
MANDATORY ANTITRUST LAW AND MULTIPARTY INTERNATIONAL ARBITRATION

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*So many vows. They make you swear and swear. Defend the King, obey the King, obey your father, protect the innocent, defend the weak. But what if your father despises the King? What if the King massacres the innocent? It's too much. No matter what you do, you're forsaking one vow or another.*¹

What is an arbitrator to do? In recent years a choice of law doctrine has developed in international arbitration that requires the application of so-called “mandatory law” to antitrust issues. At the same time an increasing complexity in cross-border transactions has led to an increase in multiparty arbitrations, further complicating the choice of law analysis. As multiparty arbitrations increasingly address competition law issues, tribunals must grapple with the tension between party autonomy and possibly conflicting mandatory laws.

Almost all countries now allow the settlement of private disputes through arbitration.² Tribunals are empowered to issue binding awards by the agreement of contracting parties.³ Consent, or party autonomy, is considered the most important principle in international arbitration because parties essentially waive their right to adjudication by a court.⁴ The benefit of this arrangement is that

¹ *Game of Thrones: A Man Without Honor* (HBO television broadcast May 13, 2012).

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) Status, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [perma.cc/XTH8-S6GF] (last visited Mar. 1, 2015) (listing 154 countries who are party to the Convention of approximately 190 total countries in the world).

³ PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 9-10 (Emmanuel Gaillard & John Savage eds., 1999) [hereinafter GAILLARD] (describing various national definitions of arbitration as a form of binding agreement between the parties).

⁴ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL

parties can resolve their disputes in a neutral forum⁵ and enjoy easier enforcement in foreign jurisdictions where the losing party's assets may be located.⁶ Arbitral awards are enforceable around the world in any country that has signed on to the New York Convention.⁷

This note will address the potential conflicts arbitral tribunals encounter when deciding antitrust law issues in international arbitration. It will be argued that the application of mandatory law creates irreconcilable conflicts that increase costs and detract from the benefits of international arbitration. The scope of the choice of law problems is most readily apparent in multiparty arbitration, though many of the same concerns apply equally to two-party arbitration. The issue of conflicting mandatory antitrust laws in arbitration is important given the rise of multi-national corporations whose continued growth is constrained by a jumble of competition regulations. More than 111 countries currently have competition law regimes, the vast majority of which have been adopted only within the past 25 years.⁸ Furthermore, the stakes are high and judgments can reach into the billions of dollars in a single case.⁹

ARBITRATION, 19 ¶ 1.52 (5th ed. 2009) [hereinafter REDFERN & HUNTER] (noting that consent is essential to a valid arbitration, which in effect functions as a "denationalized or delocalized" proceeding). See UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 7(1) (1985) (amended 2006) [hereinafter "MODEL LAW"], available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [perma.cc/5V49-RAZD] (stating that arbitration is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise . . .").

⁵ Some national courts tend to favor local parties. See Damjan Kukovec, *International Antitrust - What law in action?*, 15 IND. INT'L & COMP. L. REV. 1, 35, (2004) (describing an empirical study that revealed that judges of the ICJ, whose country is a litigant, vote more frequently in their country's favor).

⁶ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 73 n. 518 (2nd ed. 2014) ("There is no 'universal' convention on the recognition and enforcement of foreign judgments, parallel to the New York Convention for arbitral awards.").

⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 3 (New York, 1958) [hereinafter New York Convention], available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> [https://perma.cc/YL2D-WV7B] ("Each Contracting State shall recognize arbitral awards as binding and enforce them . . ."); see BORN, *supra* note 6, at 109 ("[C]entral to the Convention are Articles III, IV and V, which establish a basic rule of validity and enforceability of foreign and non-domestic arbitral awards falling within the scope of the Convention.").

⁸ Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy* 15 (2010).

⁹ See, e.g., Christie Smythe & Christian Dolmetsch, *Visa, Mastercard \$5.7 Billion*

The discussion that follows is divided into six sections. Section one outlines the current legal basis for resolving antitrust issues in arbitration, and highlights concerns regarding preclusive effects, multiparty arbitrations, and the requirement of equal treatment.¹⁰ Section two explores the major considerations in the choice of substantive law analysis.¹¹ It discusses the foundations of the applicability of mandatory law to antitrust disputes and examines the ways in which the choice of mandatory law may impact the outcome of the proceeding. Section three suggests solutions for arbitrators (and arguments to be made by the parties) to resolve statutory antitrust law issues in multiparty arbitration.¹² Considerations of enforceability are weighed against the countervailing interest of party autonomy and predictability in contracting. Section four discusses the implications of the choice of law problems on forum shopping and contract drafting. Finally, section five recommends policy changes for courts and legislators to address the concerns raised in the preceding part.¹³ Section six concludes.¹⁴

Swipe Fee Accord Approved, Bloomberg, Dec. 14, 2013, available at <http://www.bloomberg.com/news/articles/2013-12-13/visa-mastercard-swipe-fee-accord-approved-by-u-s-judge> [perma.cc/NR5N-RSRE] (reporting the EU fined Intel 1.06 billion euros for monopolizing the computer chip industry); James Kanter, *European Court Upholds \$1.44 Billion Fine Against Intel*, N.Y. Times, June 12, 2014, available at http://www.nytimes.com/2014/06/13/business/international/european-court-upholds-1-06-billion-fine-against-intel.html?_r=0 [perma.cc/Z63Y-DNN7] (describing “years of litigation” over claims that credit-card swipe fees were improperly fixed).

¹⁰ See *infra* p. 5.

¹¹ See *infra* p. 11.

¹² See *infra* p. 17.

¹³ See *infra* p. 25.

¹⁴ See *infra* p. 29.

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1. ARBITRABILITY OF ANTITRUST ISSUES

To better understand the basis for the current problems in antitrust arbitration, one must first consider the historical basis for resolving antitrust law issues in arbitration. Initially thought un-arbitrable,¹⁵ several jurisdictions in Europe and the United States now recognize the resolution of antitrust issues in limited circumstances.¹⁶ Under the broadest interpretation, arbitral tribunals have the authority to adjudicate a statutory private right of action under applicable national antitrust laws or when raised as a defense in arbitration.¹⁷

1.1. *In General*

Questions concerning the arbitrability of a claim may itself be dispositive in an arbitral proceeding. Regardless of the merits of a case, an arbitral tribunal may not be permitted by law in a given jurisdiction to decide antitrust matters. If the tribunal nevertheless issues an award, the losing party can challenge it on grounds of non-arbitrability.¹⁸ National courts in the seat of arbitration usually issue

¹⁵ See *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2nd Cir. 1968) (holding antitrust claims un-arbitrable due to public policy interest in ensuring proper enforcement).

¹⁶ For a description of various country's approaches to arbitration, see Alexis Mourre, *Arbitrability of Antitrust Law from European and US Perspectives*, in *EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS* 6-8 (Gordon Blanke & Phillip Landolt eds., 2011). Arbitral tribunals can order the civil consequences of a violation of antitrust laws by enjoining a party to cease violating the other's rights, awarding damages, or invalidating the contract. *Id.*; see also, JEFFREY KESSLER ET AL., *INTERNATIONAL TRADE AND U.S. ANTITRUST LAW* § 8:16 (2nd ed. 2014) (describing arbitrability of antitrust claims in the United States). For a historical perspective, see Ludwig von Zumbusch, *Arbitrability of Antitrust Claims under U.S., German, and EEC law: the International Transaction Criterion and Public Policy*, 22 *TEX. INT'L L. J.* 291, 292 (Spring/Summer 1987) (describing the changing attitudes towards a more favorable view of arbitrability of antitrust claims).

¹⁷ Mourre, *supra* 16, at 23 ¶ 1-078. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634-38 (1985) (upholding arbitrability of counterclaimed violations under the Sherman Act).

