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Website- www.aarf.asia, **Email** : editor@aarf.asia , editoraarf@gmail.com

ANTITRUST ARBITRABILITY: THE CONTINUING SAGA

Harsha Rajwanshi
PhD Scholar, Gujarat National Law University, Gandhinagar

Antitrust law is the law of competition which seeks to promote competitive markets. It is concerned with wrongs committed against competitive processes in a given line of commerce or market. Antitrust expounds per se violations, such as price-fixing by direct competitors as well as commercial conduct employed by one or more firms that wield market power and abuse it by overcharging and under serving their captive customers to preserve and enlarge it. The antitrust laws have never been anti-market or anti-business in their underlying conception or in their implementation. The purpose is not to punish big companies on account of their size or because of their commercial success. The object is to promote market economics and healthy competition in every market, while checking the abuses that sometimes arise in different markets. The goal is to provide an equal playing field for similar businesses that operate in a specific industry while preventing them from gaining too much power over their competition. The idea behind these laws is that in every market there should be robust competition to force the sellers in market to strive continually both to improve their goods and services offer the buyer's favorable terms. Customers benefit from this competition. Poorly run companies are run out of business, as they deserve to be. The better run companies and the most honest ones, tend to prosper. The antitrust laws exist to help marketplace economics to work better and benefit the society as a whole.[1]

Antitrust

Before there was antitrust, there were trusts. A "trust" is a group of firms or industries organized to concentrate power, and reduce or eliminate competition. The model developed in the 1880s, as burgeoning oil Baron John D. Rockefeller sought to consolidate his holdings across state borders by placing stock from different properties into a single entity known as a trust. In US until the 1880s, vast new industrial power was regulated at a state level through restrictive corporate chartering. The State corporate charters did not allow one corporation to buy stock in another. But in 1882, an oil refiner named John D. Rockefeller helped invent a centralizing legal tool to capture industries across state borders. He placed all stock from various oil properties into one legal

[1] Markham Law, 'An Overview of Antitrust Law' (2000) <https://www.markhamlawfirm.com/law-articles/overview-of-antitrust-law/>

structure called a "trust." Known as the Standard Oil Trust, Rockefeller's oil companies might look independent legally, but the trust's board of directors set policy for the combined group. With this new legal tool, Rockefeller built the largest and most powerful monopoly of the era. Standard Oil is often referred to as the first trust, and the legal mechanism. Rockefeller pioneered paved the way for an unprecedented period of monopolization in the US. It marked the birth of the giant corporations that today dominate the daily lives of people around the world. Rockefeller's Standard Oil consolidated the oil industry; financier John Pierpont Morgan organized General Electric and US Steel and captured the railroads.[2]

Rockefeller Trust had worked adversely for consumers as there was no alternative source for oil. In 1890 U.S. Congress enacted Sherman Antitrust Act to curb concentrations of power that interfere with trade and reduce economic competition. It was named for U.S. Sen. John Sherman of Ohio, who was an expert on the regulation of commerce. The Sherman Antitrust Act declared illegal every contract, combination or conspiracy in restraint of trade or commerce. The Act aimed to prevent agreements between companies that would limit competition and made it illegal to obtain a monopoly if it was done by not competing fairly or cheating. The Corporations were holding too much power, they were able to set prices and take advantage of consumers; to break the anticompetitive behavior resulted in antitrust legislation.[3] Another important U.S. antitrust law was the Clayton Antitrust Act of 1914, as amended in 1936 by the Robinson–Patman Act, prohibits discrimination among customers through prices or other means; it also prohibits mergers of firms or acquisitions of one firm by another, whenever the effect may be to substantially lessen competition.[4]

Antitrust law

Antitrust law or antitrust policy is term primarily used in the United States, while in many other countries the terms competition law or policy are used. Some countries have utilized the phrases Fair Trading or Antimonopoly law. The intellectual basis for antitrust economics or policy is the sub-field of industrial organization economics which addresses issues arising from the behavior of firms operating under different market structure conditions.[5]

Antitrust anticompetitive business practices

Anticompetitive business practices may be considered as "abusive or improper exploitation" of monopolistic control of a market aimed at restricting competition. The term abuse of dominant

[2] *See* 'Antitrust Laws: A Brief History' <https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf>; 'Antitrust law' <https://www.newworldencyclopedia.org/entry/Antitrust_law>; Wayne D. Collins, 'Trusts and the Origins of Antitrust Legislation' (2013) 81(5) Fordham Law Review 2279 <https://ir.lawnet.fordham.edu/flr/vol81/iss5/7>

[3] Corporate Finance Institute, 'Antitrust Laws' <https://corporatefinanceinstitute.com/resources/knowledge/finance/antitrust-laws/>

[4] The Editors of Encyclopaedia Britannica, 'Antitrust law' <https://www.britannica.com/topic/antitrust-law>

[5] Organisation for Economic Co-Operation and Development (OECD), 'GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW' <https://www.oecd.org/regreform/sectors/2376087.pdf>

position has been explicitly incorporated in competition legislation of various countries. Anticompetitive business may include the charging unreasonable or excess prices, price discrimination, predatory pricing, price squeezing by integrated firms, refusal to deal/sell, tied selling or product bundling and preemption of facilities. The type of business practices likely to be construed as being anticompetitive vary by jurisdiction and on a case by case basis. Certain practices may be viewed as per se illegal while others may be subject to rule of reason. Resale price maintenance in most jurisdictions is viewed as being per se illegal whereas exclusive dealing may be subject to rule of reason. The standards for determining whether or not a business practice is illegal may also differ. In the United States, price fixing agreements are per se illegal whereas in Canada the agreement must cover a substantial part of the market. With these caveats in mind, competition laws in a large number of countries examine and generally seek to prevent a wide range of business practices which restrict competition. These practices are broadly classified into two groups: horizontal and vertical restraints on competition. The first group includes specific practices such as cartels, collusion, conspiracy, mergers, predatory pricing, price discrimination and price fixing agreements. The second group includes practices such as exclusive dealing, geographic market restrictions, refusal to deal/sell, resale price maintenance and tied selling. Generally speaking, horizontal restraints on competition primarily entail other competitors in the market whereas vertical restraints entail supplier-distributor relationships. However the distinction between horizontal and vertical restraints on competition is not always clear cut and practices of one type may impact on the other. These practices may raise barriers to entry and entrench the market position of existing firms and/or facilitate anticompetitive arrangements.[6]

