

Reassess the arbitrability of antitrust disputes in China

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Reassess the Arbitrability of Antitrust Disputes in China by Qingxiu Bu

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Reassess the Arbitrability of Antitrust Disputes in China

Qingxiu Bu

Abstract

Given the lack of clarity under Chinese law, a long-standing question remains uncertain as to whether an arbitration clause in the contract could exclude the court's inherent jurisdiction to hear an antitrust dispute. In the Crosshairs is public policy debate. China's Supreme People's Court (SPC) has made two landmark judgments, which have, however, left scope for ambiguity. It is argued that the SPC should play a more proactive role and provide more clarity. Doing so would help China integrate into the established international track in the transnational dispute resolution mechanism.

Introduction

Firms can harm consumers through unfair pricing and inhibiting new entrants in an anticompetitive market.¹ Antitrust law seeks to protect public interests by ensuring free and fair competition in markets,² while arbitration is of a private nature and a creature of contract.³ The former is enacted to maintain competition among various businesses participating in a certain market segment,⁴ while the latter is characterised by its hallmarks of adaptability and access to expertise.⁵ Parties benefit from the efficiency of arbitration,⁶ which is attributed to there being only narrow circumstances for judicial review on limited grounds.⁷ Based on an orthodox divide between *right in rem* and *right in personam*, antitrust law is normally enforced through public agencies.⁸ With the boundary between public enforcement and private dispute resolution becoming increasingly blurred, the arbitrability of private antitrust actions has long been a highly debated topic. Disputes differ considerably in terms of suitability for arbitration, which could be further limited by the scope of the arbitration agreement at issue. Furthermore, private antitrust claims have long been thought non-arbitrable due to the public nature of antitrust law, though the scope of non-arbitrability varies from one jurisdiction to another. It is essential to explore a variety of inquiries in this controversial scenario. Is the lack of legislation explicitly a decisive obstacle to recognising antitrust-related arbitration? Does the public nature of Chinese Antimonopoly Law (the AML 2008) preclude arbitration in the antitrust dispute's resolution? The greatest challenge is how the Chinese people's courts respond to the arbitration awards made by their counterparts in the U.S. and the EU in cross-border cases.

¹ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940)

² Japanese Antimonopoly Act Art. 1; Conceptually, antimonopoly and antitrust are interchangeably used throughout the study.

³ Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 (8) *The Yale Law Journal* 2804, 2939

⁴ 15 U.S.C. § 1 (2018)

⁵ *Mitsubishi Motors v. Soler*, 473 US 633 (1985)

⁶ Pamela Bookman, 'The Arbitration-Litigation Paradox' (2019) 72 *Vanderbilt Law Review* 1119, 1149

⁷ 5 U.S.C. §§ 571–84 (2018)

⁸ Harry First, Eleanor Fox and Daniel Hemli 'The United States: The Competition Law System and the Country's Norms' in Eleanor M. Fox and Michael J. Trebilcock (eds.) *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford, Oxford University Press, 2013) 329–383

This study undertakes a comparative analysis on the arbitrability or non-arbitrability of antitrust disputes in China, U.S. and the EU. However, the focus will be on the Supreme People's Court's (SPC's) rulings on *Shell v Huili* and *Shell v Changlin*. The paper starts with the evolutionary analysis of U.S. law on the arbitrability of antitrust disputes. It then moves to the EU perspective on the basis of a judgment on *Eco Swiss* made by the European Court of Justice (ECJ). The inconsistency of judgments in China's lower courts have not been resolved when the SPC handed down its judgments. Primary criticisms are based on the SPC's controversial reasoning, and China's potential integration into the international arbitration regime. The paper draws on a deterrence theory to propose an innovative basis for striking a balance between parties' autonomies and limited judicial review of arbitral agreements. It concludes that the existing regimes are inadequate for protecting public policy and public interests, and it is imperative to make China's approaches compatible with the international arbitration regime.

I. The Arbitrability of Antitrust Disputes in the U.S. and the EU

The question of arbitrability has been settled conclusively in both the U.S. and the EU.⁹ The superseded *American Safety* doctrine previously allowed the courts to refuse arbitration of antitrust disputes.¹⁰ A variety of factors had been advanced to justify the courts' refusals in the U.S., including the overriding of public interest, complexities, and exclusive jurisdiction over antitrust disputes.¹¹ In a ground-breaking ruling in *Mitsubishi v Soler Chrysler-Plymouth*, the U.S. Supreme Court held that if an international contract contained an arbitration agreement, it would normally be given effect to include submission of an antitrust dispute to arbitration.¹² The sea change is not only manifested in this landmark case, but also in a first antitrust arbitration initiated by the Antitrust Division of the Department of Justice (DoJ).¹³ The ECJ's ruling of *Eco Swiss*¹⁴ represents a similar approach to that in *Mitsubishi*, namely that no specific type of contract dispute had been pre-excluded from arbitration, thus supporting the arbitrability of competition disputes.

1.1 Would Arbitration Affect Antitrust Law Development?

Initially, the U.S. jurisdiction emphasised the nature of public law and held that antitrust-related disputes were not within the scope of arbitrable disputes. The legal landscape has changed enormously given that arbitration is playing an increasingly significant role in antitrust law disputes. A more specific question arises as to whether the increased use of arbitration will affect the development of antitrust precedent. The U.S.' validation of private arbitration began in 1925 when Congress enacted the Federal Arbitration Act (FAA).¹⁵ If a commercial contract contains an agreement to settle controversies that arise from the contract through arbitration, the promise to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁶ The FAA creates a presumption

⁹ Robert Brandt von Mehren, 'The *Eco-Swiss* Case and International Arbitration' (2003) 19 (4) *Arbitration International* 465, 469

¹⁰ *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir.1968)

¹¹ Thomas Brewer, 'The Arbitrability of Antitrust Disputes: Freedom to Contract for an Alternative Forum' (1997) 66 (1) *Antitrust Law Journal* 91, 126

¹² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985)

¹³ DoJ, 'Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation' (Washington DC, DoJ, 9 March 2020) <<https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute>>

¹⁴ *Eco Swiss v Benetton Int'l* Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.)

¹⁵ 9 U.S.C. §§1–200 (2012)

¹⁶ Federal Arbitration Act (FAA) s2; 9 U.S.C. §2

in favour of arbitration,¹⁷ which echoes the New York Convention, Chapter II.¹⁸ With only narrow grounds for judicial review of the resulting awards,¹⁹ the statute can be used to bar access to courts when merchants allege violations of antitrust laws.²⁰ Antitrust disputes had long been not arbitrable in the U.S.²¹ The Second Circuit in *American Safety Equipment Corp. v J.P. Maguire & Co.* became the first Court of Appeals to hold that antitrust claims were not subject to arbitration.²² The doctrine of *American Safety* was thus established prohibiting arbitration of antitrust issues.

Firstly, a theoretical basis lies in the fact that a claim under antitrust law could be of more than private interest.²³ There was a concern regarding whether an arbitration tribunal can realise the ultimate legislative intent, that is, to address a scenario where a transaction substantially lessens competition under section 7 of the Clayton Act. Secondly and most importantly, arbitration normally does not create precedent in the same manner as do courts.²⁴ A court ruling is normally made public, and provides valuable precedents for future cases.²⁵ Arbitration, however, is typically confidential, and decisions are not disclosed in public domains.²⁶ Given its confidential nature, the public may not be able to benefit from the *collateral estoppel*.²⁷ In addition, arbitration does not adhere to the principle of *stare decisis*, which is fundamental to a common law jurisdiction.²⁸ Arbitration awards do not hold the same weight of authority as that of a court ruling. Arbitration decisions are generally not subject to any substantive appeals.²⁹ As such, merely resolving disputes in lieu of intending to make law, arbitral awards have little or no precedential value in future disputes.³⁰ From the perspective of creating precedents, a court decision is preferable. A commentator even argued that increased use of arbitration will jeopardise the evolving of common law.³¹ A third concern might be that arbitral tribunals are unwilling to apply certain laws as accurately as courts would.³² For instance, arbitration may not be appropriate in merger cases involving multiple dispositive antitrust issues, or lack structural remedies.³³ It remains uncertain as to whether merging parties would prefer an arbitration characterised by confidentiality to a proceeding in a public courthouse.³⁴

¹⁷ Richard Frankel, 'The Arbitration Clause as Super Contract' (2014) 91 (3) Washington University Law Review 531, 587

¹⁸ FAA Chapter 2; 9 U.S.C. § 201

¹⁹ Michael Scodro, 'Deterrence and Implied Limits on Arbitral Power' (2005) 55 (3) Duke Law Journal 547, 607

²⁰ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Mitsubishi Motors v Soler*, 473 U.S. 614 (1985)

²¹ *Baxter Int'l v Abbott Laboratories*, 315 F 3d 832 (7th Cir.2003)

²² *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir.1968)

²³ William Nissen, 'Antitrust and Arbitration in International Commerce Developments in International Commercial Arbitration' (1976) 17 (1) Harvard International Law Journal 110, 121

²⁴ Michael Abramowicz and Maxwell Stearns, 'Defining Dicta' (2005) 57 Stanford Law Review 953, 1004

