrust law violation.²⁰⁵

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See *supra* note 181 and corresponding text.

²⁰³ *Baxter Int’l, Inc. v. Abbott Laboratories*, 315 F.3d 829 (U.S. Court of Appeals, 7th Cir. 2003).

²⁰⁴ *Mitsubishi Motors*, 473 U.S. at 638.

²⁰⁵ See *Baxter*, 315 F.3d at 831.

In this case, Baxter, a manufacturer of an anesthetic gas, argued that the arbitral tribunal's enforcement of an exclusive licensing agreement created a violation of U.S. antitrust law. Specifically, Baxter challenged enforcement of a term which (according to the arbitral tribunal's interpretation of the contract) gave Baxter's competitor (Abbott) the exclusive right to sell the anesthetic gas within the United States and prohibited Baxter from selling the same product -including versions that had been made under a different patented "process" - for several years.²⁰⁶ Baxter argued that enforcing the arbitral tribunal's award, which ordered Baxter to comply with the broadly-interpreted prohibition on U.S. sales, created a territorial market allocation in violation of Section 1 of the U.S. Sherman Act.²⁰⁷ Baxter argued that the award was unenforceable under the New York Convention because it violated competition law and therefore public policy.²⁰⁸

The arbitral tribunal had considered and rejected this argument.²⁰⁹ Further, it had determined that any anticompetitive effect related to the arrangement in question was the result of Baxter's acquisition of a third company that had invented the new process for creating the same anesthetic gas (and, but for the acquisition, would have been able to sell it in the U.S. market without being restricted by the Baxter/Abbott licensing agreement).²¹⁰ When Abbott requested to enforce the award in the United States, Baxter argued that the court should refuse enforcement based on public policy.²¹¹

²⁰⁶ *Abbott Laboratories v. Baxter Int'l, Inc.*, Case Nos. 01 C 4809, 01 C 4839, 2002 WL 467147 at *6 (U.S. District Court for the Northern District of Illinois, March 27, 2002). (This citation is to the decision of the trial court, not the U.S. Court of Appeals).

²⁰⁷ *Id.* Notably, a horizontal market allocation is widely considered to be a "hard-core" restraint under national competition laws. In many jurisdictions, including the U.S., these types of restrictions are considered illegal *per se*, without extensive factual inquiry. See *infra* note 270 and accompanying text.

²⁰⁸ *Abbott*, 2002 WL 467147 at *6.

²⁰⁹ See *Baxter*, 315 F.3d at 831 (discussing arbitral tribunal's reasoning).

²¹⁰ See *id.* at 831 and 833.

²¹¹ *Abbott*, 2002 WL 467147 at *6.

The district court rejected this argument²¹², and the U.S. Court of Appeals for the Seventh Circuit agreed.²¹³

The U.S. Court of Appeals for the Seventh Circuit concluded that under *Mitsubishi Motors*, the arbitral tribunal's findings of fact and conclusions of law were off-limits: because the arbitral tribunal had determined that its award did not violate U.S. antitrust law, the court could not review this issue.²¹⁴ The scope of judicial inquiry was simply to determine whether the arbitral tribunal had taken cognizance of the antitrust issue and decided it.²¹⁵ The court explained that "[u]nder domestic law, as well as under the Convention, arbitrators have completely free rein to decide the law as well as the facts and are not subject to appellate review."²¹⁶

The court added that revisiting a legal question already decided by the arbitrators would effectively circumvent the holding from *Mitsubishi Motors* on arbitrability:

"Mitsubishi did not contemplate that, once arbitration was over, the federal courts would throw the result in the waste basket and litigate the antitrust issues anew. That would just be another way of saying that antitrust matters are not arbitrable."²¹⁷

The decision in *Baxter* also included some gratuitous discussion about the concern that the ruling could reinforce illegal conduct. The court noted that enforcing

²¹² *Id.* at *1.

²¹³ *Baxter*, 315 F.3d at 833.

²¹⁴ *Id.* at 831

²¹⁵ *See id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 832.

the award did nothing to insulate the parties from the scrutiny of the U.S antitrust law authorities or from other private plaintiffs.²¹⁸ It stated that:

“Treating Baxter as bound (vis-à-vis Abbott) by the tribunal's conclusion . . . does not condemn the public to tolerate a monopoly. [T]he United States, the FTC [a government enforcement agency], or any purchaser of sevoflurane is free to sue and obtain relief. None of them would be bound by the award. As far as we can see, however, only Baxter is distressed by the award – and Baxter, as a producer, is a poor champion of consumers.”²¹⁹

One of the three judges on the panel in *Baxter* dissented, stating that he would have refused enforcement because the award indisputably ordered the parties to break the law by creating a horizontal market allocation.²²⁰ The key disagreement highlighted by the dissent involves the issue of where the merits of the case end and the potential public policy violation begins. According to the majority opinion in *Baxter*, examining the future effect of the award meant reviewing a question of law already decided by the tribunal.²²¹ Because the court cannot review an issue of law, the *Baxter* court reasoned, it could not refuse to enforce the award.²²² According to the dissent, however, the court had the obligation to independently evaluate the future effect of enforcing the award.²²³

A potential blind spot in U.S. jurisprudence based on *Baxter* is that a completely deferential approach to public policy questions only works as well as the arbitral tribunal actually raises the right issues. *Baxter* provides no guidance as to whether (and

²¹⁸ *Id.*

²¹⁹ *Id.* The comment that “Baxter, as a producer is a poor champion of consumers” makes reference to the underlying public purpose of competition law, which is to protect consumers (not necessarily competitors).