Agreement to lessen or restrict competition may cover such matters as prices, production, markets and customers. These types of agreements are often equated with the formation of cartels or collusion and in most jurisdictions are treated as violations of competition legislation because of their effect of increasing prices, restricting output and other adverse economic consequences. Nevertheless all agreements between firms are not necessarily harmful for competition or proscribed by competition laws. In several countries, competition legislation provides exemptions for certain cooperative arrangements between firms which may facilitate efficiency and dynamic change in the marketplace. For example, agreements between firms may be permitted to develop uniform product standards in order to promote economies of scale, increased use of the product and diffusion of technology. Similarly, firms may be allowed to engage in cooperative research and development (R&D), exchange statistics or form joint ventures to share risks and pool capital in large industrial projects. These exemptions, however, are generally granted with the proviso that the agreement or arrangement does not form the basis for price fixing or other practices restrictive of competition.[7]

Bid rigging is a particular form of collusive price-fixing behavior by which firms coordinate their bids on procurement or project contracts. There are two common forms of bid rigging. In the first, firms agree to submit common bids, thus eliminating price competition. In the second, firms agree

[6] ibid
[7] ibid

on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts. Bid rigging is one of the most widely prosecuted forms of collusion.[8]

Cartel in its broad sense is synonymous with "explicit" form of collusion. Cartels are formed for the mutual benefit of member firms. The theory of "cooperative" oligopoly provides the basis for analyzing the formation and the economic effects of cartels. A cartel is a formal agreement among firms in an oligopolistic industry. Cartel members may agree on matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid-rigging, establishment of common sales agencies, and the division of profits or combination of these. Cartels or cartel behavior attempts to emulate that of monopoly by restricting industry output, raising or fixing prices in order to earn higher profits. Successful cartels, be they public or private, require "concurrence", "coordination" and "compliance" among members. This means that cartel members need to be able to detect when violations of an agreement take place and be able to enforce the agreement with sanctions against the violators.[9]

Collusion between firms to raise or fix prices and reduce output is viewed as serious violation of competition laws. It is distinct from Cartel but the economic effects of collusion and a cartel are the same. People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. This may be in the form of combinations, conspiracies or agreements. Collusion is generally easier when sellers are few and produce homogenous products. In one bid-rigging conspiracy firms used the "phases of the moon" to take turns and determine which amongst them would submit the "low" bid to win the contracts. In yet other types of cases, collusion entailed market sharing agreements. In oligopolistic industries, firms tend to be interdependent in their pricing and output decisions so that the actions of each firm impact on and result in a counter response by the other firm(s). In such circumstances, oligopolistic firms may take their rivals' actions into account and coordinate their actions as if they were a cartel without an explicit or overt agreement. Such coordinated behavior is often referred to as tacit collusion or conscious parallelism. Various types of collusion are examples of cooperative strategic behavior which is more likely to occur in industries with small numbers of buyers and sellers. Non-cooperative strategic behavior includes pre-emption of facilities, price and non-price predation and creation of artificial barriers to entry.[10]

Dominant firms raise competition concerns when they achieve the power to set prices independently. A dominant firm accounts for a significant share of a given market and has a significantly larger market share than its next largest rival. Dominant firms are typically considered to have market shares of 40 per cent or more. An industry with a dominant firm is often an oligopoly. Dominant firms may be the target of competition policy when they achieve or maintain their dominant position as a result of anti-competitive practices. A dominant firm deliberately

[8] ibid
[9] ibid
[10] ibid

adopts a strategy, usually by driving competitors out of the market by setting very low prices or selling below the firm's incremental costs of producing the output (often equated for practical purposes with average variable costs). Once the predator has successfully driven out existing competitors and deterred entry of new firms, it can raise prices and earn higher profits. Non-price predation is another form of strategic behavior that involves raising rivals' costs. Typical methods include using government or legal processes to disadvantage a competitor. A firm may be able to force competitors to incur significant litigation or administrative costs, at little cost to itself. Prices and price changes established by a dominant firm generally tend to set a price high enough above the competitive level.[11]

Direct interlocks are illegal in the US but other countries are more lenient. An interlocking directorate occurs when the same person sits on the board of directors of two or more companies. There is a danger that an interlock between competing firms (direct interlocks) may be used to co-ordinate behavior and reduce inter-firm rivalry.[12]

The ability of a firm or group of firms to raise and maintain price above the level that would prevail under competition is referred to as market or monopoly power. The exercise of market power leads to reduced output and loss of economic welfare. The actual measurement of market power is not straightforward. In monopolization dominant firm or group of relatively large firm's attempts to maintain or increase market control through various anticompetitive practices such predatory pricing, pre-emption of facilities, and foreclosure of competition. Monopoly is a situation where there is a single seller in the market. In conventional economic analysis, the monopoly is taken as the polar opposite of perfect competition. The monopolist has significant power over the price it charges. He is a price setter rather than a price taker. The monopolist sets a higher price, produce a lower output and earn above normal profits. Consequently, consumers face a higher price, leading to a deadweight welfare loss. In addition, income is transferred from consumers to the monopoly firm. Monopolies can only continue to exist if there are barriers to entry. Barriers which sustain monopolies are often associated with legal protection created through patents and monopoly franchises. However, some monopolies are created and sustained through strategic behavior or economies of scale. The latter are natural monopolies which are often characterized by steeply declining long run average and marginal costs and the size of the market is such that there is room for only one firm to exploit available economies of scale. For purposes of competition law and policy, monopoly may sometimes be defined as a firm with less than 100 per cent market share. Different jurisdictions approach "monopoly" in different ways depending upon market share criteria.[13]

Reciprocity may benefit firms by ensuring contract fulfillment or by facilitating secret price-cutting. Firms enter into bilateral or multilateral arrangement to bestow favorable terms on, or buy and sell from, each other to the exclusion of others. This limits competition and prevents the entry