¹⁸ New York Convention, *supra* note 7, art. 5(2)(a) ("Recognition and enforcement of an arbitral award may be refused if [the] subject matter of the difference is not capable of settlement by arbitration. . .").

interlocutory rulings on questions of arbitrability,¹⁹ though some institutional rules also allow the tribunal itself to make that determination.²⁰

The first prerequisite for an arbitrable claim is the existence of a private right of action. Primarily Western jurisdictions have national laws that provide for private enforcement of antitrust or competition law claims, and have subsequently allowed such claims to be resolved in arbitration.²¹ For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the United States Supreme Court held that an agreement to arbitrate was enforceable with respect to antitrust claims under foreign law, but *only* if the alternative forum would allow an opportunity to present its statutory antitrust law claim.²² This holding is problematic. First it begs the question as to what qualifies as an “opportunity” to present a claim.²³ National approaches to antitrust issues differ significantly. Being afforded an opportunity to present arguments alone may not be enough to fulfill a party’s expectations. What the party is really interested in is an opportunity to obtain *specific kinds of relief*, which may not be possible in all situations endorsed by the court. For example, in the *Mitsubishi* case the plaintiff was forced to

¹⁹ Mourre, *supra* note 16, at 13 ¶ 1-030 (explaining that issues of arbitrability are usually decided by courts but may also be decided by arbitrators). See also Douglas Yarn & Gregory Jones, *Legal exclusions and special problems involving statutory claims*, in GEORGIA ALTERNATIVE DISPUTE RESOLUTION PRACTICE & PROCEDURE § 9:14 (2014) (“Federal courts have imposed public policy exceptions to the arbitrability of certain claims under the FAA”).

²⁰ Elizabeth McCallum et al., *Cover Stories: Arbitration Procedures, the Rules of the Road in Arbitrating Antitrust Disputes*, 19 ANTITRUST A.B.A J. 15, 16-17 (describing variations in American case law on who decides arbitrability). See also American Arbitration Association, *Commercial Arbitration Rules*, R-7(a) available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103 [perma.cc/NR5N-RSRE](establishing that a tribunal may rule on its own jurisdiction). But see ICDR, *International Dispute Resolution Procedures* (2014), available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased> [perma.cc/Z63Y-DNN7] (containing no provision for a tribunal’s jurisdiction to rule on issues of arbitrability).

²¹ See *Mitsubishi Motors*, 473 U.S. at 614 (upholding arbitrability of antitrust claims under arbitration agreement requiring American plaintiff to arbitrate against Japanese defendant in Japan).

²² *Id.* at 637.

²³ But see *Mitsubishi Motors*, 473 U.S. at 637 n. 19 (suggesting in dicta that choice of forum and choice of law clauses may waive access to statutory antitrust claims under U.S. law).

bring its antitrust claims in a forum much less favorable to providing antitrust relief. Can this really be considered an adequate “opportunity” to present a claim? The second problem with the *Mitsubishi* holding is that it endorses arbitration of a claim based on law other than the governing law of the contract. As discussed below,²⁴ deviating from the party’s choice of law detracts from the benefits of arbitration by introducing uncertainty and also impinges on party autonomy.

1.2. Preclusive Effects

The issue of preclusion in arbitration is highly debated.²⁵ In general, claims decided in arbitration are given preclusive effect in any subsequent litigation between the same parties—as would be the case with a judgment issued by a court.²⁶ Unlike a court judgment, however, arbitral awards are not subject to appeal and are afforded much greater deference by foreign courts.²⁷ Under the New York Convention, arbitral awards can only be reviewed for procedural fairness and may not be challenged on the merits.²⁸

²⁴ See § 2 *infra*.

²⁵ See, BORN, *supra* note 6, at 1112 (“Although it is widely recognized that arbitral awards have binding, *res judicata* effects, the precise nature of those effects . . . is debated.”); Greta Walters, *Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?* 29 J. Int’l Arb. 6, pp. 651-680. At 651 (2012) (“While the legal principle of *res judicata* is widely recognized in domestic laws and by international tribunals, its scope and meaning are unsettled topics.”); Compare Nathalie Voser & Julie Raneda, *Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution*, 33 ASA Bulletin Vol. 4, pp. 749-779 (2015) (discussing various recent decisions in Switzerland on the preclusive effect of prior proceedings and setting a high bar for preclusion) with Katherine Jonckheere, *Avoiding Re-litigation of Identical Issues at the Enforcement Stage: A Deferential Approach*, KLUWER ARBITRATION BLOG February 3, 2016 (advocating a deferential approach) available at <http://kluwerarbitrationblog.com/2016/02/03/avoiding-re-litigation-of-identical-issues-at-the-enforcement-stage-a-deferential-approach/> [https://perma.cc/B5F3-AHGZ].

²⁶ Allen Scott Rau, *The Arbitrator and Mandatory Rules of Law*, 18 AM. REV. INT’L ARB. 51, 58 (2007) (agreeing that a decision on the merits on a statutory claim should and is intended to give “*res judicata*” effect to statutory claims under the holding in *Mitsubishi*); BORN, *supra* note 6, at 3738-3739 (preclusion is a matter of international law).

²⁷ BORN, *supra* note 6, at 3185 (“An annulment court does not review the arbitral tribunal’s decision in the nature of an appellate proceeding, but instead considers only whether one of a specified number of defined statutory grounds for annulment is present.”).

²⁸ BORN, *supra* note 6, at 3185 citing New York Convention, *supra* note 7, art. 7.

Some have raised concerns that arbitration is an inappropriate forum to resolve antitrust issues. Critics argue that the arbitral tribunal may not have the same expertise,²⁹ and it certainly does not have the same public responsibilities as a state regulatory agency. Questions of market definition often benefit from third-party evidence—which a tribunal is unable to compel.³⁰ Despite these concerns, considerations of party autonomy suggest that parties should be allowed to define the scope of their arbitration agreements to include antitrust issues, and the resulting awards should be given the same weight as adjudications by national courts or administrative agencies. If arbitral decisions on antitrust issues really were inferior, parties would learn to exclude them from their arbitration agreements.

Due to the contractual nature of the forum, arbitral awards can only have preclusive effect on the actual parties to the proceeding.³¹ International arbitration is premised on consent, and should not purport to bind third parties.³² However, the very nature of antitrust law concerns market effects.³³ A key distinction must therefore be made concerning the role of an arbitral tribunal in the resolution of antitrust issues in contrast to a regulatory authority. The goals of private party actions are “to secure relief and end misconduct,” whereas a public regulator also seeks to “effectuate

²⁹ See Mourre, *supra* note 16, at 23 § 1-078 (noting arbitral tribunals will become more experienced with antitrust law issues as they are more frequently presented in arbitration).

³⁰ McCallum, *supra* note 20, at 7; Renato Nazzini, *Parallel Proceedings before the Tribunal and the Courts/Competition Authorities*, in *EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS* 890-891 (Gordon Blanke & Phillip Landolt eds., 2011).

³¹ See, BORN, *supra* note 6, at 3751 (“An award will have preclusive effects only if the subsequent proceedings involved the ‘parties’ to the arbitration or their ‘privies’”); See also, New York Convention, *supra* note 7, art. 2(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.”) (emphasis added).

³² *Id.* See also Born, *supra* note 6, at 1407-08 (describing the nature of consent to arbitration); *Granite Rock v. Int'l Brotherhood of Teamsters*, 561 U.S. 287 (2010) (refusing to compel arbitration upon finding defendant did not consent to submit specific issue to arbitration).

³³ WILLIAM BLUMENTHAL & JAMES D. HURWITZ, *Chapter 42: Alternative Dispute Resolution and Federal Trade Commission Antitrust Enforcement in EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS* (Kluwer Law International 2011).

enforcement policies, establish precedent, explain new learning, earn broad compliance, and reestablish competition in the market.”³⁴ The scope of the arbitral award must therefore be restricted to the issues presented by the parties, and cannot impose externalities on others who cannot take part in the arbitration.³⁵

1.3. *Multiparty Arbitration*

As corporate structures and business transactions become more complex, arbitrations increasingly involve more than two parties.³⁶ Antitrust cases in particular commonly involve multiple parties in part because any allegation of collusion necessarily involves more than one co-conspirator and therefore more than one potential defendant. When multiple parties are involved in a dispute, they have an interest in efficiently resolving their dispute in a single arbitration that is binding on all of them.³⁷ Requiring parties to arbitrate their claims separately is inefficient and has the potential to generate inconsistent and unfair results.³⁸

³⁴ *Id.*

³⁵ Regulatory agencies often allow public comment or the submission of amicus briefs by third-parties that might potentially be affected by an impending regulatory decision. This type of participation generally is not possible in the arbitration context. See BERNARD HANOTIAU, *COMPLEX ARBITRATION: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 192 (Kluwer Law International 2006) (noting that briefs amicus curiae generally are not allowed in arbitrations other than under NAFTA, ICSID, or the WTO). But see JEFF WAINCYMER, *The Process of an Arbitration: Complex Arbitration*, *PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION* 602 (2012), at 602 (“[A]micus submissions have been accepted in disputes which have a strong public interest dimension, in particular investor-state and competition law disputes . . .”).