²²⁰ *See id.* at 834-35 (Judge Cudahy, dissenting). The dissent in *Baxter* is noteworthy because the holding of the court is not binding outside the U.S. Court of Appeals for the Seventh Circuit, and it appears that courts in other circuits have not reached the issue.

²²¹ *Id.* at 832.

²²² *Id.*

²²³ *See id.* at 836 (Judge Cudahy, dissenting).

how) U.S. courts could reach underlying violations of U.S. antitrust law that are not alleged by the parties during the arbitration.²²⁴ The ECJ's decision in *Eco Swiss* and the French cases of *Thales* and *Linde* (discussed above) at least address this possibility, and maintain that courts may have obligations to reject awards even under such circumstances.²²⁵

III. THE ARBITRATOR'S ROLE IN DEVELOPING COMPETITION LAW ISSUES

This Part discusses the role of international arbitrators in ensuring that any competition law concerns underlying the dispute are identified and decided prior to the rendering of a final award. The first section discusses the private international law framework for applying mandatory norms based on the facts in the arbitration proceedings. The second section discusses the implied expectation that, based on the "healthy award" approach, arbitrators will proactively identify certain "hidden" competition law problems. The third section addresses the remote threat of arbitrator liability arising from underlying competition law violations. The fourth and final section will reach a conclusion on the extent to which arbitral tribunals can be expected to uncover "hidden" competition law violations on their own initiative (*ex officio*) or at least keep such violations from underlying awards.

A. APPLYING MANDATORY RULES UNDER PRIVATE INTERNATIONAL LAW

Arbitrators can – and at least sometimes do – apply mandatory competition law rules that are extrinsic to the *lex contractus*. An arbitrator following principles of private international law would identify the jurisdiction(s) whose public laws (such as

²²⁴ The dissenting opinion identified this problem in a footnote, where it suggested Baxter might have been better off *not* raising the competition law issue in arbitration. *See id.* at 835 n.3 ("if Baxter had not raised the antitrust issue during arbitration, it would have risked being met with a defense of waiver to consideration of the issue here. Yet, on the other hand, Baxter's position here might well have been strengthened if it had chosen not to bring the question forward during arbitration and thereby armed Abbott with the (dispositive, as it turns out) argument for deference to the arbitration award.")

²²⁵ See discussion in Part II(D)(1)(a), *supra*.

competition laws) have mandatory application to the facts of the case, doing so regardless of the parties' choice of law.²²⁶

The issue of which jurisdiction's competition law rules apply depends on where the conduct in question has effects.²²⁷ For example, an agreement requiring a Japanese auto manufacturer to purchase auto parts exclusively from a parts producer in Korea is likely to be subject to Japanese competition law based on the direct effects of the transaction in Japan. Assuming the contract covers all of the auto manufacturer's assembly lines in both Japan and in Germany, the agreement will likely be subject to the competition laws applicable within both Japan and Germany. This means the competition law rules of Japan, Germany, and the EU apply to the activity underlying the transaction (the EU rules being automatically applicable in Germany in addition to German competition law).

Under private international law, competition law rules of the place in which the activities in question have effects are likely to be considered "mandatory" legal norms.²²⁸ This means the *lex contractus* and the location of the seat of arbitration do not

²²⁶ V. V. Veeder and Paul Stanley, *Arbitrating Competition Law Issues: the Arbitrator's Perspective*, in EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS, 91, 99 (Gordon Blanke & Phillip Landolt eds. 2011).

²²⁷ When overseas conduct creates anticompetitive effects in a given jurisdiction, the effects (especially if they are clear and direct) may serve as a basis for the enforcement of that jurisdiction's competition law against the overseas conduct. The extent to which effects in a jurisdiction may trigger extraterritorial enforcement depends on the underlying facts and on how the country's laws and enforcement policies are defined. But to put the issue in perspective, extraterritorial enforcement of competition law – i.e., enforcement of competition law against conduct that happens outside the jurisdiction but creates effects of commerce within the jurisdiction – is increasingly common. See Georgios I. Zekos, *Antitrust/Competition Arbitration in EU versus US Law*, 25 J. INT'L ARBITRATION 1, 25 (2008) (discussing "substantive effects" standard for extraterritorial enforcement under U.S. law and "appreciable effects" standard under EU competition law). Gordon Blanke, *Antitrust Arbitration under the ICC Rules*, in EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS, 1763, 1827 (Gordon Blanke & Phillip Landolt eds. 2011) (discussing arbitration cases recognizing EU competition law has application based on effects.)