²⁵ Luca Radicati di Brozolo and Laurence Idot, 'Hearing: Arbitration and Competition' (Paris, OECD, October 2010) < <https://www.oecd.org/daf/competition/abuse/49294392.pdf>

²⁶ Stefan Pislevik, 'Precedent and Development of Law: Is it Time for Greater Transparency in International Commercial Arbitration?' (2018) 34 (2) Arbitration International 241, 260

²⁷ Mark Lemley and Christopher Leslie, 'Antitrust Arbitration and Merger Approval' (2015) 110 (1) Northwestern University Law Review 1, 62

²⁸ Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 (1) Journal of International Dispute Settlement 5, 23

²⁹ 5 U.S.C. § 580(d)

³⁰ Michael Abramowicz and Maxwell Stearns, 'Defining Dicta' (2005) 57 Stanford Law Review 953, 1004

³¹ Richard McAdams, 'The Expressive Power of Adjudication' (2005) 5 University of Illinois Law Review 1043, 1118

³² *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir.1968)

³³ Mark Lemley and Christopher Leslie, 'Antitrust Arbitration and Merger Approval' (2015) 110 (1) Northwestern University Law Review 1, 62

³⁴ Pamela Bookman, 'The Adjudication Business' (2020) 45 (2) Yale Journal of International Law 227, 283

Given the growth of cross-border transactions, the Supreme Court in *Mitsubishi* even initiated to consider whether Sherman Act claims could be decided by international arbitration tribunals.³⁵

1.2 The Supreme Court's *Mitsubishi* Ruling

The Supreme Court in *Mitsubishi* first applied the FAA to preclude litigation of a federal statutory right.³⁶ A core inquiry before the Court was whether Soler's antitrust claim should be resolved in court or through arbitration.³⁷ Critically, it revoked rationales which, as cornerstones of the *American Safety* doctrine, had been used to render antitrust disputes non-arbitrable.³⁸ The Supreme Court in *Mitsubishi* held that:

“the private right of action statute³⁹ will remain just as viable in arbitration as in judicial litigation and thus as ‘the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies.’”⁴⁰

As a strategy to avoid antitrust liability, some businesses impose arbitration agreements on their distributors and customers.⁴¹ For instance, they attempt to preclude class action litigation in their arbitration clauses.⁴² It is worth noting that this landmark ruling foreshadows the potential application scope in terms of domestic and international scenarios.⁴³ The Supreme Court emphasised the importance of “international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes... Even assuming that a contrary result would be forthcoming in a domestic context...”⁴⁴ This ruling confirms the role of the effective vindication doctrine in streamlining the use of arbitration of antitrust disputes, which, to some extent, strengthens the antitrust victims' statutory rights.⁴⁵ The *Mitsubishi* ruling indicates confidence in arbitrators' willingness to enforce U.S. antitrust law and their ability to deal with its complexity.⁴⁶ This includes deterrence, which is often identified as the more important public benefit.⁴⁷ As such, the Supreme Court affirmed that:

³⁵ *Mitsubishi Motors v Soler*, 473 US 632-635 (1985)

³⁶ *Mitsubishi Motors v Soler*, 473 US 614 (1985)

³⁷ *Mitsubishi Motors v Soler*, 473 US 624 (1985)

³⁸ Ramona Lampley, 'Is Arbitration Under Attack?: Exploring the Recent Judicial Scepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape' (2009) 18 *Cornell Journal of Law and Public Policy* 477, 518

³⁹ Section 4 of the Clayton Act, 15 USC sec 15.

⁴⁰ *Mitsubishi Motors v Soler*, 473 US 636 (1985)

⁴¹ Judith Resnik, 'Fairness in Numbers: A Comment on *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*' (2011) 125 *Harvard Law Review* 78, 122

⁴² Myriam Gilles and Gary Friedman, 'After Class: Aggregate Litigation in the Wake of *AT&T Mobility v. Concepcion*' (2012) 79 (2) *The University of Chicago Law Review* 623, 675

⁴³ Lisa Sopata, '*Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*: International Arbitration and Antitrust Claims' (1986) 7 (3) *Northwestern Journal of International Law & Business* 595, 617

⁴⁴ *Mitsubishi Motors v Soler*, 473 US 629 (1985)

⁴⁵ Raul C. Loureiro, 'Ineffective Vindication of Antitrust Rights' (2019) 21 (4) *The University of Pennsylvania Journal of Business Law* 978, 1005

⁴⁶ Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 (8) *The Yale Law Journal* 2804, 2939

⁴⁷ Michael Scodro, 'Deterrence and Implied Limits on Arbitral Power' (2005) 55 (3) *Duke Law Journal* 547, 607

“so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”⁴⁸

Arguably, the Supreme Court did not reverse the *American Safety* doctrine, but rather distinguished its domestic application from that of *Mitsubishi*'s international focus. It explained that “the importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court.”⁴⁹ More importantly, the Supreme Court did not leave aside the orthodox issue of public interests and held that:

“having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.”⁵⁰

Apparently, the Court justified its ruling on the ground that arbitration awards will receive scrutiny “sufficient to ensure that arbitrators comply with the requirements of the statute at issue”.⁵¹ As Scodro observed, the Supreme Court struck a proper balance between vindicating Soler's rights effectively while enabling courts to ensure arbitral cognizance of antitrust law when asked to enforce the award.⁵² In this vein, a double-check mechanism was established through the second-look doctrine.⁵³

1.3 The DoJ Antitrust Division's First Antitrust Arbitration

Antitrust legal proceedings could be viable through alternative mechanisms. The Antitrust Division of the U.S. DoJ explained that arbitration is favoured by federal policy and would offer “a speedier and less costly alternative to litigation”.⁵⁴ In some situations, Congress has allowed parties to obtain the advantages of arbitration if they are willing to accept less certainty of legally correct adjustment.⁵⁵ In *Mitsubishi*, the Supreme Court laid the foundations for antitrust arbitration, recognising antitrust-related disputes as arbitrable claims under the Sherman Antitrust Act.⁵⁶

A dispositive motion is playing a critical part in the development of antitrust law, which has been influenced by several Supreme Court antitrust decisions.⁵⁷ When deployed properly, it can potentially reduce the time and expense of a case, which is also consistent with the goals of arbitration.⁵⁸ Justice Blackmun noted that:

⁴⁸ *Mitsubishi Motors v Soler*, 473 US 614, 637 (1985)

⁴⁹ *Mitsubishi Motors v Soler*, 473 US 635 (1985)

⁵⁰ *Mitsubishi Motors v Soler*, 473 US 638 (1985)

⁵¹ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987)

⁵² Michael Scodro, ‘Deterrence and Implied Limits on Arbitral Power’ (2005) 55 (3) *Duke Law Journal* 547, 607

⁵³ Alexandra Theobald, ‘Mandatory Antitrust Law and Multiparty International Arbitration’ (2016) 37 (3) *University of Pennsylvania Journal of International Law* 1059, 1089

⁵⁴ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–46 (2011)

⁵⁵ *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 828 (2d Cir. 1968)

⁵⁶ George Bermann, ‘Navigating EU Law and the Law of International Arbitration’ (2012) 28 (3) *Arbitration International* 397, 445

⁵⁷ *Bell v Twombly*, 550 US 544 (2007)

⁵⁸ James H. Carter, ‘Dispositive Motions in International Arbitration and the Role of U.S. Courts’ in John Norton Moore (ed.) *International Arbitration: Contemporary Issues and Innovations* (Martinus Nijhoff, Brill, 2013) 39-45

“[b]y agreeing to arbitrate a statutory claim, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”⁵⁹

Expanding the use of arbitration for merger review cases could make federal antitrust enforcement more flexible and efficient.⁶⁰ On 4 September 2019, the Antitrust Division filed a complaint in the U.S. District Court for the Northern District of Ohio, challenging Novelis’ proposed US\$2.6 billion acquisition of Aleris Corporation.⁶¹ At stake was a focus upon a narrow but dispositive issue regarding the relevant market definition. Both the Antitrust Division and the merging parties agreed on the parameters of a divestiture remedy, seeking to expedite the pathway to closing the transaction through binding arbitration.⁶² The result would determine whether Novelis would divest the overlap facility or whether the Antitrust Division would move to dismiss the complaint. On 9 March 2020, the DoJ prevailed in its first-ever arbitration of a merger issue in this landmark case.⁶³ The case of *Novelis* signals not only the Antitrust Division’s willingness to deploy an alternative dispute resolution (ADR), but also an opportunity for merging parties to avoid a trial by using alternative remedies, like arbitration, to decide dispositive issues.⁶⁴

The Administrative Dispute Resolution Act of 1996 (ADRA 1996) allows a federal government agency to “use [an alternative] dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative programme, if the parties agree to such proceeding.”⁶⁵ The legislative intent of ADRA 1996 is to alleviate the court’s burden via the ADR.⁶⁶ Despite the theoretical existence of the Act for over two decades, it is the first time that the DoJ has used arbitration as an alternative in order to resolve a merger challenge case.⁶⁷ The case of *Novelis* witnesses to the fact that ADR mechanisms are no longer just a theoretical means of resolving antitrust investigations.⁶⁸ However, the question arises as to whether the availability of arbitration will be limited to cases in which the issues in dispute are well-defined and discrete.⁶⁹ It may be too early to affirm whether this case portends a larger shift in the Antitrust Division’s approach. However, this ground-breaking practice exemplifies a potential model for the DoJ to follow when resolving future antitrust disputes. The exploration of the EU’s approaches may shed more light on the extent to which arbitration is used as a competition law dispute resolution mechanism.