³⁶ JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 376 (KLUWER LAW INTERNATIONAL 2003) [hereinafter *Lew*] About 40% of arbitration cases worldwide involve more than two parties, and that number has been rapidly increasing for twenty years. Nathalie Voser, *Multiparty Disputes and Joinder of Third Parties*, in Albert Jan van den Berg (ed.), *50 years of the New York Convention: ICCA International Arbitration Conference*, Vol 14, pp. 343-410 at 342 (2009).

³⁷ *Id.* This analysis assumes that there is a valid arbitration agreement binding on all parties. In the absence of a pre-dispute agreement to arbitrate, parties may conclude an arbitration agreement after a dispute has arisen. Alternatively, some jurisdictions at least in the U.S. have been willing to extend jurisdiction of an arbitral tribunal over parties who are accused of colluding with a party to an arbitration agreement. See *JLM Indus. V. Stolt-Nielsen SA*, 387 F.3d 163, 178 (2d Cir. 2004); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *Fujian Pac. Elec. Co. v. Bechtel Power Corp.*, 2004 WL 2645974, at *5-6 (N.D. Cal. Nov. 19, 2004).

³⁸ *Lew*, *supra* note 36, at 377.

In multiparty arbitration, an important consideration is the requirement that all parties must receive equal treatment in resolving their dispute.³⁹ This includes a responsibility to only consider the issues and evidence presented by parties to the arbitration agreement and to avoid being influenced by outsiders who are not part of the arbitration.⁴⁰ To do otherwise would violate the notion that arbitration is a product of individual party autonomy and could potentially risk non-enforcement of the award.⁴¹ Arbitration is a product of contract and the tribunal's authority derives entirely from the authority granted by the parties.⁴² By choosing arbitration, the parties waive a quite substantial right – the right to trial. Much like a court is limited to considering only issues within its subject matter jurisdiction on evidence properly admitted, it would be inapposite for an arbitral tribunal to consider issues beyond the scope granted by the parties or to consider evidence that the parties themselves have not supplied. In the context of antitrust law claims, this means that arbitrators should only consider the evidence and legal positions actually provided by the parties in the dispute.

Equal treatment also requires that the parties retain substantially the same substantive rights and remedies in arbitration as would be available under national law. For example, by statute national courts and the European Commission have the ability to give individual exemptions to parties under existing competition laws for policy reasons.⁴³ If a party instead chooses to go to arbitration, the arbitrator must have the ability to grant the same exemption.⁴⁴ Provisions like this complicate multiparty arbitration, however, because not all parties may be subject to the same laws and thus exemptions may be available for some but not others.

³⁹ *Id.* at 408.

⁴⁰ *Id.*

⁴¹ See New York Convention, *supra* note 7, art. 5(1)(c) (“Recognition and enforcement of the award may be refused [if the] award deals with a difference 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. . .”).

⁴² REDFERN & HUNTER, *supra* note 4, at 329 ¶ 5.48 (describing the contractual school of arbitration which posits that the relationship between the arbitrators and the parties is one of contract). See also Rau, *supra* note 26 and accompanying text.

⁴³ Mourre, *supra* note 16, at 46 n. 261 (noting that equal treatment is implicated by the availability of an exemption under Article 81(3)).

⁴⁴ *Id.*

Further, questions concerning joinder and consolidation are particularly salient in this context. On the one hand, adding additional parties to the arbitration has the potential to drastically change the scope of the legal issues in the proceeding and may increase the amount of evidence available to the tribunal.⁴⁵ On the other hand, the complications resulting from the application of multiple mandatory antitrust laws raise concerns over the ability of a tribunal to issue an enforceable award that is binding on all parties.⁴⁶ This is an important concern, because unequal treatment of the parties in arbitration is grounds for non-enforcement of the arbitral award.⁴⁷

2. CHOICE OF LAW ANALYSIS

Choice of law in international arbitration can have a determinative effect not only on the outcome of a dispute, but also on whether a claim is even heard by a tribunal in the first place. Uncertainty surrounding the choice of law is a cost born by the parties and makes alternate dispute resolution by arbitration less attractive.⁴⁸

The relevant points to keep in mind are that parties are free to select the governing law of the contract⁴⁹ and that of the arbitration agreement,⁵⁰ and these choices are generally upheld under principles of party autonomy.⁵¹ Nevertheless, some have argued

⁴⁵ LEW, *supra* note 35, at 408.

⁴⁶ YVES DERAINS & ERIC SCHWARTZ, *GUIDE TO THE ICC RULES OF ARBITRATION*, 183 (2nd ed. 2005) (noting that due to enforcement concerns, tribunals constituted under the ICC rules have used the consolidation provision “sparingly”).

⁴⁷ New York Convention, *supra* note 7, art. 5(1)(c).

⁴⁸ See BORN, *supra* note 6, at 900-01 (“The choice-of-law complexities that arise in international arbitration do not comport with the ideals of predictability and efficiency of the arbitral process.”); Charles Brower II, *Arbitration and Antitrust: Navigating the Contours of Mandatory Law*, 59 *BUFFALO L. REV.* 1172, 1132, 1140 (2011) (Whether through continued application by tribunals, or continued enforcement by national courts, “the pursuit of expediency outside the normal bounds of party autonomy seems likely to harm the integrity of the arbitral process”).

⁴⁹ Also referred to as the *lex contractus*.

⁵⁰ Also referred to as the *lex arbitri*.

⁵¹ REDFERN & HUNTER, *supra* note 4, at 195-96 ¶¶ 3.94, 3.97. See, e.g., LCIA Arbitration Rules, London Court of International Arbitration, (2014 Amendments) art. 22.3 available at http://www.lcia.org/Dispute_Resolution_Services/Lcia-arbitration-rules-2014.aspx [perma.cc/GXK3-CQJB] (“The Arbitral Tribunal shall decide the parties’ dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute.”).

that at least in the context of statutory claims, we should not assume “that the law that may govern the performance of the substantive terms of their bargain tells us everything we need to know about the merits of . . . extra-contractual causes of action.”⁵²

With respect to antitrust issues, the choice of law applied to arbitrability as well as the choice of law governing the substance of the dispute may be determinative. The *lex arbitri* governing the procedural issues (e.g. whether the dispute is arbitrable) is likely to be governed by a body of law that is different from that applied to the merits (e.g. the standard for evaluating a substantive claim).⁵³ The topic of this note focuses on the latter: however similar issues are also presented by the conflict of laws rules applied to arbitrability.⁵⁴

2.1. Foundations of Mandatory Law

Despite most national arbitration laws authorizing the tribunal to look to principles of international law⁵⁵ and to supplement the governing law absent express agreement by the parties,⁵⁶ the

⁵² Rau, *supra* note 26, at 65.

⁵³ REDFERN & HUNTER, *supra* note 4, at 173 ¶ 3.34 (noting that since arbitration is often seated in a “neutral” jurisdiction, the procedural law will generally be different from the law that governs the substantive matters in the dispute).

⁵⁴ For example, many of the arguments made regarding the multiplicity of conflicting mandatory substantive laws may also arise with respect to questions of arbitrability. A national court could potentially refuse to enforce an award with respect to antitrust issues on either the arbitrability ground or the public policy ground. See New York Convention, *supra* note 7, art. 5(2) (enforcement of an award may be refused if “[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country, or [. . .] enforcement of the award would be contrary to public policy.”).

⁵⁵ MODEL LAW, *supra* note 4, art. 2A (“In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application.”).

⁵⁶ REDFERN & HUNTER, *supra* note 4, at 235 ¶ 3.222 (summarizing the intention of the model law and various arbitration rules to allow the arbitral tribunal to select the governing law in absence of agreement by the parties, and to allow for the application of individual rules from various jurisdictions to different aspects of a dispute). See e.g., ICC Arbitration Rules, International Chamber of Commerce, (2012 Amendments) art. 21(1), available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> [perma.cc/2YZS-C2SS] [hereinafter ICC Arbitration Rules] (“In the absence of [. . .] agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate”); MODEL LAW, *supra* note 4, at art. 28 (“Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable”).

application of foreign law to the resolution of antitrust law issues has proven particularly difficult. When antitrust issues first became arbitrable, many jurisdictions refused to enforce awards under the public policy exception in Article V of the New York Convention.⁵⁷ National courts objected to the perceived incursion of arbitral tribunals into the sphere of market regulation⁵⁸ and feared that arbitral tribunals would reduce the deterrent effect by incorrectly adjudicating claims on the merits more favorably to would-be defendants than if a claim were brought in open court.⁵⁹

Citing requirements under institutional rules to make “best efforts” to render enforceable awards,⁶⁰ tribunals shifted their choice of law analysis to account for possible public policy objections of the jurisdictions where enforcement is most likely to occur.⁶¹ Commonly referred to as the “mandatory law” because of its perceived unavailability, it does not in fact refer to any uniform body, law or method of interpretation.