²²⁸ See Heitzmann, *supra* note 82 at 1275 ("It is a general principle of international private law that parties cannot evade mandatory rules of public policy, including rules derived from competition law, by agreeing to a law that does not include similar rules that would otherwise alter the validity of their contract."). See also Thomans H. Webster and Dr. Michael W. Bühler, *Commentary on the ICC Rules of Arbitration*, in HANDBOOK OF ICC ARBITRATION: COMMENTARY, PRECEDENTS, MATERIALS ¶¶ 21-58, 21-59,

strip away the possibility that other jurisdictions' competition laws may apply to the underlying facts.²²⁹ Going back to the hypothetical above, even if a contract states that disputes underlying the auto parts transaction must be resolved by arbitration in Singapore under U.S. law, the competition laws of Japan, Germany, and the EU would still have mandatory application. This is just another way of saying that the parties cannot "contract out" of their obligations arising under the public competition law rules that otherwise govern their actions.²³⁰

International arbitral tribunals know how to apply the legal principles above regarding "mandatory" rules.²³¹ By illustration, the commentary to the ICC's arbitration rules states that mandatory sources of public law may apply to a dispute – and specifically cites to competition law as an example.²³²

However, without some meaningful incentive to apply mandatory norms in a way that would expose "hidden" competition law problems (potentially against the will of the parties), an arbitrator cannot be expected to do so as a matter of course. Arbitrators have no firm obligation to apply rules of mandatory law.²³³ Instead, arbitrators have obligations to resolve issues as defined by the parties.²³⁴ Therefore, one

and 21-60 (3d. ed. 2014) (commentary to Art. 21 of the ICC Rules (2012): "applicable rules of law") (discussing applicability of competition law of jurisdiction in which effects take place, in addition to the U.S. and EU precedent on mandatory application of competition law).

²²⁹ See *id.* ¶ 21-58.

²³⁰ See Heitzmann, *supra* note 82 at 1275. See also Blanke, *supra* note 120 at 560 (discussing mandatory nature of EU law, and citing to the case of *Almelo v. NV Energiebedrijf*, [1994] ECR I-1477 (European Court of Justice, June 1, 1999), in which the ECJ stated that private parties avoid the application of EU competition rules by asking the arbitral tribunal to resolve their dispute by "amicable composition" (i.e., based on equitable principles in lieu of applying mandatory sources of law)).

²³¹ See Diederik de Groot, *The Ex Officio Application of European Competition Law by Arbitrators*, in EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS, 568, 601-604 (Gordon Blanke & Phillip Landolt eds. 2011).

²³² Webster and Bühler, *supra* note 227 ¶¶ 21-58, 21-59, and 21-60 (commentary to Art. 21 of the ICC Rules (2012): "applicable rules of law").

²³³ See de Groot, *supra* note 230 at 606.

²³⁴ See *id.*

cannot expect arbitrators to automatically apply mandatory rules as part of their professional routine – especially when this would go against the expectations of the parties²³⁵ – in the absence of some meaningful incentive to do so.²³⁶

B. THE “HEALTHY AWARD” APPROACH AND ITS LIMITS

This section will discuss the extent to which, based on the so-called obligation to render a healthy award, arbitrators have the incentive to identify underlying competition law violations. The range of potential problems that can be revealed based on the “healthy award” approach is narrow and by no means comprehensive. Further, even if arbitrators are compelled to identify competition law problems on their own under this so-called duty, the principle of party autonomy can limit the ability to arbitrators to actually decide the issues.

1. Protection based on duty to render a healthy award

The so-called duty to render a healthy award – in other words, to produce an award that is ultimately enforceable at law²³⁷ – can be characterized as a best efforts commitment or an expectation of professional due diligence.²³⁸ In other words, it requires arbitrators to use best endeavors to render an award that the winning party can enforce, but it does not guarantee that result.²³⁹

²³⁵ See *id.* (“The core meaning of an *ex officio* duty to apply such rules is that it justifies the arbitrator ingoing against the immediate wishes and expectations of the parties[.] Once the connection with a national forum [a state-backed system of civil procedure] is severed [arbitrators have no forum], the paradigm of private international law fails to provide its users with decisive arguments to justify the *ex officio* application of any substantive rules.”)

²³⁶ Two incentives for raising mandatory competition law issues *ex officio* (specifically, the “healthy award” approach and the risk of personal liability) are discussed in the following two sections (*infra* Part III(B)-(C))

²³⁷ See Martin Platte, *An Arbitrator's Enforceable Awards*, 20 J. INT’L ARB 307, 312 (2003).

²³⁸ See REDFERN & HUNTER, *supra* note 6 § 11.11; Blanke, *supra* note 120 at 552.

²³⁹ See REDFERN & HUNTER, *supra* note 6 § 11.11.