⁵⁹ *Mitsubishi Motors v Soler*, 473 US 628 (1985)

⁶⁰ DoJ, ‘Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation’ (Washington DC, DoJ, 9 March 2020) <<https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute>>

⁶¹ *United States v. Novelis, Inc.*, 1:19-CV-02033, Dkt. 1, (N.D. Ohio Sept. 4, 2019)

⁶² 9 U.S.C. §§ 10–11 (2018)

⁶³ DoJ, ‘Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation’ (Washington DC, DoJ, 9 March 2020) <<https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute>>

⁶⁴ Karen Hoffman Lent, Kenneth Schwartz and Heather Cicchese, ‘DoJ and the Arbitration Option for Merger Review’ (Columbia Law School’s Blog on Corporations and the Capital Markets, 22 October 2019) <<https://clsbluesky.law.columbia.edu/2019/10/22/skadden-discusses-doj-and-the-arbitration-option-for-merger-review/>>

⁶⁵ The Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 et seq.

⁶⁶ 5 U.S.C. § 572(a) (2018); 5 U.S.C. § 575 (2018)

⁶⁷ U.S. DoJ, ‘Antitrust Division Update 2020’ <<https://www.justice.gov/file/1280196/download>>

⁶⁸ Pamela Bookman, ‘The Arbitration-Litigation Paradox’ (2019) 72 *Vanderbilt Law Review* 1119, 1149

⁶⁹ Catherine Rogers, ‘Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration’ (2002) 39 (1) *Stanford Journal of International Law* 1, 58

1.4 The EU and the U.S. Share Similar Approaches

Competition disputes are arbitrable under EU law.⁷⁰ The *Mitsubishi* position was mirrored by the ECJ in *Eco Swiss v Benetton*.⁷¹ Although the ruling of *Eco Swiss* does not distinguish between different breaches of EU competition law, the ECJ accepts the arbitrability of EU antitrust disputes. The DoJ's use of arbitration in *Novelis* and the increasing acceptance of international arbitration to determine EU competition law issues demonstrate that arbitration can be a useful tool for settling their antitrust disputes.⁷²

In *Eco Swiss v Benetton*, an arbitral tribunal ordered Benetton to make compensation for the damage suffered by Eco Swiss.⁷³ Benetton applied for annulment, alleging that the contract in question was inconsistent with the principle of public policy.⁷⁴ The question before the ECJ was:

“if the court considers that an arbitration award is in fact contrary to Article 85 of the EC Treaty, must it allow a claim for annulment of that award if the claim otherwise complies with statutory requirements?”⁷⁵

The ECJ affirmed in *Eco Swiss* that the national courts in the EU should grant annulment of any award where “its domestic rules of procedure require it... for failure to observe national rules of public policy”.⁷⁶ It is implied that an arbitral award shall be enforced, if the competition issue does not go against public policy or involve a hard-core violation under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).⁷⁷ Otherwise, a competition claim would fall outside the jurisdiction of arbitrations. The case of *Eco Swiss* is the first case where the ECJ indirectly admitted the arbitrability of competition claims.⁷⁸

Eco Swiss establishes the duty of the arbitral tribunal to apply the EC Treaty ex officio.⁷⁹ It demonstrates the possible annulment of arbitration agreements by EU national courts in cases of infringement of the TFEU, on the grounds of public interests.⁸⁰ In the ECJ's ruling in *Achmea*, similarly, an arbitration agreement was nullified due to its incompatibility with EU law.⁸¹ It is notable that the ECJ in *Eco Swiss* does not require national courts to undertake a greater level of review in respect of EU competition law than they would where other public policy arguments are triggered.⁸² Furthermore, the ECJ qualifies EU competition law as a

⁷⁰ George Bermann, ‘Navigating EU Law and the Law of International Arbitration’ (2012) 28 (3) *Arbitration International* 397, 445

⁷¹ *Eco Swiss v Benetton Int'l* Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.)

⁷² Christopher Cook, Sven Frisch and Vladimir Novak, ‘Recent Developments in EU Merger Remedies’ (2020) 11 (5) *Journal of European Competition Law & Practice* 309, 326

⁷³ Michael Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Bloomsbury, 2004) 311-388

⁷⁴ TFEU Art. 85

⁷⁵ *Eco Swiss v Benetton Int'l* Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.) §30

⁷⁶ *Eco Swiss v Benetton Int'l* Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.) §41

⁷⁷ Niamh Dunne, ‘Characterising Hard Core Cartels under Article 101 TFEU’ (2020) 65 (3) *The Antitrust Bulletin* 376, 400

⁷⁸ *Eco Swiss v Benetton Int'l* Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.)

⁷⁹ *Eco Swiss v Benetton Int'l* Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.) §40

⁸⁰ *Eco Swiss v Benetton Int'l* Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.) §40

⁸¹ *Slovak Republic v Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 (Mar. 6, 2018)

⁸² Pierre Heitzmann and Jacob Grierson, ‘*SNF v CYTEC Industrie*: National Courts Within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Article 81 EC’ (2007) 2 *Stockholm International Arbitration Review* 39, 49

matter of public policy within the meaning of Article V(2)(b) of the New York Convention. As Blanke observed:

“it imposed an obligation on EU member state courts in their capacity as supervisory courts to perform a full substantive review of international commercial arbitral awards to ensure their compliance with EU competition law.”⁸³

As such, *Eco Swiss* signals that arbitration is a competent forum for addressing EU antitrust issues.

Although arbitration has traditionally played a marginal role in antitrust enforcement, the U.S. and EU’s approaches exemplify its increasingly significant role in the future resolution of antitrust law disputes. The role of international arbitration in competition law disputes will continue to grow across jurisdictions.⁸⁴ The abovementioned affirmative judgments are reflective of the arbitrability of competition claims from both the EU and the U.S. perspectives. The ECJ’s ruling in *Eco Swiss* epitomises the EU’s attitude towards arbitrability and ensures the continued attractiveness of arbitration to an EU-based business.⁸⁵ To avoid any asymmetrical gap between China and the EU and U.S., it is worth exploring the approaches of China’s SPC in this area.⁸⁶

II. Ambiguity in the SPC’s Ruling in *Shell v Huili vis-à-vis Shell v Changlin*

The controversy over the arbitrability of antitrust disputes has been a long-standing issue in China. The inquiry goes further as to whether an arbitration clause can exclude the court’s inherent jurisdiction to hear an antitrust dispute. The SPC has made two landmark judgments, given that neither the China Arbitration Law 2017 nor the AML 2008 explicitly provides whether antitrust disputes may be resolved by arbitration. The responses have, however, left scope for ambiguity.

II.1 *Shell v Huili vis-à-vis Shell v Changlin*

A controversial in *Shell v Huili* was that Huili initiated an antitrust lawsuit and alleged that Shell had organised a horizontal distribution agreement which infringed upon its interests. Shell argued that the disputes should be resolved by arbitration because of a valid arbitration clause was contained in their agreement. The SPC explained that disputes about monopolistic agreements exceed the scope of the contractual rights and obligations between the parties.

On 29 August 2019, the SPC ruled that a contractual arbitration clause cannot exclude a court’s jurisdiction in adjudicating alleged horizontal monopoly arrangements.⁸⁷ In the case of *Changlin v Shell*, Changlin claimed that Shell had abused its dominant market position and that such antitrust dispute would preclude the application of the arbitration clause in their

⁸³ Gordon Blanke, ‘The “Minimalist” and “Maximalist” Approach to Reviewing Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last?’ in Heather Bray and Devin Bray (eds) *Post-Hearing Issues in International Arbitration* (New York, Juris Publishing, 2013) 169-227

⁸⁴ Alexandra Theobald, ‘Mandatory Antitrust Law and Multiparty International Arbitration’ (2016) 37 (3) *University of Pennsylvania Journal of International Law* 1059, 1089

⁸⁵ Gordon Blanke, ‘Achmea: How Far Does It Reach?’ *Arbitration Blog* (25 October 2018) <<http://arbitrationblog.practicallaw.com/achmea-how-far-does-it-reach/>>

⁸⁶ *Huili v Shell* (Supreme People’s Court, No 47, 29 August 2019)

⁸⁷ *Huili v Shell* (Supreme People’s Court, No 47, 29 August 2019)

distribution agreement.⁸⁸ On 24 December 2020, the SPC released its retrial verdict. Pursuant to Article 2 of the Chinese Arbitration Law, the SPC held that Changlin's petition to the court fell within obligations agreed under the distribution agreement, which should be bound by the arbitration clause. This is the first time that the SPC has ruled that an antitrust dispute is arbitrable.

The case of *Huili v Shell* involved a number of distributors, which is in essence a horizontal arrangement, going beyond the two parties' distribution relationship. In the second case, the claim over Shell's abuse of dominance, *ex facie*, seemed to fall exclusively into the distribution relationship between Changlin and Shell. However, the SPC has failed to clarify circumstances under which the antitrust dispute will be confined into a contractual dispute, in lieu of a stand-alone antitrust issue. It is significant to look into how the SPC has distinguished verdicts in the two cases.