Different jurisdictions apply varying levels of scrutiny to the

⁵⁷ New York Convention, *supra* note 7, art. 5(2) (“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: [. . .] the recognition or enforcement of the award would be contrary to the public policy of that country”). See *Eco Swiss China Time Ltd. v. Benetton International NV*, Case C-126/97 (European Ct. of Justice 1999) (upholding applicability of European Competition law as public policy exception to enforcement of arbitral award).

⁵⁸ *C.f.* *Kukovec*, *supra* note 5, at 1 (describing the European Commission and the United States Federal Trade Commission’s blocking of the General Electric/Honeywell and Boeing/McDonnell Douglas mergers as “almost escalat[ing] into a trade war”).

⁵⁹ Mark Lee, *Antitrust and Commercial Arbitration: An Economic Analysis*, 62 *St. John L. Rev.* 1, 4 (2012).

⁶⁰ See, e.g., ICC Arbitration Rules, *supra* note 56, art. 41 (“[T]he 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”). But see, LCIA Arbitration Rules, London Court of International Arbitration, art. 32.2 (2014 Amendments) available at http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx [perma.cc/H7NC-7MA9] (“[T]he Arbitral Tribunal [. . .] shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat. . . .”) (emphasis added).

⁶¹ Stavros Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, International Arbitration Law Library, Vol. 19, at ¶ 2-36 (Loukas Mistelis & Stavros Brekoulakis eds., 2009) (noting that arbitral tribunals can consider the mandatory rules of a country other than the governing law chosen by the parties, and “[u]ltimately, it is upon the arbitrator deciding the particular case whether to take the enforcement factor into account or not”).

application of mandatory law.⁶² In general, European courts have been most favorable to the concept of mandatory law,⁶³ though the United States has also required that U.S. antitrust principles be considered where “the effects of the underlying agreement [is] felt in the United States.”⁶⁴ Critics argue that the practice ignores the intention—and explicit choice—of the parties.⁶⁵ Others have suggested that applying mandatory law is unprincipled and politically motivated, bringing the field of arbitration into disrepute.⁶⁶ Nevertheless, this practice continues widely.⁶⁷

2.2. Choice of Mandatory Law

Assuming the conflicts of laws analysis in a given jurisdiction allows the application of mandatory laws to antitrust disputes, the next inquiry is to decide *which* mandatory law to apply. The parties in arbitration may have assets in multiple jurisdictions, and given that awards can be annulled on public policy grounds the law of the arbitral seat must also be considered.⁶⁸ The latter concern means an arbitral tribunal can effectually only apply a foreign mandatory antitrust law which does not conflict with, and preferably synergizes with, the law of the arbitral seat.⁶⁹

⁶² Brower, *supra* note 48, at 1147 (“Given the vast differences in approach by national courts, tribunals may devote more or less attention to local mandatory laws depending on the anticipated level of judicial review at the seat of arbitration.”).

⁶³ *Id.* at 1148-52.

⁶⁴ Thomas H. Webster & Michael Buhler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* 314 ¶ 21-58 (Sweet & Maxwell eds., 2014).

⁶⁵ Brower, *Supra* note 48, at 1129-30 (mandatory laws . . . enable adjudicators to apply important regulatory norms enacted by the place of adjudication . . . without regard to (and often in contravention to) private agreements about the governing law.”).

⁶⁶ *Id.* at 1138 n. 32, *citing* PHILLIP LANDOLT, MODERNISED EC COMPETITION LAW IN INTERNATIONAL ARBITRATION ¶6-07, at 108 (2006) (“[The failure to apply mandatory laws] brings arbitration into disrepute and thus jeopardizes it as an institution”).

⁶⁷ *Id.* at 1128 n. 4 (quoting leading commentators on the increasing application of mandatory law to antitrust issues); REDFERN & HUNTER, *supra* note 4, at 205-07 ¶¶ 3.128 - 3.135 (“[P]erhaps the most frequently encountered instance of the application of mandatory law is competition or anti-trust law”).

⁶⁸ New York Convention, *supra* note 7, art. V(1)(e) (Enforcement may be refused if an award “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.”).

⁶⁹ Note that because of the annulment issue, tribunals will be more likely to favor applying the law of the arbitral seat even though this may conflict with the

The choice of law is important because jurisdictions differ substantially in their approach to antitrust policy.⁷⁰ Antitrust laws in the United States focus on consumer protection, are hostile to highly concentrated markets, and are less focused on regulating efficiency.⁷¹ In contrast, European Union competition laws seek to further economic integration between member states, raising the economic competitiveness of worse-off nations, and promoting the free-flow of goods across borders.⁷² Initially focused on private law issues, the European Union has only recently taken on a more regulatory function in the realm of competition law.⁷³

On the other hand, Switzerland⁷⁴ has taken a contrary position

governing law of the contract or create enforcement issues in the jurisdiction of the losing party. The calculus is that an award enforceable only in the jurisdiction of the losing party would be useless if it could be annulled in the national courts of the arbitral seat. *See generally*, BERNARD HANOTIAU, THE LAW APPLICABLE TO ARBITRABILITY, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, ICCA CONGRESS SERIES, Vol. 9, 158 (Albert Jan van den Berg ed., 1998) (outlining the factors an arbitrator will apply when deciding whether to apply foreign policy considerations to questions of arbitrability).

⁷⁰ *Cf.*, Kyle Robertson, *One Law to Control Them All: International Merger Analysis in the Wake of GE/Honeywell*, 31 B. C. INT'L & COMP. L. REV. 153 (2008) (noting that U.S. and E.U. antitrust regulators came to opposite conclusions concerning the proposed GE-Honeywell merger); Dianne P. Wood, *International Harmonization of Antitrust Law: The Tortoise or the Hare?*, 3 CHI. J. INT'L L. 391, 405-406 (2002) (comparing differing approaches in OECD countries versus developing countries to questions of national treatment in antitrust laws, and suggesting that developing countries are motivated by different policy objectives of spreading economic wealth among locals).

⁷¹ Eleanor Fox, *US and EU Competition Law: A Comparison*, in GLOBAL COMPETITION POLICY 339, 340-341 (Edward Montgomery Graham & J. David Richardson eds., 1997). *See also* Sherman Act, 15 U.S.C. §§ 1, 2 (banning actual or attempted monopolization and the restraint of trade).

⁷² Fox, *supra* note 71, at 339, 340-341; *see also*, Treaty of Rome, European Community, art. 85(3) (1957) (Mergers that would otherwise be voidable may be exempted if they "[contribute] to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit") available at http://ec.europa.eu/competition/legislation/treaties/ec/art81_en.html [perma.cc/W89Q-5JDD]

⁷³ Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 226 (2001).

⁷⁴ Brower, *supra* note 48, at 1159 (noting that "parties wishing to avoid European competition law reportedly provided for Swiss arbitration" but were unsuccessful as the Swiss Federal Tribunal later held EU competition laws nevertheless applicable); *see* Tribunale federale [DTF] [Federal Supreme Court] Nov. 13, 1998, X SA v. Y SA, Judgment of Nov. 13, 1998, 25 Y.B. Comm. Arb. 511, 513 (Switz.) (holding that arbitrators must consider EU competition law when the parties are from

on the subject of mandatory law, and professed that antitrust law is not a matter of international public policy.⁷⁵ Though EU competition law may still apply in cases where the parties have sufficient ties to the European Union, under Swiss law “an award rendered in Switzerland may not be set aside due to an incorrect application of EU competition law by the arbitrators.”⁷⁶ By comparison, Switzerland is therefore far less concerned with controlling the application of a coherent antitrust law policy than either the United States or the European Union.