Some international arbitral tribunals may have internal rules recognizing this duty. For example, Article 41 of the International Chamber of Commerce Rules of Arbitration states:

“In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.”²⁴⁰

Even where the so-called duty to render a healthy award lacks an explicit source (in either actual or “soft” law), authors widely accept its implied existence and its importance in allowing private arbitration to function as a legitimate system. As one commentator notes:

“This idea of the arbitrator's duty to render an enforceable award [as *ratio essendi* of arbitrators] is deeply rooted in arbitration law and jurisprudence. . . . A system of private justice cannot exist without the active support and endorsement of the public justice system; otherwise, an award would not be enforceable.”²⁴¹

According to Blanke, the duty to render a healthy award implies a best efforts commitment to consider public policy issues that underlie the award, to the extent that not doing so could ultimately jeopardize enforcement.²⁴² Blanke proposes that the duty requires that arbitrators take the following measures:

“[E]nsure that the award complies with (a) the formal and essential requirements of the *lex arbitri*; with (b) the requirements of the major international arbitration conventions, first and foremost the New York Convention; and with (c) the law of any jurisdiction to which the parties specifically draw the tribunal's attention as a likely place of enforcement.”²⁴³

²⁴⁰ Article 41, ICC Rules (2012).

²⁴¹ de Groot, *supra* note 230 at 610.

²⁴² See Blanke, *supra* note 120 at 552-53.

²⁴³ *Id.*

Where potentially “hidden” competition law violations could jeopardize future enforcement of an award, the standard above implies that arbitrators have at least some obligation to consider these issues.²⁴⁴ Here is this author’s proposed formulation of the duty in the context of considering competition law issues *ex officio* (in situations where, whether by deliberate choice or oversight, the parties have not identified potential competition law violations that could affect the health of the award in their claims and defenses):

Arbitral tribunals must identify and discuss with the parties any competition law violations that (based on the arbitrator’s judgment in light of the facts known) may underlie either party’s requested relief, to the extent that such violations would create a risk that: (1) a court in the seat of arbitration would set aside the eventual award; or (2) a court in the place of requested enforcement would refuse enforcement of the eventual award.

In discussing an underlying competition law problem with the parties, the arbitral tribunal should specifically inform the parties of the potential impact a violation could have on the validity or enforcement of a final award. The arbitrator should request that the parties provide the information necessary to resolve the issue. This may include requesting that the parties provide additional information, make clarifying statements on the record, or consider submitting arguments regarding the competition law issue.²⁴⁵

²⁴⁴ See *id.* at 556-58 (discussing what Blanke characterizes as an “implicit” duty to raise and decide EU competition law issues that could affect validity or enforceability).

²⁴⁵ Accord Blanke, *supra* note 120 at 556 (“[T]he arbitrator should submit any unseen and/or uncommented competition issues to the parties for their comments. To *raise* a competition law issue *ex officio* is very different from *deciding* competition law issues *ex officio* and is arguably a necessary *prerequisite* for the arbitrator to *go on* to decide any of those issues.”) Blanke further argues that in certain situations, the arbitrator may have an implied duty to *decide* a competition law issue *ex officio*, against the will of the parties. *Id.* at 561. This position is subject to debate among scholars.

Whether, after identifying a competition law issue that could bear on enforceability *ex officio* and engaging in fruitless discussion with the parties, an arbitral tribunal must also *decide* the issue is a difficult question and subject to debate.²⁴⁶

2. Limits to the “healthy award” approach

While the extent of an arbitrator’s duty to map out underlying competition law problems based on the healthy award approach is debatable, nobody can deny that any such duty is subject to major limitations in practice. For example, the articulation of the arbitrator’s duty to address “hidden” competition law issues proposed above has two major limitations. The first limitation is due to the narrow range of jurisdictions that could potentially annul or deny enforcement of an award, and the limited reach of the public policy exception under the Convention framework.²⁴⁷ The second limitation is based on the “party autonomy rule,” or the general principle that the parties control the scope of the arbitral proceedings.²⁴⁸

a. Competition law violations matter only if they bear on enforceability

Turning to the first limitation, the “healthy award” approach is based on a practical, narrowly-defined task that does not involve the consideration of every possible competition law issue underlying the award.²⁴⁹ Rendering a healthy award means doing the due diligence to reasonably expect that the award the tribunal plans to enter will be honored in a limited range of jurisdictions: (1) the seat of arbitration; and (2) the place(s) in which the winning party will likely request to enforce the award against the losing party.²⁵⁰ This duty may require examining compliance with the competition

²⁴⁶ See Blanke, *supra* note 120 at 561 & nn. 74-76 (citing to arguments for and against recognizing an *ex officio* duty for arbitrators to raise competition law issues in certain circumstances).

²⁴⁷ See de Groot, *supra* note 230 at 613.

²⁴⁸ For discussion of the tension between party autonomy and the duty to raise competition law issues based on the “healthy award” approach, see: Blanke, *supra* note 122 at 556-61; de Groot, *supra* note 230 at 612-13; Veeder and Stanley, *supra* note 225 at 100-01.

²⁴⁹ See de Groot, *supra* note 230 at 613.