[11] ibid
[12] ibid
[13] ibid

of other firms into certain markets. Concern about reciprocal arrangements has been particularly raised in the context of conglomerates. Conglomerate firms may emerge through mergers and acquisitions and investments across a diverse range of industries for a variety of reasons such as minimization of risk, increased access to financial and management resources, and more efficient allocation of resources. Competition policy concerns have been raised, although without universal agreement among economists, that conglomerates facilitate anticompetitive practices through cross subsidization of less profitable activities aimed at driving out competition and reciprocal arrangements with other conglomerates in the purchase and sale of inputs-outputs.[14]

For resale price maintenance (RPM) supplier specifies the minimum or maximum price at which the product must be re-sold to customers. By maintaining profit margins through RPM, the retailer may be provided with incentives to spend greater outlays on service, invest in inventories, advertise, and engage in other efforts to expand product demand to the mutual benefit of both the supplier and the retailer. RPM may also be used to prevent free riding by retailers on the efforts of other competing retailers. In many countries, RPM is per se illegal with few exceptions or exempt products. From a competition policy viewpoint, specifying the minimum price is of concern. The specification and attempted enforcement of "minimum" prices for products is illegal in many countries.[15]

Antitrust Sanctions

Increasing numbers of jurisdictions are adopting competition policy a strategy for development. Antitrust/Competition law offenders are often subject to sanctions. A growing numbers of competition authorities enforce competition laws, and impose significant fines on those companies or individuals undertaking illegal anticompetitive conduct. The various tools have different levels of effectiveness in each jurisdiction. Antitrust enforcement seems to have two great templates: the US criminal law model that has been adopted mainly in common law countries and the European Union's laws that have been adapted to a greater extent in many other jurisdictions around the world. Economic theories provide a sound framework for evaluating fining methodologies, but do not provide compelling sets of specific factors that should be followed by the competition authorities. Much debate exists about the appropriate level of fines. Fining guidelines are not always beneficial for achieving the deterrence goal of antitrust fines. Number of competition authorities has put forth a great deal of effort to adopt or revise their legislation or guidelines on fines.[16]

Private enforcement of competition laws is permitted in many countries. While some jurisdictions limit private enforcement to cases that 'follow-on" from a successful government enforcement action, "stand-alone" private suits also are permitted in the United States (US), European Union (EU), and the United Kingdom (UK). The policies of all three jurisdictions provide for private

[14] ibid
[15] ibid
[16] OECD, 'Competition and sanctions in antitrust cases' <https://www.oecd.org/daf/competition/competition-and-sanctions-in-antitrust-cases.htm>

enforcement in order to ensure that those injured by antitrust violations are fully compensated. Furthermore, private enforcement is also intended to deter antitrust violations.[17] 90 percent of claims under the US antitrust laws are private damages actions. In the United States, the attractiveness of private actions in US inter alia include the major reason that successful plaintiffs are entitled to treble damages, entitling them to claim three times the actual damages. Private enforcement is often treated as something new or at least marginally important in Europe, it has been the driving force of antitrust enforcement since the middle of the 20th century. In order to create more incentives to seek compensation before European courts, the European Commission has published a Green Paper in 2005 and a White Paper in 2008 to incentivize private damages actions and remove perceived obstacles for victims of anticompetitive conduct.[18]

Antitrust Public and Private Enforcement

The enforcement of antitrust laws by a government, for example by the competition authority or a prosecutor, to detect and sanction violators of competition rules is acknowledged as public enforcement. Private enforcement the narrower concept of "private damage litigation" referring to compensatory justice encompass claims of possible infringements of competition law brought by an individual, a legal entity, an organization or a public entity (such as local government and procurement agency in the bid rigging case) for the recovery of the damages suffered. Private enforcement can be triggered by a stand-alone action or by an action which follows on a public enforcement decision. In most jurisdictions, private enforcement is mostly represented by follow-on private actions.[19]

There is a broad agreement in the literature and in policy documents that individuals and firms who suffer injury from anti-competitive conduct should be entitled to reasonable compensation. At the same time, governments have to be very conscious of the importance of striking the right balance between public and private enforcement. Obtaining the right balance between these tools and goals is key to ensuring that private enforcement (i) does not adversely affect the effectiveness of public enforcement, and (ii) encourages greater compliance with antitrust rules, while avoiding litigation that is wasteful and could discourage socially beneficial conduct.[20]

In competition law systems based on strong public enforcement, private enforcement has to date played a minor role. Private enforcement has developed in few jurisdictions. In US private enforcement has long played a central part in the competition law framework. The private antitrust

[17] Michael D. Hausfeld, 'Private enforcement' (Global Dictionary of Competition Law Art. No 86753, Concurrences) <https://www.concurrences.com/en/dictionary/private-enforcement>

[18] Kai Hüschelrath and Sebastian Peyer, 'Public and Private Enforcement of Competition Law - A Differentiated Approach' [2013] SSRN Journal 1 <http://competitionpolicy.ac.uk/documents/8158338/8235394/CCP+Working+Paper+13-5.pdf/86d76261-eda5-4de7-af2a-51d9684e0c45>

[19] OECD, 'RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT' <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2015)14&doclanguage=en>

[20] ibid

enforcement system in the United States is solidly based on actions for treble damages. Since 2004, the EU Commission has invested in establishing and encouraging a "culture" of private enforcement of EU competition law. Following a decade-long policy debate, an EU Directive on Antitrust Damages Actions was finally adopted on 26 December 2014. The Directive established the right of victims to obtain full compensation for the harm caused by an anti-competitive conduct. In June 2013, the UK government launched a project to reform private antitrust litigation. In Japan, there is a growing trend towards more antitrust private actions. The period between 1998 and 2001, however, marked a turning point for Korea private enforcement. Hungary has introduced the possibility of both stand-alone and follow-on private actions for damages. There is private enforcement in France and Canada. In China, there is a comparatively higher level of private enforcement. The private damages regime under the Indian competition law has come into force in 2009.[21]

The role of private enforcers in the implementation of laws against anticompetitive practices remains a subject of considerable controversy.[22] Nevertheless to ensure that victims of antitrust infringement can effectively exercise their right to compensation, jurisdictions are attempting to introduce better measures and a more effective framework to facilitate private enforcement of competition law compared to general civil litigation[23].