II.2 The Grey Area of Arbitrability

There is no inherent bar to the private enforcement of competition law by way of arbitration. The controversy stems largely from the fact that both the Arbitration Law 2017 and the AML 2008 are silent on the matter. Arbitration is not specifically stipulated in the AML 2008 as the means of resolution of antitrust disputes. In terms of the scope of arbitrable disputes, the Arbitration Law 2017 provides that "contractual disputes and disputes arising from property rights may be put to arbitration".⁸⁹ The parties ought to be able to settle the claim by arbitration, since plaintiffs are free to refrain from suing after a violation has occurred.⁹⁰ Following the SPC's position, arbitration clauses should not exclude people's courts' jurisdiction over antitrust civil disputes, because the SPC held that the case between Shell and Huili was a monopoly-related civil dispute rather than a contractual dispute.

a. Hypothetical Challenge vis-à-vis Objective Cognizance

A rationale behind the SPC ruling in *Huili v Shell* is that arbitration clauses cannot directly exclude the court's inherent jurisdiction to hear antitrust cases. It further explained that the AML 2008 stipulates expressly that monopoly-related cases are to be resolved either through civil litigation or by administrative authorities.⁹¹ The AML 2008 does not make a reference to arbitration. In furtherance of its reasoning, the SPC referred to the Arbitration Law 2017, saying that a people's court has jurisdiction over a dispute if:

- i. One of the parties has already filed its claims in a court; and
- ii. The dispute is not related to contractual rights or other property rights.⁹²

The SPC blocked the arbitration of competition claims partly due to the lack of explicit provisions covered by the scope of arbitration in the Arbitration Law 2017. Arguably, civil disputes caused by monopolistic behaviour are disputes between two equal parties, the issue of which is tort liability.⁹³ Following the reasoning of standing and eligibility, it seems paradoxical

⁸⁸ *Shell v Changlin* (Supreme People's Court, Civ. Division, No 6242, 2020)

⁸⁹ The China Arbitration Law 2017 Art. 2

⁹⁰ Michael Scodro, 'Deterrence and Implied Limits on Arbitral Power' (2005) 55 (3) *Duke Law Journal* 547, 607

⁹¹ The AML 2008 Articles 10, 50

⁹² The China Arbitration Law 2017 Art. 2

⁹³ Hannah Buxbaum, 'The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation' (2001) 26 *The Yale Journal of International Law* 219, 263

that public enforcement is to be implemented by antitrust authorities and private enforcement by Chinese courts or arbitration tribunals. Impliedly, antimonopoly disputes between contractual parties with equal standing are thus out of the scope of arbitration enshrined in the Arbitration Law 2017.⁹⁴ As such, the absence of existing provisions explicitly allows antitrust disputes to be settled via arbitration, which seems to lead to the invalidity of the arbitration clauses. Therefore, they should not exclude the court's jurisdiction over disputes concerning horizontal monopoly agreements.

The scope of review for statutory claims is, *prima facie*, the same as for arbitrated claims. The enforcement relies primarily on regulatory agencies. From the reasoning of SPC in *Shell v Changlin*, there is no explicit legal provision to bar arbitration from being used for antitrust disputes. Article 50 under the AML 2008 does not exclude the feasibility of arbitral dispute resolution. The law provides that one party shall be liable for the damage where another party suffers loss due to the underlying monopolistic conduct,⁹⁵ but does not explicitly stipulate that only the courts have jurisdiction over antitrust disputes. Another three provisions define the scope of arbitrable matters,⁹⁶ none of which negates the arbitrability of antitrust issues. In addition, Article 2 of the Arbitration Law 2017 provides that:

“contractual disputes and other disputes over the rights and interests in property between citizens, legal persons, and other organisations that are equal subjects may be arbitrated.”

It seems that statutory disputes relating to antitrust matters can be within the scope of arbitration. From a dialectical perspective, the non-arbitrable subject matters stipulated in the Arbitration Law 2017 do not include competition claims.

b. The Blurred Scope of Review: Statutory Claims vis-à-vis Arbitrable Claims

The SPC in *Huili* has clarified Chinese people's courts' jurisdiction over antitrust disputes, and they may only be resolved through civil litigation or administrative sanctions, despite an arbitration clause existing in the contract concerned. However, it has not addressed monopolistic arbitrability from the angle of jurisprudence. Inconsistent rulings have been made on the issue of the arbitrability of antitrust disputes. In *Songxu Technology v Samsung (China)*, the Jiangsu High People's Court emphasised that:

“the AML 2008 is a matter of public law and that since the law does not clearly stipulate that the AML-related disputes can be resolved through arbitration, the courts should have jurisdiction, given the public law nature of the AML and the underlying public interest.”⁹⁷

In contrast, *Shell v Changlin* concerned an antitrust dispute based on an allegation of abuse of dominant market position. The Beijing High People's Court held that “a jurisdiction over a case should be determined by the existence of a valid arbitration clause in the contract, as long as the claims were closely associated with the contract.”⁹⁸ The court considered that it had no jurisdiction over this abuse of dominance dispute arising from a contract with a valid arbitration

⁹⁴ The China Arbitration Law 2017 Art. 2

⁹⁵ The AML 2008 Art. 50

⁹⁶ The AML 2008 Articles 2, 3, 65

⁹⁷ *Songxu Technology v. Samsung, Jiangsu High People's Court*, (Civil Court, No. 00072, 29 August 2016)

⁹⁸ *Shell v. Shanxi Changlin*, Beijing High People's Court (Civil No. 44, 2019)

clause. This ruling took a similar position to that of the UK High Court's decision in *Microsoft Mobile v Sony*.⁹⁹ The UK court held that the claim should be applicable under the Arbitration Act 1996 when considering the application of an arbitration clause in a tortious claim arising from allegations of anticompetitive conduct.¹⁰⁰ The UK High court normally recognises the positive benefits of arbitrating competition disputes, and holds that anticompetition claims are arbitrable provided that the petition alleging an infringement falls within the ambit of a contractual arbitration clause.¹⁰¹ The reasoning of the High Court in the *Microsoft Mobile* case was drawn from the *Attheraces* judgment.

The SPC successively rendered different rulings on the jurisdiction issues in two antitrust cases related to Shell.¹⁰² The two conflicting judgments are reflective of the divergences in China's judicial practices. The SPC's ruling is pertinently applicable to monopolistic agreements. However, in another decision by the SPC, it held that "whether the arbitration clause stipulated in the contract can exclude the court's jurisdiction should be determined on the basis of specific circumstances of the antitrust dispute."¹⁰³ Thus, the SPC itself is not strictly bound by its prior judgment. Although the SPC regards a court as an appropriate avenue for addressing monopolistic conduct,¹⁰⁴ such a position has not been sufficiently justified in terms of the AML 2008's remedial and deterrent functions. Given the SPC's subtle justification, the ruling in *Shell v Huili* leaves considerable room for further interpretations in cases involving other types of antitrust disputes. As such, the SPC should have established an authority via a judicial interpretation in *Changlin* to address the issue of inconsistencies.

II.3 The Divide between Public Law and Private Law

The SPC justifies its ruling of *Huili* on the underlying issue with public law nature beyond personal disputes.¹⁰⁵ The Court explained that the subject matter involved goes beyond the rights and obligations between the private counterparties of the contract, and thus falls outside the scope of arbitrable matters.¹⁰⁶ As such, the SPC made a judgment that Shell could not rely on the arbitration clause to exclude the court's jurisdiction to adjudicate the dispute. The case indicates that the arbitration clause should not negate the court's jurisdiction over antitrust civil disputes.¹⁰⁷ It is conceivable, however, that there could be some leeway for arbitration in this arena, given that some of antitrust disputes do not necessarily impact on public policy or public interests.

⁹⁹ *Microsoft Mobile v Sony* [2017] EWHC 374 (Ch)

¹⁰⁰ Arbitration Act 1996 s9; *Microsoft Mobile v Sony* [2017] EWHC 374 (Ch) §§ 45-46, 72-73

¹⁰¹ *Attheraces Limited v British Horseracing Board* [2007] EWCA Civ 38

¹⁰² *Changlin v Shell* (Beijing High People's Court, No. 44, 2019); *Huili v Shell* (Supreme People's Court, No. 47, 29 August 2019)

¹⁰³ *VISCAS v. SGCC Shanghai Electric Power Company* (Intellectual Property Bench of the Supreme People's Court, No. 356, 1 December 2019)

¹⁰⁴ Salil Mehra, 'Deterrence: The Private Remedy and International Antitrust Cases' (2002) 40 *Columbia Journal of Transnational Law* 275, 284

¹⁰⁵ *Huili v Shell* (Supreme People's Court, No 47, 29 August 2019)

¹⁰⁶ The China Arbitration Law 2017 Art. 17 (1)