It is important to remember that arbitral tribunals are the product of contract law, and therefore serve a different role in society than courts.⁷⁷ As more national courts and arbitral tribunals find antitrust issues arbitrable, it will become impossible for arbitrators to avoid ruling on these issues. While national courts have often elected to dismiss claims based on foreign antitrust laws, foreign regulatory interests have not been ignored in the choice of law analysis.⁷⁸ Further, an international arbitration tribunal by its very nature does not have the authority to decline jurisdiction on the basis that a claim is based on foreign law – nor should it. Therefore an arbitrator’s consideration of appropriate foreign regulatory interests in issuing an arbitral award is a natural extension of established practice. The point is that arbitration has the potential to improve the way parties resolve disputes, and these benefits are stifled by holding arbitrations to the same public policy objectives as national courts.

2.3. Joinder

Joinder presents a particular difficulty in the context of antitrust arbitration because it further complicates the choice of law analysis. As a theoretical matter, the joinder of an additional party should not alter the choice of law applicable to a given dispute between the

the EU and one party invokes its provisions).

⁷⁵ Tribunale federale [TF] [Federal Supreme Court] Nov. 13, 1998, *X SA v. Y SA*, 25 Y.B. Comm. Arb. 511, 513 (Switz).

⁷⁶ KLAUS PETER BERGER, CORRECTION, INTERPRETATION AND SETTING ASIDE OF THE AWARD, *IN PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS: NEGOTIATION, MEDIATION, ARBITRATION* 665 (3rd ed. 2015).

⁷⁷ Rau, *supra* note 26, at 53 (“[A]rbitration, as part of a process of private government and self-determination, should be understood through the lenses of contract rather than of adjudication.”).

⁷⁸ Buxbaum, *supra* note 73, at 235-237.

existing parties.⁷⁹ However, a conflict may arise where the additional party is located in a jurisdiction different from the parties who are already part of the arbitration, thus implicating an alternate—and possibly conflicting—mandatory law. Parties may be joined either as additional claimants or respondents, however the choice of law issues are more likely to be determinative when a party is joined as respondent as this is the party against whom an award is most likely to be issued. Additionally, parties joined as respondents are also more likely to raise defenses based on antitrust law.

Thus, an arbitral tribunal deciding which antitrust law to apply in multiparty arbitration must seek to harmonize the potentially conflicting mandates of (1) the law of the arbitral seat, (2) the laws of the most likely jurisdiction where enforcement against respondent parties would be sought, (3) the laws of the jurisdiction of any of the claimant parties against which a counterclaim based in antitrust law has been raised, and potentially (4) the law of the jurisdiction of the additional party to be joined. Given the current state of affairs, this is at times an impossible task.

3. SOLUTIONS FOR ARBITRATORS

The following discussion will demonstrate the ways in which all of the current solutions available to arbitral tribunals are inadequate. All have the potential to leave the whole or part of an award unenforceable. Especially for larger awards, the winning party may need to apply for enforcement in multiple jurisdictions. The tribunal can only choose to apply one country's governing law at a time. As the quote at the opening of this comment depicts, when faced with conflicting mandates a tribunal is always left to disappoint one jurisdiction or another.

In all cases the tribunal will need to determine whether a fundamental tension between competing antitrust laws exists. If all potential rules would make available the same rights and remedies to the parties, and yield substantially the same result on the facts, the issue need not be decided. However, given that many countries have resisted harmonization of antitrust laws,⁸⁰ this outcome is

⁷⁹ HANOTIAU, *supra* note 35, at 183 (interpreting experience with a case where the CEPANI appointments committee declined consolidation which would have required the resolution of additional issues under a different applicable law).

⁸⁰ John McGinnis, *The Political Economy of International Antitrust Harmonization*,

unlikely in all but a minority of multiparty and joinder cases.⁸¹

Under the current state of affairs, if the antitrust policies in the various place of enforcement differ substantially, the tribunal may not be able to write a sufficiently enforceable award. Tribunals can resolve this tension in a number of ways, some of which are more or less consistent with the fundamental premises of arbitration. This section will consider the costs and benefits of the most practical options, and suggest ways to minimize risk. As always, tribunals must work within the limits of their authority or face non-enforcement.⁸²

3.1. *Law of the Seat*

The law of the seat is relevant for two main reasons: (1) national courts can set aside arbitral awards on public policy grounds,⁸³ and (2) the choice of seat may be interpreted as explicit consent by the parties to be subject to its laws.⁸⁴ As discussed, the public policy ground for annulment is the justification for applying mandatory antitrust law. Competition law statutes are considered matters of public policy in many jurisdictions, and in many jurisdictions a losing party could apply to the national court “in the place the award was made” to annul an award on antitrust or other regulatory issues if the law applied does not conform to local law.⁸⁵ Perhaps for this reason, some jurisdictions have also interpreted the explicit choice of the seat as an implicit agreement to be bound by public policy choices of the arbitral seat.⁸⁶

45 WM. & MARY L. REV. 549, 593 (2003) (arguing against antitrust harmonization because it has high agency costs and reduces long-run experimentation and innovation in antitrust).

⁸¹ See also, Rau, *supra* note 26, at 89 (noting that the explanatory force of an arbitral tribunal’s reasoning declines as the number of considered laws and jurisdictions increases).

⁸² New York Convention, *supra* note 7, art. V. (stating the conditions under which an authority could refuse to enforce the award).

⁸³ BORN, *supra* note 6, at 3163-64 (noting that many national arbitration statutes and the UNCITRAL Model Law allow for annulment in the place the award was made on the ground that “the award is contrary to public policy”). see also UNCITRAL Model Law, *supra* note 2, at art. 34(2)(b)(ii) (“An award may be set aside [by a national court if] the court finds that: [. . .] the award is in conflict with the public policy of this State.”).

⁸⁴ Rau, *supra* note 26, at 74-75.

⁸⁵ BORN, *supra* note 6 and accompanying text.

⁸⁶ BORN, *supra* note 6, at 622 note 10(c) (“[N]ational courts in the arbitral seat are usually competent (and exclusively competent) to entertain actions to annul or

3.2. *Governing Law of the Contract*

The obvious solution would be to apply the governing law of the contract, or *lex contractus*. This body of law may be the same or different as that of the arbitral seat, and hopefully the governing law is at least compatible with the *lex arbitri*.⁸⁷ What if a mismatch exists between the antitrust policies under the law of the seat and the law of the contract?

Under the current practice tribunals would be wise to defer to the law of the seat. An unenforceable award is of little use to the prevailing party. Given the widely accepted (though misguided) application of mandatory law under the guise of public policy, the safer choice for an arbitral tribunal is to opt for the law of the arbitral seat so as to avoid annulment there. This outcome should seem unfair; after all it violates the explicit choice of the parties. This example demonstrates the fundamental problem with the way antitrust laws are currently handled in arbitration. The better solution would be for arbitral tribunals to issue awards based on the law of the contract, and for national courts to enforce them even when they conflict with the public policy objectives under national law. This argument is discussed further below.⁸⁸

3.3. *Place Where Conduct Occurred*

The law of the place where alleged misconduct occurs is clearly legally relevant. To that end, some arbitrators have even found it inappropriate for arbitral tribunals to apply mandatory law to the extent that (1) the parties chose an alternate governing law and (2) the allegedly violative conduct occurred outside the territorial jurisdiction of the law governing the dispute.⁸⁹ To do so would

set aside" awards, and that some jurisdictions allow very limited review while others allow "extensive public policy inquiries."); *see also*, BORN, *supra* note 6, at 979 note 21(b)) (citing ICC Award No. 4132 for the proposition that "an arbitrator's overriding duty is to render an enforceable award, and impliedly that this requires consideration of public policy defenses and claims).

⁸⁷ *See supra* § 2.

⁸⁸ *See infra* §5.1.

⁸⁹ Rau, *supra* note 26, at 59 (citing ICC Case No.6320, XX Y.B Comm. Arb. 62 (ICC Int'l Ct. Arb.) at ¶¶ 151, 159 and stating that "even if" American courts were to interpret the statute as calling for the application of treble damages in such a case, "the acceptable interest to stop activities such as those covered by RICO also outside the United States is not, by itself, sufficient to lead to mandatory extraterritorial application in international arbitration.").

imply that the nation promulgating such laws “has some sort of police authority for international trade outside [its] territory” or that the laws were a representative “expression of ‘international public policy.’”⁹⁰ Thus, arbitral tribunals must not only consider whether a choice of law has jurisdiction over the *parties*, but also whether there is jurisdiction over the present *dispute*.