²⁵⁰ *Id.* at 611 (“Arbitrators need to anticipate the actions of national courts both at the place of arbitration (annulment) and at the place or places where execution of the award may be effected (*exequatur*).”); Blanke, *supra* note 120 at 552-53.

laws in these jurisdictions (to the extent that the violation would trigger the public policy exception under the law of the same jurisdiction).²⁵¹ But whether the award violates the competition laws of other jurisdictions is likely irrelevant.²⁵²

Recall that under the Convention, parties are free to select the seat of arbitration and can typically enforce the arbitral award where the losing party has reachable assets. Given the breadth of these options, parties can rather easily enforce conduct that violates competition law by private contract under New York Convention framework without being scrutinized by the arbitrators under the “healthy award” standard.²⁵³

It is not difficult to think of a hypothetical scenario where an arbitral tribunal enforces an anticompetitive agreement that violates some jurisdiction’s competition law without identifying the problem based on the “healthy award” standard. For example, assume that the seat of arbitration is in jurisdiction A, the place of probable enforcement is jurisdiction B, and the effects of the agreement take place in jurisdiction C. The “healthy award” standard will presumably not compel the arbitrator to press the parties about an underlying violation of the competition law in jurisdiction C. (At least this is true to the extent a violation of jurisdiction C’s competition law cannot trigger the

²⁵¹ *Id.* at 558 (“the arbitrator should consider the proper application of those antitrust rules that belong to the place affected by the anti-competitive behaviour to the extent that this place may also be a future place of enforcement.”)

²⁵² See Groot, *supra* note 230 at 613 (discussing the limited reach of probing for competition law issues under the healthy award approach) (“An award in an international commercial arbitration has a potentially global reach, but in more complex commercial cases, arbitrators cannot be expected to render an award that will meet with global acceptance. ... [A]rbitrators will rely on their assumptions as to the relevant jurisdictions.”) The Swiss Supreme Court’s decision in *Tensacciai* also specifically takes the position that violations of *other jurisdictions’* competition laws are outside the scope of the public policy exception. See 24 ASA Bull. at 555-56.

²⁵³ Commentators have noted the apparent ease of violating a given country’s competition law while evading the application of the affected country’s law in arbitration and the enforcement proceedings. *E.g.*, Heitzmann, *supra* note 82 at 1274-75.

public policy exception as interpreted under the laws of jurisdiction A and jurisdiction B – which is likely a reasonable assumption).²⁵⁴

b. Party autonomy limits which issues are decided

Recall the difference between an arbitrator identifying a potential competition law violation (for purposes of discussion with the parties) and actually deciding the issue *ex officio*.²⁵⁵ An arbitral tribunal faces a compromising situation when it identifies a competition law violation that could result from one of the parties' requested relief (and affect the validity or enforceability of the award), but the parties insist that the tribunal not decide the issue. The problem involves a conflict between so-called duty to render a healthy award and the principle that the parties have autonomy over the scope of the proceedings.²⁵⁶

The question of which principle should yield to the other and when is debatable. On one hand, deciding an issue against the will of the parties could result in subsequent annulment or refusal to enforce the award based on the arbitrator exceeding the scope of authority.²⁵⁷ On the other hand, some commentators have proposed that sometimes, party autonomy should yield to the arbitrator's implied duty to raise competition law

²⁵⁴ This seems likely to be a safe assumption under the laws of most jurisdictions today, based on: the language of Article V of the New York Convention, which defines public policy as national in character; the breadth of national court decisions interpreting the public policy exception as extending to only violations of certain domestic laws; the discussion in the *Tensacciai* case (discussed previously in this paper), in which the Swiss Supreme Court recognized a relatively broad a definition of "international public policy" but nonetheless concluded that violations of other jurisdictions' competition laws were outside the scope of the exception (see 24 ASA Bull. at 555-56); and the absence of decisions that take a position opposite to *Tensacciai* with respect to alleged violations of foreign competition laws).

²⁵⁵ See, e.g., Blanke, *supra* note 120 at 556.

²⁵⁶ For discussion of the tension between party autonomy and the duty to raise competition law issues based on the "healthy award" approach, see: Blanke, *supra* note 120 at 556-61; de Groot, *supra* note 230 at 612-13; Veeder and Stanley, *supra* note 225 at 100-01.

²⁵⁷ See, e.g., New York Convention, Art. V(1)(c) (enforcement may be refused if it "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration"); UNCITRAL Model Law Article 34 (allowing annulment for same reason). For discussion of this rule in the specific context of raising competition law issues *ex officio*, see: Blanke, *supra* note 120 at 556; de Groot, *supra* note 230 at 616.

violations *ex officio*.²⁵⁸ It suffices to say that the professional relationship between arbitrators and the parties who hired them makes it difficult for the arbitrators to decide unraised competition law issues without the parties' approval (or even to divert resources toward investigating such issues independently.²⁵⁹)

C. THE REMOTE THREAT OF ARBITRATOR LIABILITY

The theoretical possibility that arbitrators could face liabilities for authorizing conduct that violates competition law could provide extra incentive to make sure awards do not further "hidden" violations. But as discussed below, there is little information suggesting that arbitrator liability based on hidden competition law violations is a serious possibility in practice. Further, arbitrators are more likely to be concerned with potential liabilities arising from countervailing obligations to the parties (e.g., duties of confidentiality, etc.) than from those based on the underlying conduct of the parties.