¹⁰⁷ *Huili v Shell* (Supreme People's Court, No 47, 29 August 2019); Michael Scodro, 'Arbitrating Novel Legal Questions: A Recommendation for Reform' (1996) 105 (7) *The Yale Law Journal* 1927, 1961

a. Public Policy/Interests vis-à-vis Privity of Contract

Antimonopoly disputes are usually viewed as a public policy matter.¹⁰⁸ In *Huili v Shell*, the SPC's refusal to relegate the court's authority and render antitrust disputes arbitrable is attributable to two-deeply rooted factors. Firstly, the Court referred to the AML's legislative intent, which is to prevent monopoly behaviour, ensure fair competition and protect consumers and public interest in society.¹⁰⁹ A main rationale behind the SPC ruling is that the AML 2008 in nature falls within the ambit of public law. The law, in principle, seeks largely to protect competition instead of the competing parties, whose interests do not necessarily align well with public interests.¹¹⁰ The SPC held that China's Arbitration Law applies to contractual disputes and disputes arising from property rights.¹¹¹ While a claim of anticompetitive conduct reaches beyond the rights or obligations of contractual parties, impacting society more generally. They should go beyond the privity of contract and in turn render the competition claims inappropriate for arbitration.¹¹² It addresses a unique area of public interest,¹¹³ which enforcement actions serve the public interest by seeking to maintain competitive markets.¹¹⁴ The application of the AML 2008 can be analogised to a prosecutorial action on behalf of consumers.¹¹⁵ From the SPC's perspective, it is more appropriate for either an administrative organ or a court to evaluate allegations of anticompetitive conduct. The SPC distinguishes antitrust disputes from a contractual one, of which the former falls squarely within the sphere of public law. Furthermore, an SPC Judicial Interpretation provides further authority to address the ambiguous controversy:

“[w]here a plaintiff directly files a civil lawsuit with the people's court or files a civil lawsuit with the people's court after a decision of the antimonopoly law enforcement authority affirming the existence of monopolistic conduct comes into force, if the lawsuit satisfies other conditions for lawsuit acceptance as prescribed by law, the people's court shall accept the lawsuit”.¹¹⁶

The SPC's Judicial Interpretation implies that the scope of public interests goes beyond the privity of a contract. Antitrust claims normally reach beyond the rights and obligations of individuals, impacting the society as a whole.¹¹⁷ They should not be limited to the narrow confines of arbitration.¹¹⁸ Arguably, antitrust claims do not necessarily be equated with public interests. The above reasoning does not address the issues enshrined in the case of *Shell v Changlin*.

¹⁰⁸ Daniel Crane, 'The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy' (2014) 79 (3) *Antitrust Law Journal* 835, 853

¹⁰⁹ The AML 2008 Art. 1

¹¹⁰ Maurice E. Stucke, 'Is competition always good?' (2013) 1 (1) *Journal of Antitrust Enforcement* 162, 197

¹¹¹ The China Arbitration Law 2017 Art. 2

¹¹² The AML 2008 Art. 15 (4); Art. 28

¹¹³ *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968)

¹¹⁴ *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968)

¹¹⁵ Hugh Fleming, 'Antitrust Enforcement by Arbitration: DoJ's Use of Arbitration in *United States v Novelis* Puts Matter of Consumer Protection in Questionable Hands' (2020) 104 *Minnesota Law Review De Novo* (24 April 2020)

¹¹⁶ SPC, *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct* (Beijing, SPC, 1 June 2012) Art.2

¹¹⁷ Katherine Stone and Alexander Colvin, 'The Arbitration Epidemic' (Washington DC, Economic Policy Institute, 7 December 2015) <<https://www.epi.org/publication/the-arbitration-epidemic/>>

¹¹⁸ Thomas Brewer, 'The Arbitrability of Antitrust Disputes: Freedom to Contract for an Alternative Forum' (1997) 66 (1) *Antitrust Law Journal* 91, 126

Secondly, China is generally concerned that certain public law rights will not be handled properly in private arbitration, and doing so would be to the detriment of the public at large. Arbitrators are empowered to give effect to the parties' intent under the contract, not to advance public policies embodied in antitrust statutes.¹¹⁹ Another counterargument lies in the high likelihood for potential imbalances in resources between litigants in antitrust actions given defendants' position as potential monopolists.¹²⁰ An arbitrator's background may be correlated to arbitration outcomes.¹²¹ Since arbitrators are frequently experts drawn for their business sphere, it hardly seems proper for them to determine these issues of great public interest.¹²² Arbitrators are not nearly as insulated from undue pressures, and resulting bias may influence their decisions.¹²³ Fleming noted that the bias problem may allow defendants to exploit arbitration for their own benefit to the ultimate detriment of the public.¹²⁴ Thus, denying private contractual parties of their standing in antitrust claims seems consistent with the legislative purpose.¹²⁵

Nevertheless, a balance needs to be struck between the public interest and other factors, like efficiency, cost savings, flexibility and confidentiality. In most cases, arbitral tribunals are required only to calculate the amount of awardable damages.¹²⁶ Ostensibly, a large proportion of competition claims that involve cartels or price fixing practices inevitably affect public interests.¹²⁷ In *Shell v Huili*, the contractual clause is primarily binding on the contract parties, whereas the setting up of supply obligations by the defendant to the plaintiff may pertain to competition concerns, but only affects the parties under disputes.¹²⁸ This serves a strong rationale for the SPC's ruling in *Shell v Changlin*. In addition, the Arbitration Law 2017 actually provides a safeguard provision, which allows an arbitral award to be nullified in case of violations of public interests or public policy.¹²⁹ Therefore, it is untenable that the SPC in *Huili* has invoked the absence of precedents recognising the arbitrability of antimonopoly disputes. A court should avoid overriding the boundary between state justice and private autonomy, given the nature of arbitration, such as privity and independence.¹³⁰

¹¹⁹ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59 (1974)

¹²⁰ *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 827 (2d Cir.1968); Hugh Fleming, 'Antitrust Enforcement by Arbitration: DoJ's Use of Arbitration in *United States v Novelis* Puts matter of Consumer Protection in Questionable Hands' (2020) 104 Minnesota Law Review *De Novo* (24 April 2020)

¹²¹ Stephen J. Choi, Jill E. Fisch, and A.C. Pritchard, 'The Influence of Arbitrator Background and Representation on Arbitration Outcomes' (2014) 9 Virginia Law & Business Review 43, 88

¹²² *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d, 826, 827 (2d Cir.1968)

¹²³ Mark A. Lemley and Christopher R. Leslie, 'Antitrust Arbitration and Merger Approval' (2015) 110 (1) Northwestern University law review 1, 62

¹²⁴ Hugh Fleming, 'Antitrust Enforcement by Arbitration: DoJ's Use of Arbitration in *United States v Novelis* Puts matter of Consumer Protection in Questionable Hands' (2020) 104 Minnesota Law Review *De Novo* (24 April 2020)

¹²⁵ Alexandra K. Theobald, 'Mandatory Antitrust Law and Multiparty International Arbitration' (2016) 37 (3) University of Pennsylvania Journal of International Law 1059, 1089

¹²⁶ Miriam Driessen-Reilly, 'Private Damages in EU Competition Law and Arbitration: A Changing Landscape' (2015) 31 (4) Arbitration International 567, 587

¹²⁷ Hannah Buxbaum, 'The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation' (2001) 26 The Yale Journal of International Law 219, 263

¹²⁸ Siyou Zhou, 'Arbitrability of Competition Claims in China-A Case Study of the EU, US and China' *Leiden Law Blog* (16 December 2019)

¹²⁹ The China Arbitration Law 2017 Art. 58

¹³⁰ Jan Kleinheisterkamp, 'Overriding Mandatory Laws in International Arbitration' (2018) 67 (4) International and Comparative Law Quarterly 903, 930

b. Law's Intrinsic Resilience Applies Equally to China's Law Evolution

The SPC in *Shell v Huili* seems to be less willing to embrace arbitration, which mirrors the approach taken by the UK Competition Appeal Tribunal (CAT). In *Claymore Dairies*,¹³¹ the CAT emphasised the public law nature of the Competition Act (CA 1998), which is to protect the public interest via the CAT.¹³² As to the above analysis, two limbs of the reasoning seem to justify the SPC's ruling, which reflects the absence of explicit statutory inclusion under Article 2 of the China Arbitration Law 2017. The SPC's position also resembles the *American Safety Doctrine* established by the U.S. Second Circuit Court of Appeals in 1968,¹³³ which held that courts are the appropriate avenue for resolving antitrust disputes.¹³⁴ The U.S. courts had long adhered to the doctrine, which limited the arbitrability of domestic antitrust disputes.¹³⁵ Arguably, the SPC focuses more on vertical restraints. Neither the AML 2018 nor the U.S. Sherman Act expressly bars parties from arbitrating monopolistic conducts. But both China's SPC in *Huili* and the U.S. Second Circuit concluded that antitrust disputes warranted public adjudication.¹³⁶ The SPC has seemingly addressed the non-arbitrability of antitrust civil disputes and held that they are not within the scope of arbitration. Its ruling, to some extent, is helpful to settle a split among lower courts and offered plausible clarity for companies with operation in China. Nevertheless, the SPC may have lost an opportunity to make a milestone ruling to address the intersection of arbitration and antitrust. As the highest tribunal as well as the final arbiter of the law in China, the SPC's mission is to ensure justice by law.¹³⁷ Firstly, China does not have a tradition of precedents, since it belongs to a civil law system, and thus the common law doctrine of *stare decisis* does not exist in China *stricto sensu*.¹³⁸