3.4. Finding the Money

Alternatively, the tribunal could choose to apply the mandatory law of the country where enforcement of the largest portion of the award would likely to be required. The benefit to the plaintiff would be that both antitrust as well as other related claims would be resolved in a single arbitration, while ensuring that at least the most significant portion of the claim will be enforceable. This procedure however would greatly disadvantage the defendant, who may raise an objection to unequal treatment on the grounds that the plaintiff would receive greater control over the parameters of the arbitration. Allowing the plaintiff to forum shop for the jurisdictional rules that would result in the largest enforcement capabilities would impose a policy choice on the parties that is necessarily pro-antitrust enforcement. Before doing so, however, the tribunal should make a holistic assessment of the various policies governing the parties, and ensure that any implicit policy choice comports with fundamental fairness. Nevertheless, the procedural fairness objections are not the only problem with implementing this strategy.

This solution is problematic because the reasoning is inherently circular. The place of enforcement will depend on who the successful party is, which in turn may depend on which law is applied.⁹¹ Moreover, it may be unclear which party faces the largest potential liability, or where the most significant assets of that party are located. Choosing the governing law in this way could potentially be arbitrary, and would therefore be subject to criticism.⁹²

⁹⁰ *Id.* at ¶ 156.

⁹¹ Rau, *supra* note 26, at 82.

⁹² Born, *supra* note 6, at 2615 (“[D]ifferences between national laws and procedures can be great . . . the need for predictability and stability is particularly substantial and . . . the risks of arbitrary or discriminatory legislative or judicial actions are especially acute [in international commercial matters].”)

3.5. Applying Multiple Mandatory Laws

Particularly in multiparty arbitrations, the tribunal could end up applying different mandatory laws to each claim against each respondent—in effect, joining the claims for purposes of the proceeding and then severing them before issuing the arbitral award. Ironically, such an approach could actually hasten innovation and improve antitrust regulations worldwide. Some have argued that arbitration in general tests the “inherent soundness” of established law, and allows tribunals to consider more freely “whether *the policy underlying the rule* has truly been implicated.”⁹³ Moreover, in the case of multiparty arbitration, applying multiple mandatory laws could create a forum to directly compare the results of different rules applied to the same set of facts.⁹⁴ This information, to the extent that it becomes available,⁹⁵ could then be used by legislatures to tailor national competition laws to more reliably achieve their desired outcomes.

Although the application of multiple mandatory antitrust laws to different parties in a multiparty arbitration would address some concerns, this solution is painfully imperfect. The law of the arbitral seat may still conflict with the law of the most likely place of enforcement, or it may be unclear where the enforcement will eventually be sought. Non-enforceable awards could still result. There is also a chance that the results would be inconsistent as between the parties. This may negatively affect the parties’ relationship, particularly if one party is treated less favorably compared to the same conduct arising out of the same contract.

Furthermore, this solution comes at a substantial financial cost. While there are some efficiency gains from holding a single proceeding to decide common questions of fact between the parties, there may be few common questions of law. When applying

⁹³ Rau, *supra* note 26, at 87.

⁹⁴ Provided of course the parties allow the opinions to be published. See 2015 *International Arbitration Survey: Improvements and Innovations in International Arbitration*, Queen Mary Univ. London, White & Case LLP at 22 (“The suggestion that institutions should publish awards in redacted form (and/or as summaries was accordingly . . . favoured for its academic value and usefulness when arguing a case. . . .”) available at <http://arbitration.qmul.ac.uk/docs/164761.pdf>.

⁹⁵ This does not mean that confidentiality could not be maintained. Scholarly commentators and even arbitral institutions sometimes publish case notes including the arguments advanced and the legal conclusions reached by the tribunal. To protect confidentiality, the names and identifying facts are redacted or omitted.

different substantive laws to the parties, counsel will need to make separate submissions to the tribunal, and the arbitrators will have to expend time and effort crafting individual awards based on various legal standards. This duplication of effort increases the financial costs of this dispute resolution mechanism, and could be avoided if a single governing law (such as the law of the contract) could be applied in an enforceable way.

3.6. *Refusing Joinder*

The least likely resolution would be for the tribunal to refuse joinder of any additional party with a conflicting mandatory law. Tribunals have discretion under the institutional rules that allow joinder.⁹⁶ The benefit of this tactic is that it avoids the issuance of an award which would likely be unenforceable, while potentially preserving a claim against the additional party. However, this option is unattractive because it potentially violates the parties' right to arbitrate against the parties of their choosing and may result in multiple proceedings on similar issues. Despite the conflict of law issues and the attendant enforcement difficulties the parties may still prefer to hold a joint arbitration with all the relevant parties.

4. IMPLICATIONS

The point of arbitration is to generate an enforceable award. What good is winning on the merits in a dispute if one cannot collect the spoils? The problems created by the application of mandatory antitrust laws in arbitration lead parties to engage in inefficient and negative-value behavior that undermines the benefits to international arbitration. Specifically, parties are incentivized to engage in forum shopping at the enforcement and adjudication stages, and to waste resources by spending additional time drafting strategic arbitration clauses.

4.1. *Forum Shopping*

Forum shopping may occur at the enforcement stage. Winning parties will try to enforce their award in jurisdictions with favorable antitrust laws, and in fact may have to apply to multiple

⁹⁶ LEW, *supra* note 36, at 289-290 (describing the standards for third-party joinder under the LCIA and CCIG arbitration rules and noting that tribunals have final discretion).

jurisdictions in order to collect the full amount of an award.⁹⁷ Worryingly, parties may even be tempted to argue the enforcement prospects at the adjudication stage to encourage the arbitral tribunal to apply the competition laws of a particular jurisdiction (which is otherwise unconnected to the dispute) when rendering the award. For example, if a claimant becomes aware that respondent has assets located in a jurisdiction favorable to antitrust enforcement, the claimant may urge the tribunal to apply the substantive antitrust laws of that jurisdiction even in the face of other substantive laws that have a closer nexus to the dispute. This is problematic because it adds uncertainty and increases the cost of arbitration by inviting spurious argumentation choice of law issues.

A tribunal may be swayed by such arguments to the extent that producing enforceable awards affects the ability of an arbitrator to obtain future appointments. No one wants to hire an arbitrator who has a history of producing unenforceable awards. Not only will the disappointed party who was unable to enforce their award be disinclined to hire or recommend their arbitrators in the future, but other potential clients will know not to hire those arbitrators since — unlike arbitral awards — enforcement proceedings are publically available because they must be filed in open court.

Conversely, parties seeking to avoid enforceability will have every incentive to disperse their assets to more favorable jurisdictions. Given the premise that awards will only be enforceable where the award conforms to national public policy interests, a losing party could avoid paying damages on an award simply by moving their assets to jurisdictions that have adopted policies inconsistent with those applied in the award. This may not be possible in every case, but even if it happens only in a small fraction of cases this has the potential to seriously vitiate the benefits of resolving antitrust disputes in international arbitration. Thus, forum shopping both in favor of and opposed to antitrust regulations will lead to a lack of uniformity, unfair applications of foreign law, and skewed results in arbitration.

⁹⁷ Rau, *supra* note 26, at 82 (citing the “the transitory nature of ‘assets’ in an electronic world” as one factor making it “impossible for the arbitrators to predict with any accuracy just which jurisdictions may later be called on to recognize an award.”).

4.2. For Drafting Arbitration Agreements

Given the extensive reach asserted by their national courts,⁹⁸ companies with strong ties in the European Union or the United States are unable to “contract out” of statutory antitrust enforcement. The goal in drafting arbitration agreements therefore should be to mitigate the potential problems should a multiparty international arbitration on antitrust issues occur. An explicit choice of antitrust law in an arbitration agreement alone would not be effective. Fearing non-enforcement, tribunals have shown a willingness to ignore explicit selections in favor of unpredictable mandatory law.⁹⁹

The most effective tool in drafting an arbitration agreement in anticipation of possible multiparty antitrust arbitration would be to select an arbitral seat and a set of institutional rules whose policies match the enforcement profile of the parties. Parties whose business plan involves taking advantage of economies of scale should seek the protection of rules that favor free markets and non-intervention.¹⁰⁰ Small businesses and new market entrants who

⁹⁸ See Kyle Robertson, *One Law to Control Them All: International Merger Analysis in the Wake of GE/Honeywell*, 31 B. C. INT'L & COMP. L. REV. 153 (2008) (discussing the implications of the European Commission's blocking of the proposed merger between two U.S. companies: GE and Honeywell). *Cf.*, Dimitrios-Panagiotis L. Tzakas, *Civil Antitrust Liability in the International Context: From Empagran to the Rome II Regulation*, 37 DAJV NEWSLETTER 19 (2012) (reviewing the history of extraterritorial enforcement of antitrust laws by U.S. and European courts); Juliette Gardside, *From Google to Amazon: EU goes to war against powers of US digital giants*, GUARDIAN, (Jul. 5, 2014), available at <http://www.theguardian.com/technology/2014/jul/06/google-amazon-europe-goes-to-war-power-digital-giants> [perma.cc/E69B-E9EC] (describing European regulators investigation and criticism of U.S. based company Google for its near monopoly of internet searches in Europe likening it to a threat to national sovereignty).