Arbitrability

Arbitration is a dynamic dispute resolution technique. Commercial parties generally welcome the opportunity of settling their disputes in efficient, confidential proceedings before judges of their own choice in a neutral forum.[24] The definitions of arbitrability can be found in national arbitration laws or in case law typical for common law countries. States use various criteria to define arbitrability. The concept of arbitrability can be found in Article II, paragraph 1, of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which provides that each contracting State shall recognize an agreement in writing "concerning a subject-matter capable of settlement by arbitration." In addition, it can also be found in Article V, paragraph (2)(a), which states that recognition and enforcement of an arbitral award may be refused if the court where such recognition and enforcement is sought finds that "subject matter of the difference is not capable of settlement by arbitration under the law of that country." Therefore, Articles II and V of the New York Convention provide for the law of arbitrability as a ground for a court to refuse recognizing and enforcing an award but are silent as to which law should govern the question of arbitrability at the pre-award stage.[25]

[21] ibid
[22] R. Rajabiun, 'PRIVATE ENFORCEMENT AND JUDICIAL DISCRETION IN THE EVOLUTION OF ANTITRUST IN THE UNITED STATES' (2012) 8(1) Journal of Competition Law and Economics 187 <https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0049-155185.pdf>
[23] OECD, 'RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT' (n 19)
[24] David Gräslund, 'Arbitrability and Foreign Law : An analysis of under which state's law a dispute must be amenable to out-of-court settlement in order to be arbitrable under Swedish law' (21 September 2015)
[25] Julian D M Lew, Loukas A Mistelis and Stefan Kröll, *Comparative international commercial arbitration* (Kluwer Law International 2003)

In the New York Convention non-arbitrability and public policy are established separately in the Article V (2) (a) and Article V (2) (b), respectively. When the non-arbitrability doctrine is applied, it must be within the limits imposed by Article 2(3) and Article 5(2)(a) of the New York Convention. The central theme for non-arbitrability is a concern that society will be injured by arbitration of public law claims. Courts express a fear that public law issues are too complicated for arbitrators; that arbitration proceedings are too informal; or that arbitrators are like foxes guarding the chicken coop, with a pro-business bias that will lead to under-enforcement of laws designed to protect the public, the notion of non-arbitrability is grounded upon the concept which holds that the referral of some categories of disputes to arbitration that is not controlled by the state itself, goes against sovereign dignity. It was feared that a method of dispute resolution could favour parties from industrialized countries. Fortunately, the aforementioned views have been revised since then and no longer hold in the modern and arbitration friendly legal systems. It has to be realised that arbitration should not be regarded as second level justice and, therefore, the right word to use in arbitrability context is not "incapable" of being settled by arbitration but merely "not permitted" to arbitrate by state for public policy reasons and mandatory rules. Significantly almost every dispute, which is capable of settlement by adjudication, may be arbitrated. In the recent years, many national regulatory provisions have become more arbitration friendly.[26]

Basically, arbitrability determines as to what matter can and cannot be arbitrable. There is no uniform approach as to what matters can be submitted to arbitration for their settlement. It differs from one state to another and from one case to another. If a dispute is not arbitrable, arbitrators do not have jurisdiction. Most often, arbitrators use *lex arbitri* in order to decide whether the dispute is arbitrable or not. In the process of arbitration preceding the question of arbitrability is of utmost importance which means that the subject matter in dispute must be capable of settlement by arbitration.[27]

Supreme Court of India in Booz-Allen & Hamilton Inc vs. Sbi Home Finance Ltd. & Ors delineated three facets of arbitrability, in context to the jurisdiction of the arbitral tribunal, as (i) whether the disputes are capable of adjudication and settlement by arbitration? i.e. whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts). (ii) Whether the disputes are covered by the arbitration agreement? i.e. whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the `excepted matters' excluded from the purview of the arbitration agreement. (iii) Whether the parties have referred the disputes to arbitration? This decision forms the foundation for any discussion on the question of arbitrability in India as it laid down a test for determining whether a subject-matter of a dispute is capable of arbitration in India

[26] Dr Beata Kozubovska, 'Trends in Arbitrability' (2014) 1(2) IALS Student Law Review 22 <https://sas-space.sas.ac.uk/5233/1/2072-3004-1-SM.pdf>

[27] Qazi Usman, 'The Principle of Arbitrability in International Commercial Arbitration' (2015) Volume 4 Company Law Journal <https://www.researchgate.net/publication/314262048_The_Principle_of_Arbitrability_in_International_Commercial_Arbitration_published_in_Company_Law_Journal_Volume_4_November_2015>

or not. The Court observed that the question of arbitrability is to be decided on the basis of the 'nature of rights' involved in the dispute. If the dispute involves a right in rem, i.e., a person's right against the world at large, the dispute is not arbitrable. On the other hand, if a dispute involves a right in personam, i.e., rights against specific individuals, such as in a contract, the dispute is arbitrable. [28]

Arbitrability & Antitrust

Arbitration of antitrust claims is an important yet under-examined subject. The tension between antitrust laws and international arbitration derives from their fundamental opposition along the public-private dichotomy. In addressing the arbitrability of antitrust law, several reasons were advanced for the perceived unsuitability of arbitration for resolution of antitrust disputes. Even private antitrust actions were long thought to be non-arbitrable. Nevertheless, there is a growing tendency to consider as arbitrable disputes which in the past fell within the exclusive jurisdiction of national courts. The competence of arbitral tribunals in handling competition law disputes has transpired as one of the most recent global trends, albeit not an entirely uniform one.[29] There is an emerging trend to consider competition law disputes as arbitrable to an extent. For the purpose distinction has to be drawn between arbitration as (i) a means for individuals to privately enforce competition law and (ii) a tool for competition authorities in their public enforcement of competition law. While similarities exist between both forms, there are also significant differences. Two key questions must be considered: (i) can an arbitrator apply competition law? And (ii) if yes, which competition law will be applied and how will this be done? In order to answer these questions, the constraints imposed by arbitration, civil procedure and competition rules must all be considered. Arbitration is only possible if the competition law allows for it. The arbitrator can only intervene to determine the overarching civil law consequences relevant to the application of competition law. There is a limited role for arbitration in the *ex-ante* application of competition law, which includes ex post allocation of damages to one party as a result of another party violating competition law in the form of stand-alone claims, follow-on damages and merger remedies. In principle almost any question of competition can arise in private litigation. Competition law can be used by litigants as a defense (as a shield as is sometimes said) or as a ground for a claim (as a sword). The commentators almost universally accept that the relevance of an issue of competition law to the settlement of the dispute is not a bar to arbitrability.[30]