Secondly, the SPC's Judicial Interpretation plays a semi-statutory role of law making in China.¹³⁹ The unique SPC Judicial Interpretation constitutes *jurisprudence constante*, which has factual binding effect in China's judicial system.¹⁴⁰ In this regard, China may merely need a landmark case, like the EU's *Eco Swiss* and the U.S.'s *Mitsubishi*, which would establish a ground-breaking *SPC Interpretation* that renders antitrust disputes arbitrable thereafter. As Lemley and Leslie observed:

“old doctrines may give way in light of legal developments that change the underlying environment and undermine the original policy arguments upon which the old common law is based.”¹⁴¹

This notion has been manifested in the U.S. Supreme Court's ruling of *Mitsubishi*. The law's intrinsic development and resilience apply equally to the Chinese law's evolution in this arena,

¹³¹ *Claymore Dairies v OFT* [2006] CAT 3

¹³² Greg Olsen and Daniel Harrison, 'Tightening the System: The Nature and Likely Effect of UK Competition Reforms Antitrust' (2012) 26 (3) *Antitrust* 25, 29

¹³³ *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir.1968)

¹³⁴ Michael Scodro, 'Deterrence and Implied Limits on Arbitral Power' (2005) 55 (3) *Duke Law Journal* 547, 607

¹³⁵ *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir.1968)

¹³⁶ *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 826, 828 (2d Cir.1968)

¹³⁷ Ling Li, 'The Chinese Communist Party and People's Courts: Judicial Dependence in China' (2016) 64 (1) *The American Journal of Comparative Law* 37, 74

¹³⁸ 'Chinese Common Law? Guiding Cases and Judicial Reform' (2016) 129 *Harvard Law Review* 2213, 2234

¹³⁹ Shucheng Wang, 'Guiding Cases and Bureaucratization of Judicial Precedents in China' (2019) 14 (2) *University of Pennsylvania Asian Law Review* 96, 135

¹⁴⁰ 'Making Chinese Court Filings Public? Some Not-So-Foreign American Insights' (2020) 133 *Harvard Law Review* 1728, 1749

¹⁴¹ Mark Lemley and Christopher Leslie, 'Antitrust Arbitration and *Illinois Brick*' (2015) 100 (5) *Iowa Law Review* 2115, 2133

despite its traditional civil law system. The SPC's judgment in *Shell v Changlin* does not clarify but complicate the issue as to whether Chinese People's Courts should enforce contractual provisions mandating arbitration of antitrust disputes following the two SPC decisions. In such circumstances, public authorities may be inclined to step in to protect domestic distributors with less bargaining power against local subsidiaries of foreign multinational corporations.¹⁴²

Even so, the SPC still leaves room for distinguishing between contract and antitrust claims, in particular, between parties with more equal standing. The more a dispute is closely related to contractual performance, the more it is arbitrable.¹⁴³ The ruling will specifically apply to disputes over monopolistic agreements. This reasoning has been echoed in the SPC's judgment in *Shell v Changlin*. It indicates that not all arbitration clauses should be automatically deemed inapplicable in antitrust disputes. In sum, whether the arbitration clause stipulated in the contract can exclude the court's jurisdiction should be determined based on the specific circumstances of the dispute.¹⁴⁴ The divide between public and private enforcement is, to some extent, overread in antitrust disputes.¹⁴⁵ As long as a prospective litigant can effectively vindicate its statutory cause of action in arbitration, it should be free to refrain from addressing the claim by arbitration.¹⁴⁶ Following the second-look doctrine, the court can monitor over the enforcement of arbitral awards, which ensures that public policy will be protected.¹⁴⁷

III. Address the Challenges in Cross-Border Arbitrable Antitrust Disputes

Economies are inextricably interdependent despite the current debate on decoupling.¹⁴⁸ There is a place for arbitration, since competition law tolerates private enforcement.¹⁴⁹ Arbitrability of competition law, in substance, is only with respect to the civil aspect of antitrust law.¹⁵⁰ An arbitration tribunal seeks to issue an enforceable award, which goal is embodied in some institutional rules.¹⁵¹ A challenge arises as to how to protect fair competition given the potential conflict of laws across jurisdictions. Arguably, the global challenge does not rest with the issue of arbitrability, but with how to redefine the scope of public policy to avoid the triggering of the refutation by national courts.¹⁵²

¹⁴² Joseph Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2007) 23 (3) *American University International Law Review* 451, 558

¹⁴³ Kai-chieh Chan, 'China's Top Court Says No to Arbitrability of Private Antitrust Actions' *Kluwer Arbitration Blog* (23 January 2020)

¹⁴⁴ *State Grid Shanghai v. VISCAS* (Shanghai High People's Court, Civ. Division No. 83, 2020)

¹⁴⁵ Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 (2) *The International and Comparative Law Quarterly* 371, 394

¹⁴⁶ Robert Pitofsky, 'Arbitration and Antitrust Enforcement' (1969) 44 (6) *New York University Law Review* 1072, 1084

¹⁴⁷ Catherine Rogers, 'Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration' (2002) 39 (1) *Stanford Journal of International Law* 1, 58

¹⁴⁸ Lindsey Ford, 'Refocusing the China Debate: American Allies and the Question of US-China "Decoupling"' (Washington DC, Brookings, 7 February 2020) <<https://www.brookings.edu/blog/order-from-chaos/2020/02/07/refocusing-the-china-debate-american-allies-and-the-question-of-us-china-decoupling/>>

¹⁴⁹ OECD, 'OECD on "Arbitration and Competition"' DAF/COMP (Paris, OECD, 2010) 40

¹⁵⁰ Sotiris Dempegiotis, 'EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003—Conceptual Conflicts, Common Ground, and Corresponding Legal Issues' (2008) 25 (3) *Journal of International Arbitration* 365, 396

¹⁵¹ The ICC Rules Art. 41

¹⁵² David Horton, 'Arbitration About Arbitration' (2018) 70 *Stanford Law Review* 363, 441

III.1 Safeguarding Procedures Embedded in the Institutional Design

Public policy is a critical factor in denying the arbitrability of antitrust disputes in the case of *Shell v Huili*. Applying antitrust law has become mandatory for any arbitrator seeking to render an enforceable award.¹⁵³ They are supposed to *bona fide* apply substantive law, and endeavour to ensure procedural fairness and substantive justice.¹⁵⁴ Failure to do so would make an award susceptible to challenges on public policy grounds.¹⁵⁵ Rights should not be surrendered when a party agrees to arbitrate and that judicial review, though limited, is sufficient to ensure that arbitrators are in compliance with law.¹⁵⁶ The second-look doctrine allows courts to review the antitrust dispute at the award-enforcement stage to ensure that any lawful interest had been properly addressed.

a. Second-Look Doctrine

There are adequate legislations as well as international soft law in place to safeguard against any abusive use of arbitration.¹⁵⁷ The UNCITRAL Model Law explicitly provides that an award can be set aside where the court holds that the subject-matter of the dispute is not capable of settlement by arbitration.¹⁵⁸ It is similarly safeguarded under the New York Convention that recognition and enforcement of the award can be denied on the grounds of public policy.¹⁵⁹ The New York Convention entails sufficient control on the observance of the public policy behind antitrust laws, which is viewed as a “second-look doctrine”.¹⁶⁰ Article 5 reserves to each signatory country the right to refuse enforcement where the “recognition or enforcement of the award would be contrary to the public policy of that country.”¹⁶¹ As such, a national court has the opportunity to look at the award and determine if it comports with the state’s public policy.¹⁶²

The doctrine is echoed in the U.S. FAA which states “the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award”.¹⁶³ In *Mitsubishi Motors*, The Supreme Court held that:

“Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.”¹⁶⁴

¹⁵³ Phillip Landolt, ‘Arbitrators’ Initiatives to Obtain Factual and Legal Evidence’ (2012) 28 (2) *Arbitration International* 173, 224

¹⁵⁴ New York Convention 1958 Art. V (I) (B)

¹⁵⁵ 127 Andrew Guzman, ‘Arbitrator Liability: Reconciling Arbitration and Mandatory Rules’ (2000) 49 (5) *Duke Law Journal* 1279, 13349

¹⁵⁶ Stephen Ware, ‘Vacating Legally-Erroneous Arbitration Awards’ (2014) 6 *Arbitration Law Review* 56, 106

¹⁵⁷ William W. Park, ‘Soft Law and Transnational Standards in Arbitration: The Challenge of Res Judicata’ in Arthur W. Rovine (ed.) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015* (Leiden, BRILL, 2017) 52-71

¹⁵⁸ UNCITRAL Model Law Art. 34

¹⁵⁹ New York Convention Art. 5(2)(a)

¹⁶⁰ Pierre Mayer, ‘The Second Look Doctrine: The European Perspective’ (2010) 21 *The American Review of International Arbitration* 201, 210

¹⁶¹ New York Convention 1958 Art. 5 (2)

¹⁶² New York Convention 1958 Art. V(2)(b)

¹⁶³ Federal Arbitration Act s207; 9 U.S.C. §207 (2012)

¹⁶⁴ *Mitsubishi Motors v Soler*, 473 US 614, 638 (1985)