⁹⁹ See Brower, *supra* note 48.

¹⁰⁰ E.g. Switzerland when none of the parties is based in an E.U. member state. Switzerland has historically engaged in limited antitrust enforcement, and unlike in the U.S. consumers in Switzerland do not have standing to bring private suits to enforce antitrust laws. Bernhard C. Lauterburg and Philipp E. Zurkinden, *Ch. 25: Switzerland* in THE PRIVATE COMPETITION ENFORCEMENT REVIEW at 360 (7th ed. 2014); *But see*, Federal Tribunal [TF] [Swiss Supreme Court] Mar. 8, 2006, 4P.278/2005 at ¶ 3.2 (Switz.) (refusing to annul arbitral award for violation of public policy when it applied European competition laws to European parties). In general, smaller economies that are open to trade have less incentive for strong antitrust enforcement because concentrated domestic companies are more competitive abroad and the negative domestic effects of monopolization are limited by the fact that most of the goods are exported abroad. MICHAEL UTTON, INTERNATIONAL COMPETITION POLICY: MAINTAINING OPEN MARKETS IN THE GLOBAL ECONOMY 100 (2006).

depend on stronger market regulation should instead opt for jurisdictions with a history of antitrust enforcement.¹⁰¹ Where possible, the law of the seat should be same as the governing law of the contract, or at least not have opposing policy objectives. Particularly for non-European parties, Switzerland is an attractive arbitral seat because they have taken a hostile view of mandatory antitrust law.¹⁰²

Confidentiality agreements should be used in order to avoid attracting the attention of public regulatory agencies or other potential plaintiffs. In the context of antitrust arbitration, confidentiality is important because regulatory agencies may be able to initiate parallel proceedings, apply for a stay of the arbitral proceeding pending the resolution of their own investigation, or pressure the parties into holding concurrent proceedings or sharing evidence.¹⁰³ Importantly, the agencies serve interests other than, and possibly adverse to, those of the parties in arbitration. The parties will wish to resolve their private disputes in a speedy and cost-effective manner, whereas the administrative agencies serve much broader interests.

Additionally, confidentiality of the award is important so as not to encourage additional proceedings filed by third-party stakeholders. Imagine an arbitration concerning a claim for breach of contract, where the responding party successfully invokes a claim for unfair trade practices. Since the arbitration is only binding on the parties in the proceeding, there will be other potential claimants who may now wish to invoke an unfair trade practices claim against the original claimant. If the award remains confidential, those potential claimants are less likely to become aware that they have a claim, and also will not be able to rely on any of the findings in the arbitral proceedings either to aid in their discovery or as persuasive evidence in court.

Note also that this arrangement does not disadvantage the winning party in arbitration. The respondent's claim will already

¹⁰¹ E.g., members of the European Union, the United States. *See generally*, Barak Orbach, *The Antitrust Curse of Bigness*, 85 Southern L. Rev. 605-655 (2012) (describing the evolution of American antitrust law as premised on trust busting); UTTON, *supra* note 100, at 100 (describing the US and EU as having the most "highly developed and comprehensive policies" on antitrust enforcement).

¹⁰² *See generally* Berger, *supra* note 76, and accompanying text; *supra* note 100 and accompanying text.

¹⁰³ *See supra* § 1.1.

have been satisfied, and if anything the award may be easier to collect if the other party is keen to avoid having it filed publicly in court.¹⁰⁴ Lastly, at the time the arbitration agreement is concluded the parties will not know against whom a statutory antitrust claim will be made, thereby both parties benefit from the protection of a pre-emptive confidentiality clause compared to a post-dispute agreement which will be harder to negotiate once a dispute has arisen.¹⁰⁵

5. POLICY RECOMMENDATIONS

5.1. Enforcement of Foreign Antitrust Laws

National courts should accept the application of foreign antitrust laws and enforce antitrust awards based on the governing law of the contract like they would any other. Piecemeal rejection of the governing law contractually chosen by the Parties is inimical to international arbitration doctrine. The purpose of the New York Convention was "to encourage the recognition and enforcement of international arbitral awards."¹⁰⁶ The status quo of refusing to enforce awards on public policy grounds is inconsistent with this goal.

The New York Convention does expressly allow for the annulment or refusal to enforce an award on public policy grounds,¹⁰⁷ but this exception was not meant to have such far-reaching effects.¹⁰⁸ A public policy exception was necessary to convince countries to give up substantial sovereignty by agreeing to use the jurisdiction of their courts to enforce judgments they had no hand in shaping. The exception should not become the rule. Denying enforcement unless a specific mandatory law is applied

¹⁰⁴ BORN, *supra* note 6, at 2801 (noting that even where confidentiality agreements exist, awards can be made public in enforcement actions); REDFERN & HUNTER, *supra* note 4, at 140 ¶ 2.159 (discussing the view that awards filed in court for enforcement purposes become public documents).

¹⁰⁵ REDFERN & HUNTER, *supra* note 4, at 136 ¶ 2.145 (noting that confidentiality agreements can be negotiated at the time of contracting or at the outset of arbitration).

¹⁰⁶ GAILLARD, *supra* note 3, at 126, citing *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2nd Cir. 1983).

¹⁰⁷ New York Convention, *supra* note 7, art. V.

¹⁰⁸ BORN, *supra* note 6, at 3661 (arguing that the structure and objectives of the Convention suggest that member states cannot use national public policy to effectively repudiate their obligations under Articles III and V).

constitutes an end-run on a national court's obligations under the New York Convention.

Allowing the resolution of private antitrust law claims in binding international arbitration is precisely the type of incursion on national sovereignty to which the member states agreed when signing the New York Convention.¹⁰⁹ Arbitration is a give and take. In exchange for enforcing arbitral awards rendered under foreign law, states are assured that awards rendered under their own law will also be enforced with limited scrutiny. The same could be true for antitrust law claims. If national courts were to enforce awards based on foreign antitrust law, they would thereby ensure that their own citizens (the public whose interest they are keen to protect) are able to carry the protections of their own national competition laws with them when they do business abroad. Is that not an interest worth protecting?

Additionally, incursion on national sovereignty in the case of antitrust issues is actually quite small. National courts need not fear the slackening of statutory antitrust enforcement or the lack of a coherent doctrine,¹¹⁰ because the award is constrained to the resolution of issues between the parties to the arbitration¹¹¹ and no new national precedents are set in arbitral awards. An award would not deprive other private or public stake holders the opportunity to present related statutory claims in subsequent proceedings. In fact, since arbitral awards normally remain unpublished,¹¹² in many cases they cannot even be used as persuasive authority in other adjudicatory proceedings.

The purpose of allowing contracting parties to resolve antitrust law issues in arbitration is not to circumvent national laws to which the parties would otherwise be subject, but rather to embrace the freedom of parties to choose the forum in which to resolve claims

¹⁰⁹ *Id.*

¹¹⁰ See Blumenthal, *supra* note 33, at 1525 ¶ 42-053 (consumer protection cases "seldom present complex policy choices [and] generally do not pose difficulties in maintaining coherent and consistent enforcement.").

¹¹¹ BORN, *supra* note 6, at 1406 ("[T]he principle that only the parties to an international arbitration agreement are either bound or benefitted by that agreement is fundamental to international arbitration.").

¹¹² See BORN, *supra* note 6, at 3825 (discussing the limited availability of arbitral precedent because most awards are not published); see also LEW, *supra* note 36, p. 659 (noting that "arbitration proceedings normally remain confidential" and describing how voluntarily published opinions serve as a practical source of information in other arbitrations).

against each other. Under a strict interpretation of party autonomy, parties who derive a benefit from requiring adjudication of antitrust issues in national courts could exclude those claims when drafting an arbitration agreement. Ignoring the otherwise fundamental right of parties to choose *not* to the exclude those issues from arbitration is paternalistic and misplaced. International arbitration has proven a successful legal innovation to deal, among other things, with globalization and backlogged judicial systems.¹¹³ Carving out exceptions for competition law claims between two private parties imposes unnecessary costs and risks losing access to substantial benefits.