Antitrust Arbitrability - US

In US the issue of whether domestic antitrust disputes could be arbitrated was first addressed by the Second Circuit in its landmark opinion in American Safety Equipment Corp. v. J.P. Maguire & Co. American Safety was the first time that a federal court of appeals gave a clear indication

[28] The supreme court of India- Civil appellate jurisdiction- Civil appeal no.5440 of 2002
[29] Vera Korzun, 'Arbitrating Antitrust Claims: From Suspicion to Trust' (Fordham University School of Law 2016)

[30] OECD, 'ARBITRATION AND COMPETITION' (2011) <https://www.oecd.org/daf/competition/abuse/49294392.pdf>

that antitrust disputes were inarbitrable.[31] Following the American Safety decision, the general prohibition on the arbitration of antitrust disputes was applied by numerous courts within the various federal circuits.[32] The American Safety doctrine continued as the general rule in this area until the Supreme Court rendered its decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. Wherein the Supreme Court held that arbitration could be used to litigate private antitrust actions. The Court was very emphatic that it was the flexibility of arbitration that was the important factor opening the arbitrability issue for the competition disputes. Users of arbitration should adopt that very flexibility and put it to creative use in a complex arbitration in the area of fact of damage in antitrust cases.[33] Following the Mitsubishi decision; lower courts began to hold arbitration agreements enforceable as applied to anti-trust claims.[34]

The dictum of the US Supreme court in the Mitsubishi decision still retains its entire forcefulness. This case has had a considerable impact outside the US, and a number of jurisdictions have now reconsidered their position on the use of arbitration in resolving competition disputes.[35] After Mitsubishi, arbitration continues to develop as a potentially useful device for resolving antitrust disputes. The evolution of the law in this area is well worth watching.[36]

Antitrust Arbitrability – EU

In the early stages of EU competition law enforcement, arbitration was seen quite suspiciously by the antitrust enforcement milieu. The hostility was due to the fear that arbitration could be used by companies as a dangerous platform to break the antitrust rules, without risking detection by the

[31] 31. 391 F.2d 821 (2d Cir. 1968)

[32] 32. Illustrations: Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473 (9th Cir. 1984) (recognizing an implied exception to the FAA barring submission of antitrust claims to arbitration); Applied Digital Tech., Inc. v. Continental Cas. Co., 576 F.2d 116 (7th Cir. 1978) (affirming the district court's decision to enjoin arbitration of antitrust issues); Cobb v. Lewis, 488 F.2d 41 (5th Cir.1974) (holding the plaintiff's antitrust claims inarbitrable); Helfenbein v. Int'l Indus., Inc., 438F.2d 1068 (8th Cir. 1971) (holding that arbitrators have no jurisdiction to pass upon substantive aspects of arbitration laws); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9thCir. 1970) (holding an agreement to arbitrate antitrust issues invalid); A. & E. Plastik Pak Co. v.Monsanto Co., 396 F.2d 710 (9th Cir. 1968) (holding that antitrust is not an arbitrable issue);Stendig Int'l, Inc. v. B. & B. Italia, S.p.A., 633 F. Supp. 27 (S.D.N.Y. 1986) (holding arbitration of antitrust claims unenforceable).

[33] 33. 473 U.S. 614, 637 (1985)

[34] 34. See Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1515 (10th Cir. 1995) (holding antitrust claims arbitrable if within the scope of the arbitration clause); Sanjuan v. American Bd.of Psychiatry & Neurology, Inc., 40 F.3d 247, 250 (7th Cir. 1994) (reasoning that agreements to arbitrate domestic antitrust disputes are likely to be enforceable); Nghiem v. NEC Elecs., Inc.,25 F.3d 1437, 1441-42 (9th Cir. 1994) (concluding that domestic antitrust claims may be arbitrated since the American Safety prohibition was no longer viable); Swensen's Ice Cream Co. v.Corsair Corp., 942 F.2d 1307, 1310 (8th Cir. 1991) (recognizing the shift in the law in allowing antitrust disputes to be arbitrated); Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp., No.C93 20613, 1995 WL 232410, at 2-3 (N.D. Cal. Apr. 17, 1995) (finding that arbitration of domes-tic antitrust claims is allowable if the claims fall within the reach of the arbitration clause); Sys-comm Int'l Corp. v. Synoptics Communications, Inc., 856 F. Supp. 135, 137 (E.D.N.Y. 1994) (holding arbitration of domestic antitrust disputes is allowable); Western Int'l Media Corp. v. A.R. Johnson, 754 F. Supp. 871, 874 (S.D. Fla. 1991) (reading Mitsubishi as inferring that domes-tic antitrust claims are likely to be arbitrable).

[35] OECD, 'ARBITRATION AND COMPETITION' (n 30)

[36] James J. Calder and David S. Stoner, 'Arbitration, 24 Years After 'Mitsubishi'' [2009] New York Law Journal <https://katten.com/files/48510_calder%20and%20stoner_nylj_arbitration.pdf>

Commission, national competition authorities or state courts.[37] The public policy nature of the competition rules considered competition law non-arbitrable and created a rather defensive attitude of arbitrators who were usually preferring to avoid dealing with such problematic questions, rather than risk their awards' non-enforcement or annulment on public policy or non-arbitrability grounds. At the same time, arbitration specialists rejected what they saw as the Commission's interventionist and disrespectful approach vis-à-vis arbitration.[38]