These statutory and judicial approaches may partly reflect the concern that antitrust disputes are too complex to be dealt with by arbitrators.¹⁶⁵ Nevertheless, it is worth noting that the second-look doctrine has not been brought into play as was plausibly expected. The doctrine has not been substantially put into practice during the past decades. As Korzun observed, it may not have entailed something more substantial than the New York Convention public policy scrutiny.¹⁶⁶

Meanwhile, the ECJ in *Eco Swiss* held that national courts were entitled to set aside an award which violates EU competition law on public policy grounds.¹⁶⁷ In terms of legal convergence between *Mitsubishi* and *Eco Swiss*, the doctrine has been implemented to varying extents in different jurisdictions. As mentioned above, the judicial review regime regarding arbitral awards under relevant Chinese law is aimed to address public policy issues as well at the stage of award enforcement.¹⁶⁸ It was further anchored in a latest revision draft of the China Arbitration Law 2021.¹⁶⁹ This is equivalent to the second-look doctrine adopted in the EU and the U.S. Apart from the statutory approaches, it remains to be seen whether the Chinese SPC, through Judicial Interpretations, could establish a more robust framework for its own second-look doctrine. It is sensible for the courts to strike a balance between the policies enshrined in the cases of *Mitsubishi*, *Eco Swiss*, *Shell*, and the mandatory requirement in favours of robust antitrust law.

b. Recognition of Arbitrability of Antitrust Disputes ≠ Derogation of Public Policy

The recognition of the arbitrability of antitrust disputes does not deviate from the nature of public policy.¹⁷⁰ The U.S. Supreme Court has stipulated that public policies shall not be grounds for prohibiting arbitration as an ADR settlement.¹⁷¹ The current legal regimes provide adequate safeguards for arbitrators to resolve a variety of claims, after all, it is the court that has the power to enforce arbitral awards. Arbitration clauses impose a duty on arbitrators to identify and apply the law in good faith.¹⁷² Arbitrators have a contractual duty to apply the law as courts would in good faith and to the best of their ability.¹⁷³ As such, the inequality of economic power does not induce the inequality of legal subject status.¹⁷⁴ It could be concerned that arbitrators may not hold contractual parties to standards of substantive law as the court does, which would reduce the expected value of an antitrust claim.¹⁷⁵ Without the duty, arbitration would materially undermine the antitrust law's deterrent effect.¹⁷⁶ Given the

¹⁶⁵ Patrick Baron and Stefan Liniger, 'A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany' (2003) 19 (1) *Arbitration International* 27, 54

¹⁶⁶ Vera Korzun, 'Arbitrating Antitrust Claims: From Suspicion to Trust' (2016) 48 (3) *New York University Journal of International Law and Politics* 867, 931

¹⁶⁷ *Eco Swiss v Benetton Int'l* Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.)

¹⁶⁸ The China Arbitration Law 2017 Art. 58; China Civil Procedure Law 2017 Art.237, 274, 282

¹⁶⁹ The China Arbitration Law (2021 Draft) Art. 82

¹⁷⁰ Alexandra Theobald, 'Mandatory Antitrust Law and Multiparty International Arbitration' (2016) 37 (3) *University of Pennsylvania Journal of International Law* 1059, 1089

¹⁷¹ Lisa Sopata, '*Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*: International Arbitration and Antitrust Claims' (1986) 7 (3) *Northwestern Journal of International Law & Business* 595, 617

¹⁷² Andrew Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules' (2000) 49 (5) *Duke Law Journal* 1279, 1334

¹⁷³ Michael Scodro, 'Deterrence and Implied Limits on Arbitral Power' (2005) 55 (3) *Duke Law Journal* 547, 607

¹⁷⁴ Lina Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents' (2017) 11 *Harvard Law & Policy Review* 235, 294

¹⁷⁵ Salil Mehra, 'Deterrence: The Private Remedy and International Antitrust Cases' (2002) 40 *Columbia Journal of Transnational Law* 275, 284

¹⁷⁶ Michael Scodro, 'Deterrence and Implied Limits on Arbitral Power' (2005) 55 (3) *Duke Law Journal* 547, 607

second-look doctrine embedded into the regime, arbitrators' failure to satisfy their duties to apply the law in good faith would permit courts to overturn the resulting awards.¹⁷⁷ The judicial review ensures that an arbitration award will not be contrary to public policy.

c. Concerns about SPC's Reasoning in Shell v Huili

The Chinese SPC in *Huili* held merely in an abstract way that a "public interest" would be jeopardised if an antitrust dispute were to be arbitrable. An antitrust-related arbitral award rendered by a foreign arbitration institute is likely unenforceable in a Chinese court, on the grounds of either the public policy discourse, or the non-arbitrability as argued above.¹⁷⁸ The hypothetical reasoning would be further complicated in a scenario where an arbitration involves Chinese parties but seated in a jurisdiction which allows arbitrability of antitrust issues. The New York Convention provides grounds to China, as a signatory State from 1986, for the merits of a case that may lead to the refusal of such enforcement.¹⁷⁹ This provision is embodied in China's Civil Procedure Law, which provides that a People's Court shall issue an order to invalidate an award if the enforcement would be against the public policy.¹⁸⁰ The Arbitration Law 2017 also provides that a court has the exclusive jurisdiction over setting aside an arbitral award.¹⁸¹ A Chinese People's Court will nullify an arbitral award if the court finds *ex officio* that the award is contrary to the social public interest. In view of the above EU and the U.S. practices, it can be inferred that rendering competition claims arbitrable may not necessarily involve elements that jeopardise a state's public policy.¹⁸² Notably, neither Article V(2)(b) under the New York Convention nor the ruling of *Eco Swiss* clarifies public policy elements that trigger a national court to refuse the enforcement of an arbitral award.¹⁸³ As such, the challenge may switch to redefining the "tipping point" above which an arbitral award should be rejected. Furthermore, the foremost purpose behind antitrust law is deterrence,¹⁸⁴ which is to deter those wrongdoers from causing damage not only to individual entities, but also to the society as a whole.¹⁸⁵ Arbitration of monopolistic conducts does not affect the public interest by diminishing deterrence.¹⁸⁶ Giving private parties the right to arbitrate to protect their own substantive rights lessens the government's burden in enforcing antitrust laws.¹⁸⁷ The arguments should have been manifested in *Shell v Changlin*, which could help the SPC for a landmark Judicial Interpretation on arbitrability of antitrust disputes.

¹⁷⁷ Philip McConaughay, 'The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration' (1999) 93 (2) *Northwestern University Law Review* 453, 524

¹⁷⁸ Ellen Reinstein, 'Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China' (2005) 16 (1) *Indiana International & Comparative Law Review* 37, 72

¹⁷⁹ New York Convention Article C (2)

¹⁸⁰ The China Civil Procedure Law Art. 237

¹⁸¹ The China Arbitration Law 2017 Art. 58

¹⁸² New York Convention Article C (2) (b)

¹⁸³ Margaret Moses, 'Arbitration/Litigation Interface: The European Debate' (2014) 35 (1) *Northwestern Journal of International Law and Business* 1, 47

¹⁸⁴ Jonathan B. Baker, 'Private Information and the Deterrent Effect of Antitrust Damage Remedies' (1988) 4 (2) *Journal of Law, Economics & Organization* 385, 408

¹⁸⁵ Michael Scodro, 'Deterrence and Implied Limits on Arbitral Power' (2005) 55 (3) *Duke Law Journal* 547, 607

¹⁸⁶ Raul C. Loureiro, 'Ineffective Vindication of Antitrust Rights' (2019) 21 (4) *The University of Pennsylvania Journal of Business Law* 978, 1005

¹⁸⁷ James V. Hayes, 'Arbitration as an Aid in the Enforcement of the Antitrust Laws' (1952) 17 (3) *Law and Contemporary Problems* 504, 517

III.2 Would the U.S./EU model be transplanted into China's legal regime?

Major jurisdictions, like the U.S. and EU, have recognised the arbitrability of antimonopoly disputes, considering that refusal to recognise and enforce such arbitration awards may violate the principle of international comity.¹⁸⁸ As discussed above, the arbitrability of antitrust issues has been recognised in the EU via the seminal judgment in *Eco Swiss*.¹⁸⁹ The ruling in *Mitsubishi* not only confirms the competence of arbitration, but also foresees its indispensable role in the transnational business disputes resolution.¹⁹⁰ The U.S. Supreme Court interprets an arbitration clause expansively, allowing arbitrators to enforce federal antitrust law alongside judges.¹⁹¹ After all, the professionalism of arbitration is sufficient to handle antitrust issues properly.¹⁹² The landmark cases signal the start of a worldwide trend of recognising the arbitrability of certain antitrust disputes.¹⁹³ According to the New York Convention, Chinese courts shall recognise and enforce the arbitration awards in disputes over "contractual and non-contractual commercial relations" in accordance with Chinese law.¹⁹⁴ In 1987, the SPC promulgated the *Circular on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. It defines "contractual and non-contractual commercial relations" as relations encompassed in relevant Chinese law.¹⁹⁵ In this *Circular*, an antimonopoly dispute is not excluded from the scope of arbitral awards that can be recognised and enforced in China.