5.2. Harmonization of Antitrust Law

The foreseeable complexity of these issues further highlights the potential gains of greater harmonization in antitrust law.¹¹⁴ National governments could coordinate their antitrust laws to produce more consistent rules. Similar gains have previously been achieved in the realm of tariff regulations under the auspices of the WTO.¹¹⁵ The advantage of such a regime would be that choice of law questions would frequently become immaterial in the context of antitrust, thereby increasing predictability and facilitating the growth of cross-border business activities.

Unfortunately there are many obstacles to harmonization. First, countries with different political ideations are unlikely to agree on matters of antitrust policy.¹¹⁶ Centrally-planned economies such as China have historically favored monopolies, whereas democratic governments have encouraged greater market competition.¹¹⁷

¹¹³ See LEW, *supra* note 36, at 7 (explaining that neutrality and expedition are some of the primary virtues of arbitration).

¹¹⁴ See Wood, *supra* note 71 (“To ‘harmonize’ one country’s [antitrust] law with those of another must be a Good Thing.”).

¹¹⁵ For further discussion on the role of the WTO and intergovernmental agencies, see *infra* § 5.3.

¹¹⁶ Stephans, *infra* note 118, at 185-186 (arguing that politics explains at least of the variation in antitrust policy).

¹¹⁷ See Niels Petersen, *Antitrust Law and the Promotion of Democracy and Economic Growth*, in ECONOMIC DEVELOPMENT: THE CRITICAL ROLES OF COMPETITION LAW AND POLICY, Vol. 2 (Eleanor Fox & Abel Mateus eds. 2011) (finding that antitrust law has a stronger effect on economic growth than the level of democracy); *But see* Harry First & Spencer Weber, *Antitrust’s Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013) (discussing how U.S. antitrust enforcement has become increasingly influenced by partisan politics and therefore less focused on “free” markets).

Further, given variations in economic development, it is questionable that a one-size-fits-all approach to antitrust would even be desirable.¹¹⁸ Depending on the context, businesses themselves may oppose harmonization.¹¹⁹ Finally, some have argued that harmonization would inflict high agency costs and would restrict legal innovation.¹²⁰

Thus harmonization could solve part of the mandatory antitrust law problem, but it comes with so many attendant difficulties that it is unattractive in practice. Depending on antitrust law harmonization to solve the multiparty mandatory law problem is like taking a shower to get ketchup off your thumb. It'll work, but it would be much easier to just wash your hands. Enforcing awards based on the antitrust law policies of the governing law of the contract (regardless of whether it concords with local practice or not) is the hand-washing solution in this case.

5.3. Intergovernmental Organizations

Some have argued that an intergovernmental agency or international trade organization could most efficiently resolve international antitrust issues,¹²¹ however the preceding discussion on multiparty arbitration demonstrates just a few of the drawbacks of such a proposal. National courts have ignored the otherwise established principles of party autonomy in order to evade the

¹¹⁸ See McGinnis, *supra* note 80, at 556 (describing reasons why antitrust policy in developed countries is not designed to maximize consumer welfare).

¹¹⁹ Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L. J. 383, 428 (2007) (noting that corporations are likely to favor harmonization on merger rules, but oppose confluence of rules governing market dominance or cartels).

¹²⁰ McGinnis, *supra* note 80 at 554-68.

¹²¹ Andrew T. Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L L. 355, 359 (2004) (contending that a unified regime is necessary in part because current choice of law rules result in inefficient regulation); Robertson, *supra* note 71, at 156-157 (discussing how states' individual competition laws have led to failed applications); *But see* Alex Lawson, *WTO a Tough Venue to Challenge China on Antitrust Law*, LAW 360 (Sept. 15, 2014), <http://www.law360.com/articles/576691/wto-a-tough-venue-to-challenge-china-on-antitrust-law> [perma.cc/X8LZ-ZYMZ] (last visited February 1, 2016) (discussing why cases challenging the unequal application of antitrust laws in the WTO are rare); Bradford, *supra* note 117, at 384-85 (arguing that strategic interests make a unified antitrust regime at the WTO unattractive); Paul Stephans, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L. J. 173, 209 (2005) ("[G]iving an international agency responsibility for supervising how states exercise their jurisdiction would lead to the exact same agency problems" as allowing them to self-regulate).

perceived incursion on national sovereignty to decide fundamental issues of domestic public policy.¹²² The establishment of an international antitrust adjudicative body or adjudication under the WTO¹²³ would not alleviate these concerns.

Further, establishing an international organization would do very little to alleviate the drawbacks of parallel or dual track proceedings.¹²⁴ The field of international arbitration has grown out of a desire to resolve disputes efficiently¹²⁵ and in a neutral forum,¹²⁶ and national courts have repeatedly enforced the right of parties to define the scope of issues to be decided in arbitration.¹²⁷ Parties need to be able to raise antitrust defenses in arbitration, and an intergovernmental organization is no substitute for binding arbitration specifically tailored to meet the needs of the parties.

6. CONCLUSION

Mandatory antitrust law is a thorn in the side of international arbitration. As multiparty arbitrations increasingly address competition law issues, tribunals must grapple with the tension between party autonomy and possibly conflicting mandatory laws. The application of mandatory antitrust laws in multiparty arbitration has the potential to produce uncertainty, forum-shopping, and conflicting results.

Having established the arbitrability of an antitrust issue in a multiparty arbitration, arbitrators will have to weigh a number of considerations in determining which mandatory law should apply.

¹²² See *supra* § 1.1.

¹²³ See Kukovec, *supra* note 5, at 43-45 (analyzing whether the WTO should be given a role in international antitrust adjudication).

¹²⁴ See *supra* § 1.1.

¹²⁵ See BORN, *supra* note 7, at 61 ("Procedural flexibility, informality and efficiency were key attributes of the arbitral process, and central to the business community's preference for arbitration."). See also, ICC Arbitration Rules, *supra* note 56, at art. 22 ("[T]he arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.").

¹²⁶ See REDFERN & HUNTER, *supra* note 4, at 32 ¶¶ 1.90-1.91 (describing the advantage of resolving an international dispute before a neutral tribunal).

¹²⁷ See, e.g., *Mitsubishi Motors*, 473 U.S. 614 (1985) (holding that the parties agreed to arbitrate statutory antitrust claim); *But see, Eco Swiss China Time Ltd.*, Case C-126/97 (holding that national courts must raise domestic antitrust issues as a matter of public policy when deciding whether to enforce and award – regardless of whether the issue was raised by the parties in arbitration).

Ideally, tribunals would respect party autonomy and only apply the governing law of the contract to antitrust claims that arise in connection with the contract. However, due to enforcement concerns the law of the arbitral seat and the laws of the most likely places of enforcement must also be considered. As a last resort tribunals could apply different mandatory laws to various parties or refuse joinder of an additional party with a conflicting applicable mandatory law.

The preceding discussion demonstrates the need for change at the level of national courts. International arbitration depends on the broad enforceability of awards.¹²⁸ States that have signed the New York Convention have a responsibility to recognize awards made under foreign law, and this should include antitrust laws. Alternative solutions such as the harmonization of national antitrust laws or the creation of an intergovernmental regulatory scheme are problematic and ultimately less attractive solutions. Resolution of antitrust issues in binding arbitration allows private parties to efficiently resolve disputes with minimal incursion on national sovereignty.

The scope of this problem is not limited to antitrust issues. Similar concerns arise in other areas of law that strongly implicate public policy, such as environmental law, intellectual property law, and securities regulation.¹²⁹ Likewise, though the use of class actions in international arbitration is still rare,¹³⁰ developments in that sphere may further complicate this analysis in the future. What is an arbitrator to do? Proceed carefully, and hope the award is enforced.

¹²⁸ BORN, *supra* note 6, at 102 (noting that mandatory recognition of awards, subject only extremely limited exceptions, is an extremely innovative feature of the New York Convention).

¹²⁹ Brower, *supra* note 48, at 1130 (listing common examples of mandatory laws).

¹³⁰ See S.I. Strong, *Enforcing Class Arbitration in the International Sphere*, 30 U. PA. J. INT'L L. 1, (2008) (identifying emerging issues in international class arbitration); Kessler, *supra* note 16 (discussing antitrust class arbitration in U.S. domestic context) *citing* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (upholding class arbitration waiver in form contract).