The state of affairs has changed profoundly. This follows in the wake of the ECJ's seminal ruling in *Eco Swiss* (Judgment of the ECJ of June 1, 1999, Case C-126/97 Eco Swiss China Ltd and Benetton International NV [1999] ECR I-3055). The Commission has embraced arbitration as an alternative dispute resolution mechanism that can be complementary and ancillary to competition law enforcement. There has been a whole series of merger decisions clearing concentrations subject to certain conditions or obligations, one of which is recourse to arbitration for certain disputes. In those cases, arbitration is used as a procedural remedy that ensures that parties comply by their - usually – behavioral commitments. The same has also happened in the antitrust area with some old exemption decisions pursuant to Article 101(3) TFEU 19 and some new commitment decisions pursuant to Article 9 of Regulation 1/2003.20 This "delegation" of competition law enforcement to private justice constitutes a clear indicator of complementarity between arbitration and competition law. The same change of climate can be sensed in the arbitration side. Arbitrators currently feel much more at ease with competition rules and apply or refer to them as a matter of course.[39]

European Union has embarked vigorous campaign favoring private enforcement of EU competition law. EU competition law moving away from public authorities and towards private law enforcement agents, lies at the heart of modernization and has created new opportunities for arbitration as a specialist forum for the private enforcement of EU competition rules. So great is the volume and range of EU-level legislation that it is positively playing a central role in shaping today's international legal order for creating new modernized opportunities in the direction for giving significant momentum to antitrust arbitrability.

Antitrust Arbitrability – Switzerland

Switzerland is very attractive place for arbitrating antitrust claims, both when raised as a defense as well as for affirmative antitrust claims. Typically, antitrust claims are raised by the respondent party to invalidate a contract claim. According to case law of the Swiss Supreme Court and leading scholarly writing on Swiss arbitration law, it is well settled that, antitrust claims that are raised

[37] Jacques Werner, 'Application of Competition Laws by Arbitrators -The Step Too Far' (1995) 12(1) Journal of International Arbitration 21 <http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\JOIA\JOIA1995002.pdf>

[38] Loukas Mistelis and L. A Mistelis, 'The Application of EC Law in Arbitration Proceedings by Natalya Shelkoplyas' (2004) 20(4) Arbitration International 445 <https://www.researchgate.net/publication/279243407_The_Application_of_EC_Law_in_Arbitration_Proceedings_by_Natalya_Shelkoplyas>

[39] Assimakis Komninos, 'Arbitration and EU Competition Law' [2009] SSRN Journal <https://ssrn.com/abstract=1520105>

defensively "antitrust claims as a shield" e.g., by a respondent seeking to invalidate contractual provisions, are fully arbitrable under Swiss law (Supreme Court Decision, BGE/ATF 118 II 193; Supreme Court Decision, BGE/ATF 132 III 389). Rarer is a situation where parties put forward antitrust claims in an affirmative fashion, i.e., private claims seeking damages for alleged violations of antitrust statutes "antitrust claims as a sword". According to leading Swiss scholarly writing, affirmative antitrust claims are arbitrable provided that they "entail a financial interest". This is the criterion for arbitrability according to the Swiss *lex arbitri*, as set forth in Article 177(1) of the Swiss Private International Law Act (PILA). The Swiss Supreme Court has not yet stated an opinion on the arbitrability of "antitrust claims as a sword", but the Court has by no means suggested that it would take a different position on this issue. Switzerland also allows for the possibility to claim treble/punitive damage. An arbitral award cannot be set aside for the mere misapplication of a foreign antitrust statute by the tribunal. Generally, the standard of review applied by the Swiss Supreme Court to petitions for setting aside an award is deferential, the review itself is limited in scope, and the grounds for setting aside are limited. A very attractive feature of arbitral proceedings in Switzerland is that Swiss arbitral tribunals are not subject to the interference or review of the European courts and Competition Authorities. Further, Swiss arbitral tribunals have no duty to seek the view of the Swiss competition authorities on any potential issues of Swiss competition law. No Swiss arbitral tribunal has involved the Swiss competition authorities, so no delays or disruptions have been on that ground.[40]

Antitrust Arbitrability – UK

In England, one case has touched the subject, but was not truly analytical. For England the role of "icebreaker" was played by the Et Plus SA v. Welter [2005] EWHC 2115 (Comm) wherein the English High Court noted that there is no realistic doubt that "competition" or "antitrust" claims are arbitrable, but the ruling did not analyze the question since it was not a paramount issue in the case. Although the decision might not be a strong precedent for arbitrability of competition law, the approach is evidence of a solid position towards a permissible view on the arbitrability of issues related to competition law. Moreover, the United Kingdom had been the part of the European Union having strong inclination for arbitrabilty for competition law claims.[41]

Antitrust Arbitrability – India

In India, the Arbitrability of Competition law issues has not come up before a court. It was for the first-time matter pertaining arbitration clause vis a vis Competition Act 2002 cropped up before Delhi High Court in Union of India v Competition Commission of India where the Railway Board challenged the Competition Commission of India's (CCI) jurisdiction on the basis of the arbitration clause between the parties. The Delhi High Court did not accept this as a valid ground for staying

[40] Franz X Stirnimann Fuentes and Jean Marguerat, 'Switzerland — a Favorable Seat of Arbitration for Foreign Antitrust Claims' (2016) <https://www.expertguides.com/articles/switzerland-a-favorable-seat-of-arbitration-for-foreign-antitrust-claims/arlrovio>

[41] Leonardo V. P. de Oliveira, 'THE ENGLISH LAW APPROACH TO ARBITRABILITY OF DISPUTES' (2016) 19(6) International Arbitration Law Review 155 <https://arro.anglia.ac.uk/id/eprint/701213/6/de%20Oliveira_2016.pdf>

the proceedings at the CCI and held that the scope and focus of the CCI's investigations would be very different from the scope of the arbitral tribunal.[42] In the absence of any authoritative decision relating to the arbitrability of competition law disputes in India still remains an open question in India.