The possibility of subsequent liability stems from the fact that the arbitral award only resolves the private dispute between the parties. Because an arbitral award only binds the parties, subsequent civil liability or criminal liability could still arise from a competition law violation underlying the parties' dispute.²⁶⁰ Imaginably, subsequent liability based on the underlying facts could even extend to arbitrators who ordered or authorized illegal conduct in an award.²⁶¹

²⁵⁸ E.g., Blanke, *supra* note 120 at 561. Generally speaking, the issue whether an arbitrator has an *ex officio* duty to identify and/or decide competition law issues is most fervently debated within the EU. See Mark R. Joelson, *The Ex Officio Application of US Antitrust Law by Arbitrators*, in *EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS* 1379 (Gordon Blanke & Phillip Landolt eds. 2011) (concluding that "the issue is less pronounced in the United States than in Europe").

²⁵⁹ On the issue of allocation of the tribunal's resources to independent investigation, see *id.* at 1389 (recommending that arbitral tribunals work *pro bono* on any investigation of potentially unraised competition law violations not requested by the parties).

²⁶⁰ See, e.g., *See Baxter*, 315 F.3d at 832 (noting that subsequent liability to third parties or the government was not excluded by enforcement of an arbitral award that allegedly ordered the parties to violate competition law).

²⁶¹ See Veeder and Stanley, *supra* note 225 at 102-03.

To the extent that an arbitrator is stuck in a conflict between the healthy award standard and party autonomy and cannot justify either deciding a “hidden” issue or ignoring it (*see* Part III(B)), the threat of liability could conceivably prompt an arbitrator to take other types of actions.²⁶² For example, the threat of liability under a mandatory national competition law might prompt a prudent arbitrator to resign²⁶³ or even to report illicit conduct to the appropriate authorities²⁶⁴. Some commentators have even noted that criminal laws could impose a duty to report on arbitrators under certain facts (assuming, of course, that the applicable national laws criminalize the underlying activity and that the arbitrator knows the facts comprising the elements of the crime).²⁶⁵

In spite of these possibilities, the threat of arbitrator liability under either civil or criminal law is remote and seems very unlikely as a practical matter. As for civil liability, national laws and the institutional rules of arbitral tribunals tend to shield arbitrators from damages based on civil liabilities arising within the scope of their work (save exceptional situations such as bad faith, or misconduct amounting to more than

²⁶² The incentive for arbitrators to avoid personal liability could even extend to situations beyond the scope of the so-called duty to render a healthy award. For example, it could apply in situations where the competition law violation at issue does not appear to affect the validity or enforceability of the award, or where the arbitrator cannot obtain the cooperation needed to decide the issue *ex officio*.

²⁶³ *See de Groot, supra* note 230 at 619;

²⁶⁴ *See Joelson, supra* note 257 at 1389.

²⁶⁵ For example, one commentator in the United States noted that a U.S. statute criminalizing active concealment of any felony may require an arbitrator’s disclosure of certain known violations of U.S. antitrust law. *See Joelson, supra* note 257 at 1389 & n.37 (quoting 18 U.S.C. § 4) (“Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years or both”). Since “hard-core” agreements in restraint of trade (e.g., bid-rigging, price-fixing, market allocation, and other forms of horizontal collusion between competitors) are prosecuted as felonies in the U.S, arbitrators that conceal such conduct could at least imaginably be liable under this criminal statute. The statute has been held to require “active concealment,” however, so violating it could arguably require something more than simply not reporting a known crime. *Joelson, supra* note 257 at 1389 & n.37 (citing *United States v. Johnson*, 546 F.2d 1225, 1227 (5th Cir. 1977)).

mere oversight).²⁶⁶ The possibility of criminal liability, while interesting from an academic standpoint, remains hypothetical and unproven to date. There are no known cases in which an arbitrator has been prosecuted criminally in the U.S. or in any EU Member State for having facilitated illegal activity through arbitration.²⁶⁷

Even assuming that an arbitrator could have a duty to report the parties' underlying misconduct, the arbitrator would need to weigh this possibility against any countervailing ethical or legal obligations owed to the parties.²⁶⁸ For example, the arbitrator may need to weigh the potential consequences of non-disclosure against the potential consequences of breaking confidentiality (perhaps without the information necessary to know the true legal implications of the conduct).²⁶⁹ The best course of action in an ethically compromising situation obviously depends on the facts known and on the sources of law that may apply. But once again, there appear to be no cases in which arbitrators found themselves on the wrong end of the law based on how they managed competition law problems underlying the arbitration proceedings.²⁷⁰

In sum, the possibility of arbitrator liability for mismanaging underlying competition law issues should not be ignored. But there is little evidence suggesting that this is a substantial factor in mapping out "hidden" competition law violations in arbitration proceedings.

²⁶⁶ See Veeder and Stanley, *supra* note 225 at 101. For an example of an institutional provision limiting arbitrator liability, see Article 40, International Chamber of Commerce (ICC) Rules of Arbitration (2012).

²⁶⁷ Heitzmann, *supra* note 82 at 1285 ("Just like in the United States, there do not seem to be any examples of arbitrators prosecuted [in the EU] for facilitating antitrust violations.")