On 2 July 2019, China signed the Convention on the Recognition and Enforcement of Foreign Civil and Commercial Judgments in the 22nd Session of the Hague Conference on Private International Law.¹⁹⁶ It stipulated that international civil and commercial judgments related to core cartel behaviours, such as price fixing, will be recognised and enforced in China.¹⁹⁷ However, both arbitration law and competition law were transplanted from western jurisdictions to China only a decade ago. Due to the relative lack of legislative and judicial parameters in this area, it may take longer for the Chinese People's Court to reconsider the arbitrability of antitrust disputes. Like the U.S. Supreme Court and the ECJ giving green light to antitrust arbitration, China may need to shake off the old judicial hostility to arbitration.¹⁹⁸ With China's anticompetition framework being further developed, arbitration may be bound to be a preferable forum as an alternative to litigation. China may follow standards over antitrust issues during the judicial review of recognising and enforcing arbitration awards. At stake is

¹⁸⁸ Alexandra K. Theobald, 'Mandatory Antitrust Law and Multiparty International Arbitration' (2016) 37 (3) University of Pennsylvania Journal of International Law 1059, 1089

¹⁸⁹ *Eco Swiss v Benetton Int'l* Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.)

¹⁹⁰ Hannah Buxbaum, 'The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation' (2001) 26 The Yale Journal of International Law 219, 263

¹⁹¹ David Horton, 'Infinite Arbitration Clauses' (2020) 168 University of Pennsylvania Law Review 633, 688

¹⁹² Thomas Brewer, 'The Arbitrability of Antitrust Disputes: Freedom to Contract for an Alternative Forum' (1997) 66 (1) Antitrust Law Journal 91, 126

¹⁹³ Lisa Sopata, '*Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*: International Arbitration and Antitrust Claims' (1986) 7 (3) Northwestern Journal of International Law & Business 595, 617

¹⁹⁴ Leon Trakman, 'Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection' (2018) 6 (2) The Chinese Journal of Comparative Law 174, 227

¹⁹⁵ Fiona D'Souza, 'The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China' (2006) 30 (4) Fordham International Law Journal 1318, 1359

¹⁹⁶ Ronald A. Brand, 'Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead' (2020) 67 Netherlands International Law Review 3, 17

¹⁹⁷ HCCH, *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (Hague, 2 July 2019) <<https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf>>

¹⁹⁸ *Mitsubishi Motors v Soler*, 473 US 638 (1985)

the need to strike a delicate balance, after all, any addition to the Arbitration Law's narrowly circumscribed grounds for review would seem at odds with the legislative intent.¹⁹⁹

III.3 Potential Evolution of the Arbitrability of Antitrust Disputes

Competition policies always evolve with the development of a specific jurisdiction's legislation as well as its economy.²⁰⁰ The growth of Chinese cross-border transactions will be compromised if China insist that all antitrust disputes must be resolved in people's courts,²⁰¹ let alone the gap of technical expertise of lower court judges as well as the impartiality and judicial independence. The arbitrability of antitrust issues will help China fill the gap and integrate its framework into the internationally-established track.

a. People's Courts vis-à-vis Arbitrators: An "Elephant in the Room"

In the context of trade war and plausible decoupling, it is essential to strategically resort to arbitration to settle disputes. Not doing so runs counter to the impartiality goal of China's framework of dispute resolution. This is particularly sensible with key issues considered, such as independence and impartiality of China's judges. In addition, some of China's lower-court judges are not able to address complex antitrust arbitrability that requires technical expertise.

Furthermore, China's judiciary is subject to a variety of controls that limit its ability to engage in independent decision-making.²⁰² Local protectionism represents one of the principal problems facing its judicial systems. Although the Chinese Constitution provides that the courts are not subject to interference by administrative organs, local governments are able to exert undue influence on judges because the former control judicial budgets.²⁰³ Both the SPC and National People's Congress need to conduct major structural reforms to combat the problem of local interference in the courts. Despite judicial independence as a key reform goal, China has taken limited steps to enhance the autonomy of China's judges and courts. There is still a long way to go for China to have sensible shifts in institutional balances of power, so that judges' independence, courts' professionalism and institutional legitimacy will be enhanced. However, arbitration remains largely independent from judicial and administrative interference, which is provided in Article 8 of the China Arbitration Law 2021 (Draft). It is essential to promote China's position as an arbitration-friendly destination.

b. Multipronged Approaches: The Latest Development

Given the general trend, like the U.S. and the EU's approaches in recognition of arbitrability of antitrust disputes, China may change its stance in future towards the issue. On 2 January 2020, the State Administration for Market Regulation (SAMR) issued the *Announcement of the SAMR to Seek Public Comments on the Revised Draft of the Anti-Monopoly Law* (hereinafter referred to as *SAMR Draft 2020*). It is said that SAMR will be designated by the

¹⁹⁹ Michael Scodro, 'Deterrence and Implied Limits on Arbitral Power' (2005) 55 (3) Duke Law Journal 547, 607

²⁰⁰ Tembinkosi Bonakele, Eleanor Fox, and Liberty Mncube, *Competition Policy for the New Era: Insights from the BRICS Countries* (Oxford, Oxford University Press, 2017) 51-66

²⁰¹ Laura Murray-Tjan, 'Domestic Court Implementation of Coordinative Treaties: Formulating Rules for Determining the Seat of Arbitration Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2001) 41 (4) Virginia Journal of International Law 859, 921

²⁰² Randall Peerenboom, 'Judicial Independence in China' in Randall Peerenboom (ed.) *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge, Cambridge University Press, 2012) 69-94

²⁰³ China Constitution Law 2019 Art. 131

State Council to enforce the AML.²⁰⁴ The SAMR Draft remains silent on whether antitrust issues could be resolved by arbitration, yet neither does it preclude arbitrability. Despite the SPC's *Huili* decision, this silence demonstrates that it is inappropriate for the SAMR to prohibit explicitly the arbitration of antitrust issues. With the increased use of arbitration in cross-border transactions, it is imperative to interpret the resolution of anticompetition claims in a broadly framed arbitral framework.²⁰⁵ There is no need for the courts to deny *ex ante* the arbitrability of antitrust disputes.²⁰⁶

The SPC's ruling in *Shell v Huili* confirms the court's jurisdiction and seemingly draws a line for resolving antitrust disputes in commercial contracts containing arbitration agreements. In the SPC's reasoning, the AML requires either an administrative body or a court to evaluate allegations of anticompetitive conduct, seemingly leaving no room for arbitration of private antitrust disputes. The SPC's ruling in *Shell v Changlin* has overturned the perception. It is worth noting that China is not a common law jurisdiction. The SPC judgments are not legally binding on lower courts, although they play a similar role to precedents in that they tend to be followed by lower-level courts in practice.²⁰⁷ The arbitrability of antitrust claims and enforceability of relevant domestic and foreign arbitral awards are still subject to further clarification.

Conclusion

Arbitration plays a significant role in antitrust disputes with particular regard to a public policy consideration. The Chinese SPC in *Shell v Huili* held that the antitrust disputes are not arbitrable and should be settled by courts or administrative authorities, despite Shell's challenge of a court's jurisdiction based on a pre-existing arbitration agreement. The SPC justifies its ruling on the ground that antitrust law is designed to promote the national interest in a competitive economy. Paradoxically, such a ruling is untenable given the lack of adequate statutory basis. The AML 2008 and the Arbitration Law 2017 do not refer to resolving antimonopoly issues by arbitration, nor do they explicitly preclude the ADR. Nevertheless, this does not mean the end of the nexus between antitrust issues and arbitration in China. The SPC's stance is in contrast to the U.S. and the EU, which have recognised the arbitrability of antitrust issues. The introduction of the "second-look doctrine" ensures the efficient operation of a safeguard mechanism. In view of the evolution in the intersectional debate, the public nature of a given law is no longer regarded as the determinant of the arbitrability of antitrust disputes in major western jurisdictions.

The SPC's decision of *Shell v Changlin* has not adequately addressed the inquiry concerning the arbitrability of competition claims in China. Considering the pace of development and the ever-increasing inflow of cross-border investments, it is argued that China should review its stance and adopt practices that are consistent with other primary jurisdictions, such as the EU and the U.S. This will also respond to the nature of interoperation of resolving transnational antitrust disputes. Arbitration is increasingly advocated by parties in cross-border transactions in China, and there should be leeway for competition issues falling within the purview of arbitration. It is worth exploring the possibility of whether there is room on the grounds of the

²⁰⁴ SAMR Draft 2020 Art. 11

²⁰⁵ Pamela Bookman, 'The Arbitration-Litigation Paradox' (2019) 72 (4) *Vanderbilt Law Review* 1119, 1196

²⁰⁶ Lisa Sopata, '*Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*: International Arbitration and Antitrust Claims' (1986) 7 (3) *Northwestern Journal of International Law & Business* 595, 617

²⁰⁷ Shucheng Wang, 'Guiding Cases and Bureaucratization of Judicial Precedents in China' (2019) 14 (2) *University of Pennsylvania Asian Law Review* 96, 135

public policy, particularly where the enforcement of a foreign arbitral award is concerned. Thus, the SPC should initiate a ground-breaking approach, launching a milestone Judicial Interpretation, which will facilitate integration of Chinese law reform into the global dispute resolution regimes.