Antitrust Arbitrability – Australia

The governing legislation of Australian competition law is the Competition and Consumer Act 2010 (Cth) (Act), which contains rules proscribing certain anti-competitive conduct between competitors, suppliers and customers. Competition law in Australia is concerned with protecting the integrity of the competitive process rather than the private interests of a particular person or group. Consumer welfare is the end sought to be achieved. The Australian Competition and Consumer Commission (ACCC) administer the Act and have extensive powers to investigate, regulate and prosecute breaches of competition law.[43] Arbitration is also well-established in Australia. Separate arbitration laws govern international and domestic arbitration. In Australia, International Arbitration is governed by the Federal statute, the International Arbitration Act 1974 (Cth) ("IAA"), which was significantly amended in 2010 and in 2015. Domestic Arbitration is governed by the Commercial Arbitration Act ("CAA") in each State or Territory.[44] Arbitrability is a central concept to the New York Convention and the Model Law and is required by Australian law to be considered when determining whether a dispute is of the kind that is properly within the domain of arbitration. In particular, s 7(2) (b) of the IAA requires that there be a matter capable of settlement by arbitration.[45]

In Australia, uncertainty surrounds the arbitrability of competition claims. It remains unclear whether competition disputes are arbitrable, even though Australian courts and legislatures have recognized the legitimacy of arbitration as a dispute resolution process.[46] The Australian experience has been somewhat confusing. In their determination as to whether a particular dispute is susceptible to arbitration. The Australian courts have concentrated on whether the arbitration clause sufficiently incorporates all the matters under dispute. The contract interpretation has been crucial to the determination of arbitrability still Australian jurisprudence has not been entirely consistent. Australian courts have displayed inconsistent approaches to the arbitration of the CCA. There is no direct authority for the arbitrability of competition law disputes. Australian courts have not been called upon to determine whether disputes relating to anti-trust, may be contractually referred to arbitration, the majority of the judgments suggest indirectly that this is indeed possible, because the arbitrator's authority is limited only to those matters arising under contract, and does not extend to powers granted to courts by the country's Constitution. In Francis Travel Marketing

[42] 43. W.P. (C) 993 of 2012 & C.M. Nos. 2178-79 of 2012 Judgment delivered on 23.02.2012

[43] Competition and Consumer Act 2010 Act No. 51 of 1974 as amended
[44] International Arbitration Act 1974 (No. 136, 1974)
[45] BEATON-WELLS Caron, 'Private enforcement of competition law in Australia : inching forwards?' Melbourne University Law Review <https://search.informit.org/doi/10.3316/agispt.20171222>
[46] Colette Downie, 'Will Australia Trust Arbitrators with Antitrust?' [2013] Journal of International Arbitration 221 <http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\JOIA\JOIA2013017.pdf>

the New South Wales Supreme Court concurred obiter with the United States Supreme Court's subjection of anti-trust disputes to arbitral fora, ([1996] 39 NSWLR 160) Justice Allsop's contention in Comandate Marine that disputes concerning anti-trust are not arbitrable ([2006] FCAFC 192, 200)–The remark was not challenged in an appeal. Comprehensive reading of the judgments suggest that where the clear intention of the parties is to settle their difference by reference to arbitration, the courts would generally be willing to stay judicial proceedings, as long as the claims arising out of the dispute were contractual in nature and did not involve the arbitrator passing judgment on matters falling within the purview of the state's public law functions.[47] Australia lags behind other major jurisdictions, the United States and Europe particularly, in promoting the private enforcement of competition law. This is so despite statutory provision for private actions since the Trade Practices Act 1974 (Cth) ('TPA') and now the Competition and Consumer Act 2010 (Cth) ('CCA'). Chief Justice Robert French, when delivering the 2016 Goff Lecture on arbitration and public policy concluded that arbitration is "not like a football code"—it is not a "for us or against us" system. Judicial decision making should not be about attracting labels such as "pro-arbitration" or "arbitration-friendly", especially at the detriment of public policy. However, the experience in the U.S. and Europe over three decades serves as proof that Australia could stand in good company if competition law arbitration were to be accepted.

Antitrust Arbitrability – UAE

The vexed question of the arbitrability *vel non* of competition law has reached the shores of the United Arab Emirates. The question as to whether competition law is arbitrable or not in the UAE has been prompted by the recent adoption of Federal Law No. 4 of 2012 Concerning Regulating Competition, the UAE Competition Law, which entered into force on 13 February 2013. The new UAE Competition Law is modeled on the EU competition law regime. Article 23(2) of Federal Law No. 4 of 2012 pertinently provides in unambiguous terms that the infliction of the penalties stipulated in this Law shall not prejudice the right of the aggrieved to seek the court for claiming a compensation for the damage resulting from the violation of any of the provisions of this Law. The provision seemingly attributes competence to the local courts to hear private enforcement actions brought by affected (third) parties in relation to damages caused by the various competition law infringements the text of Article 23(2) would appear sufficiently wide to encompass a reference to arbitration – as an alternative to the courts – for the hearing of follow-on damages actions: To say the least, Article 23(2) of Federal Law No. 4 of 2012 does not contain any mandatory wording to the effect of attributing exclusive jurisdiction for follow-on damages actions to the UAE courts. In this context, it should be recalled that the concept of arbitrability in the UAE is pending the interpretation of Article 23(2) by the UAE courts, it will remain uncertain whether competition law is arbitrable or not under UAE law and whether arbitration can be used as a viable

[47] Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 AYBIL

alternative to the courts in follow-on damages actions and for monitoring purposes under the new UAE Competition Law.[48]

The continuing saga

Arbitration is a normal tool for the settlement of commercial disputes. Its advantages as compared to litigation include expediency, timeliness, and cost-effectiveness. The interplay between arbitration and competition law has for years been the subject of a lively debate amongst academics and practitioners and has led to interesting jurisprudential developments. Earlier courts around the world were reluctant to allow adjudication of competition law matters by an arbitral tribunal. Near the end of 1985 United States Supreme Court through Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (473 US 614 1985) opened the gateway for antitrust arbitration. Mitsubishi asked "why not" bring simplicity, informality, and expedition to the antitrust disputes? Mitsubishi was a landmark decision in the area of arbitration, and especially complex arbitration. Since the seminal Mitsubishi judgment commentators almost universally accept that the relevance of an issue of competition law to the settlement of the dispute is not a bar to arbitrability. A simple acknowledgement that competition law matters are per se arbitrable does not mean that all antitrust disputes can be actually referred to arbitration. Competition law enforcement is based on two pillars public and private enforcement. Public and private enforcement play different. Public enforcement aims to deter, and private enforcement aims to compensate. A distinction has to be drawn between arbitration as (i) a means for individuals to privately enforce competition law and (ii) a tool for competition authorities in their public enforcement of competition law. State protects the integrity of public enforcement. Actions for damages are only one element of effective private enforcement to be complemented by "alternative avenues of redress." An effectiveness of antitrust system is thus double facet. An effective model must suitably balance these elements, ensuring that one will not hinder the value of the other. Competition issues could be arbitrated under certain conditions if the competition law allows for it. Arbitration has a role to play in competition law, but it is essential to distinguish the legal context in which the arbitration is used and it is up to the states to determine which disputes can be resolved through arbitration and which disputes fall under the exclusive jurisdiction of the state courts. The extent, to which arbitrators have the power or obligation to apply competition law *sua sponte*, differs from jurisdiction to jurisdiction.