²⁶⁸ For a discussion of duties of confidentiality and when they may yield to duties to disclose information to criminal law enforcement authorities based on certain EU Member States' laws, see Heitzmann, *supra* note 82 at 1272-74. For discussion on the same topic referring to sources of U.S. law, see Joelson, *supra* note 257 at 1387-88.

²⁶⁹ See the preceding footnote.

²⁷⁰ See Heitzmann, *supra* note 82 at 1285.

D. SUMMING UP THE *EX OFFICIO* REACH OF ARBITRATORS

This section will answer the overarching question discussed in this Part: to what extent can arbitrators, based on some *ex officio* duty, be expected to bring “hidden” competition law issues to surface (or at least make sure that these issues do not underlie awards)?

As discussed in the three previous sections, a private arbitrator’s role as a guardian of mandatory public laws is limited in practice. Arbitrators may apply mandatory legal norms – including rules that are extrinsic to the otherwise-applicable choice of law – based on long-established principles of private international law. But they have no reason to do so without a meaningful incentive. In some situations the so-called duty to render an enforceable award or a perceived duty not to authorize suspicious conduct could prompt arbitrators to try to bring “hidden” competition law violations to surface. But the parties generally control the proceedings, and party autonomy can eliminate an arbitrator’s ability to explore underlying competition law issues independently. For example, the parties can limit which issues they submit to the arbitrator to decide. The parties may also limit the arbitrator’s ability to communicate with third parties about underlying violations (for example, by contracting for strong confidentiality protections in the arbitration agreement).

In sum, arbitrators may be competent in applying mandatory competition law rules, but their more immediate professional objectives and duties to the parties make them unable to unmask “hidden” competition law violations comprehensively. It appears that arbitrators can only be expected to independently develop competition law issues in a limited range of situations. The most likely of these situations is the one analyzed in Part III(B), where a “hidden” violation could make the eventual award unenforceable at law. Even in these situations, the arbitrator’s ability to map out competition law issues independently is incomplete and subject to substantial limits based on party autonomy.

IV. CONCLUSIONS AND RECOMMENDATIONS: BEST PRACTICES FOR NATIONAL COURTS REVIEWING AWARDS

The following conclusions and recommendations aim to identify how national courts can provide optimal protection to the interests of competition law enforcement, on the one hand, and efficient arbitration under the Convention, on the other.

1. Courts can allow arbitrators to decide competition law issues raised between the parties without sacrificing competition law enforcement.

Letting arbitrators settle competition law issues in private disputes furthers the purposes of the Convention and does not inherently harm the interests of national competition law enforcement. This point holds regardless of whether competition issues appear as private claims or as defenses (the latter of which is more likely in most jurisdictions).

First, allowing arbitrability of competition law issues does not generate a meaningful risk that national competition law will be under-enforced. As noted throughout this article, the main risk to competition law enforcement presented by the Convention framework is the risk of “hidden” violations that underlie enforceable awards. This happens when the award authorizes conduct that violates competition law even though the arbitral tribunal did not reach the competition law issue on the merits. A policy that allows parties to voluntarily submit competition law claims or illegality defenses to arbitrators does not contribute to this problem. To the extent making competition law issues arbitrable puts an onus on arbitrators to raise competition law issues *ex officio*, it actually protects the interests of competition law. Moreover, a policy recognizing arbitrability of competition law would not negate the possibility of future action by law enforcement authorities based on the underlying conduct.

Second, a policy that does not recognize arbitrability or that requires a stay of arbitration proceedings when a competition law issue would create unnecessary obstacles to arbitration under the Convention without furthering the interests of competition law. Such a policy is likely to encourage bad-faith litigation tactics if it

enables parties to sabotage the arbitration proceedings – and delay the administration of a final award – simply by raising a competition law issue.

2. *The optimal standard of review: deferential, restrictive and consistent*

Assuming that competition law is important enough to be considered part of a forum’s “public policy,” the question of what standard of review to apply when a party alleges that a competition law violation underlies an award is difficult. In this author’s opinion, the ideal standard of review should be deferential, narrow, and consistent in its application.

First, the standard of review should be highly deferential, accepting the conclusions of the arbitral tribunal on the facts and law. Many of the same reasons discussed above (with respect to arbitrability) support this conclusion. For example, a policy of not deferring to arbitrators would create an obstacle to efficient administration of arbitral awards, and could be prone to abuse. Even more importantly, using a high level of scrutiny would not meaningfully strengthen the interests of competition law enforcement, since this would not national courts to reach the “hidden” issues that the arbitral tribunals have not reached.