The trend toward arbitrability of Antitrust has not been unanimous. The conceptualization of antitrust arbitrability varies on the national level and states exhibit diversity in applying antitrust arbitrability. Some countries have relinquished their exclusive jurisdiction over antitrust claims and instead permit arbitrators to also decide such claims. The use of arbitration to resolve disputes

[48] Gordan Blanke, 'The new UAE Competition Law: Is it arbitrable or is it not arbitrable? -That is the question' (2013) <http://arbitrationblog.kluwerarbitration.com/2013/02/19/the-new-uae-competition-law-is-it-arbitrable-or-is-it-not-arbitrable-that-is-the-question/>

involving competition law issues in recent years is augmentative. The EU as a supranational organization, the USA, Germany, France, the United Kingdom and Switzerland have established either through changes in the national legislation or through case law that disputes involving competition law matters can be resolved through arbitration. In several jurisdictions the issue of arbitrability of competition law dispute remains open for interpretation, and it is yet to be seen how the existing legislation will be interpreted in practice. One can hope that judges, arbitral institutions, scholars, and policy makers continue to push the envelope and walk through the door that it has opened. Antitrust arbitrability saga is ongoing.

References

'Antitrust law' <https://www.newworldencyclopedia.org/entry/Antitrust_law>.

'Antitrust Laws: A Brief History' <https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf>.

Bantekas I, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 AYBIL.

Caron B-W, 'Private enforcement of competition law in Australia : inching forwards?' Melbourne University Law Review <https://search.informit.org/doi/10.3316/agispt.20171222>.

Corporate Finance Institute, 'Antitrust Laws' <https://corporatefinanceinstitute.com/resources/knowledge/finance/antitrust-laws/>.

Downie C, 'Will Australia Trust Arbitrators with Antitrust?' [2013] Journal of International Arbitration 221 <http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\JOIA\JOIA2013017.pdf>.

Dr Beata Kozubovska, 'Trends in Arbitrability' (2014) 1(2) IALS Student Law Review 22.

Franz X Stirnimann Fuentes and Jean Marguerat, 'Switzerland — a Favorable Seat of Arbitration for Foreign Antitrust Claims' (2016) <https://www.expertguides.com/articles/switzerland-a-favorable-seat-of-arbitration-for-foreign-antitrust-claims/arlrovio>.

Gordan Blanke, 'The new UAE Competition Law: Is it arbitrable or is it not arbitrable? -That is the question' (2013) <http://arbitrationblog.kluwerarbitration.com/2013/02/19/the-new-uae-competition-law-is-it-arbitrable-or-is-it-not-arbitrable-that-is-the-question/>.

Gräslund D, 'Arbitrability and Foreign Law : An analysis of under which state's law a dispute must be amenable to out-of-court settlement in order to be arbitrable under Swedish law' (21 September 2015).

Hüschelrath K and Peyer S, 'Public and Private Enforcement of Competition Law - A Differentiated Approach' [2013] SSRN Journal 1 <http://competitionpolicy.ac.uk/documents/8158338/8235394/CCP+Working+Paper+13-5.pdf/86d76261-eda5-4de7-af2a-51d9684e0c45>

James J. Calder and David S. Stoner, 'Arbitration, 24 Years After 'Mitsubishi'' [2009] New York Law Journal <https://katten.com/files/48510_calder%20and%20stoner_nylj_arbitration.pdf>.

Komninos A, 'Arbitration and EU Competition Law' [2009] SSRN Journal <https://ssrn.com/abstract=1520105>.

Leonardo V. P. de Oliveira, 'THE ENGLISH LAW APPROACH TO ARBITRABILITY OF DISPUTES' (2016) 19(6) International Arbitration Law Review 155.

Lew JDM, Mistelis LA and Kröll S, *Comparative international commercial arbitration* (Kluwer Law International 2003).

Markham Law, 'An Overview of Antitrust Law' (2000) <https://www.markhamlawfirm.com/law-articles/overview-of-antitrust-law/>.

Michael D. Hausfeld, 'Private enforcement' (Global Dictionary of Competition Law Art. No 86753, Concurrences) <https://www.concurrences.com/en/dictionary/private-enforcement>.

Mistelis L and Mistelis LA, 'The Application of EC Law in Arbitration Proceedings by Natalya Shelkoplyas' (2004) 20(4) Arbitration International 445.

OECD, 'Competition and sanctions in antitrust cases' <https://www.oecd.org/daf/competition/competition-and-sanctions-in-antitrust-cases.htm>.

—— 'RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT' <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2015)14&doclanguage=en>.

—— 'ARBITRATION AND COMPETITION' (2011) <https://www.oecd.org/daf/competition/abuse/49294392.pdf>.

Organisation for Economic Co-Operation and Development (OECD), 'GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW' <https://www.oecd.org/regreform/sectors/2376087.pdf>.

Rajabiun R, 'PRIVATE ENFORCEMENT AND JUDICIAL DISCRETION IN THE EVOLUTION OF ANTITRUST IN THE UNITED STATES' (2012) 8(1) Journal of Competition Law and Economics 187.

The Editors of Encyclopaedia Britannica, 'Antitrust law' <https://www.britannica.com/topic/antitrust-law>.

Usman Q, 'The Principle of Arbitrability in International Commercial Arbitration' (2015) Volume 4 Company Law Journal.

Vera Korzun, 'Arbitrating Antitrust Claims: From Suspicion to Trust' (Fordham University School of Law 2016).

Wayne D. Collins, 'Trusts and the Origins of Antitrust Legislation' (2013) 81(5) Fordham Law Review 2279.

Werner J, 'Application of Competition Laws by Arbitrators -The Step Too Far' (1995) 12(1) Journal of International Arbitration 21.