Second, when awards are challenged under competition law, courts should apply the public policy exception only to a restrictive set of violations – specifically, to “hard core” violations or cartels. These violations would include the small group of serious horizontal restraints that national competition laws universally condemn, such as: price fixing, territorial market allocation, output restrictions, and bid rigging.²⁷¹ In many jurisdictions, “hard core” violations or cartel activities are condemned

²⁷¹ International Competition Network, *Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties*, ICN 4th Annual Conference (Bonn, Germany June 6-8, 2005) at 10, available at: <http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=2&type=2&workshop=0>. The International Competition Network (ICN), a voluntary group consisting of representatives from various competition law enforcement authorities, notes that “the basic statutory elements that define a hard core cartel are remarkably consistent across jurisdictions.” *Id.* They are: “(1) an agreement; (2) between competitors; (3) to restrict competition.” *Id.* The ICN report further notes that while the range of conduct defined as “cartel activity” by national law varies to some degree, “four categories of conduct are commonly identified across jurisdictions: price fixing; output restrictions; market allocation; and bid rigging.” *Id.*

summarily, without resorting to the same set of complex factual inquiries that are ordinarily needed to establish a violation (e.g., proof of: market definition; market power, presence or foreclosure; and anticompetitive harm). Restricting the public policy exception to these types of severe, easily-ascertainable violations corresponds with the idea that reviewing courts should not revisit disputed issues of fact or law (or re-open the record to evaluate them).

Third, the standard of review should be applied consistently and based on an objective benchmark, regardless of whether the arbitral tribunal has addressed the competition law issue. The *Thales* and *Linde* cases in France appear to at least pay lip service to this idea.²⁷² Both decisions analyzed previously-unraised competition law challenges under the same standard of review that would have applied to an issue already reached by the arbitral tribunal.

Where the arbitral tribunal has not reached the issue, it is important from an enforcement perspective that national courts preserve the ability to decide whether a serious competition law violation underlies the award (and potentially triggers the public policy exception). Adopting this policy places an onus on arbitral tribunals to raise serious competition law problems *ex officio* before entering awards, at least to the extent that not doing so could affect enforceability. It forces arbitrators not to settle on the assumption that courts will consider new allegations of “hidden” competition law violations as automatically waived. On the other side of the coin, such a policy would not encourage bad-faith litigation tactics so long as the standard and scope of review are equivalent to what they would be for arguments that the arbitral has already reached. If the standard of review (and scope of review²⁷³) are consistently applied,

²⁷² Arguably, these cases treat the arbitral tribunal’s non-identification of the competition law issue as proof that no “blatant” violation exists. To the extent this is the case, this author does not endorse that approach.

²⁷³ Regarding the scope of review, this author’s position is that courts should be able to examine the tribunal’s reasoning and the facts established in the record for purposes of determining the effect of enforcing the award. But they should not develop the record independently or review the tribunal’s decisions on the merits.

parties will have nothing to gain from withholding a competition law argument from the arbitration proceedings.

3. *Beyond Tensacciai: the case for extending the public policy exception to serious violations of foreign competition law.*

As discussed in Part III, arbitration agreements can rather easily enforce violations of competition laws in certain jurisdictions, particularly in places that have no control over the enforceability of the award. Judicial review of a final award is only possible in: (1) annulment proceedings (in the jurisdiction of the arbitration); and (2) enforcement proceedings (in the jurisdiction where the winning party seeks enforcement of the award). Historically, being outside of these two jurisdictions has been synonymous with having no protection against the enforcement of an international arbitral award that allegedly violates the country's competition law.

This does not necessarily have to be the case. National courts seeking to protect against this problem could define "public policy" to include serious violations of the competition laws in other jurisdictions. The scope of the exception in this context would be limited to the same narrow category of "hard core" violations or cartel activities identified above.²⁷⁴ It would reach only those violations that are fundamentally serious, universally condemned under national competition laws, and capable of being ascertained promptly.

If national courts were to uniformly adopt this approach, competition law would be less vulnerable to abuse under the Convention framework. Recognizing serious violations of foreign competition law as violations of public policy would eliminate the jurisdictional limits currently assumed under the "healthy award" approach (i.e., that only the competition laws of the seat of arbitration and the place(s) of potential enforcement are relevant to enforceability).²⁷⁵ As a result, parties would no longer be

²⁷⁴ See *supra* note 272 and corresponding text.

²⁷⁵ The conventional view, of course, is that only the competition laws in the seat of arbitration and the places of likely enforcement potentially matter. This view is based on the assumption that forums will not treat violations of foreign competition laws as a public policy violations. See Part II(B)(2)(a), *supra*.

able to evade scrutiny of an award simply because the anticompetitive effects are in jurisdictions lacking oversight over the arbitration proceedings.

Finally, given the growing interdependence of competition law enforcement regimes, national courts have good reasons for incorporating serious violations of foreign competition laws into their public policy definitions. For example, competition law enforcement authorities rely increasingly on authorities in distinct jurisdictions for assistance. The European Commission presently has bilateral agreements with over 70 countries that provide for mutual information-sharing, cooperation, and assistance in enforcement efforts.²⁷⁶ The existence of these agreements (e.g., between the country of the forum reviewing the award and the country in which the alleged violation occurs) would weigh in favor of the proposed policy. Refusing to enforce serious violations of foreign competition laws under the Convention is consistent with mutual cooperation and assistance. If national courts were to adopt this idea, they would reign in some of the risk to competition law under the Convention without undermining the efficiency of arbitration.

²⁷⁶ See European Commission, “Bilateral Relations on Competition Issues,” *available at*: <http://ec.europa.eu/competition/international/bilateral/>.