CAN AUSTRALIA COMPETE? A TRI-JURISDICTION ANALYSIS OF COMPETITION LAW ARBITRATION+

How do The United States, England, and Australia treat the issue of the Arbitrability of Competition Law?

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I INTRODUCTION

The past 50 years have seen a marked increase in competition law claims and enforcement.[1] In 1970 there were only 12 jurisdictions with a so-called "competition law"; currently, there are more than 125 jurisdictions with a competition law regime.[2] Today, many large commercial disputes frequently contain issues arising out of competition law. In the same timeframe, we have seen a global increase in international arbitration—arbitral institutions in the past 50 years have seen a 25-fold increase in caseload.[3] Survey data suggests that over 80% of international commercial agreements contain an arbitration clause.[4] The intersection of these two trends is at the heart of the inquiry that this paper seeks to explore—are competition law disputes arbitrable?

This paper will critically examine how competition law arbitration has evolved in England, the United States, and Australia, paying particular attention to the landmark case law from those jurisdictions. This paper will show that while the U.S. and England have developed a robust system for competition law arbitration, Australia has fallen short.[5] Following this analysis, this paper will suggest three reasons why Australia will benefit from adopting an approach to competition law arbitration comparable to England and the U.S.

II COMPETITION LAW AND ARBITRATION: FOUNDATIONAL PRINCIPLES

A *Competition Law*

The terms "competition law" and "antitrust" are used interchangeably. Antitrust is mostly an American term, whereas competition law is used in the U.K. and Australia.

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[1] OECD, *OECD Competition Trends 2020* (Report, 2020) <http://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf>, archived at <https://perma.cc/3398-7FWJ>. Jurisdictions such as England, the United States and early signatories of the EC Treaty were some of the first to adopt a competition law regime.

[2] Ibid 3; Many large economies have adopted a competition law regime in the last 20 years: see especially, *Competition Act 2002* (India); *Anti-Monopoly Law 2008* (China).

[3] Richard W Naimark, 'Building a Fact Based Global Database: The Countdown' (2003) 20 *Journal of International Arbitration* 105. 88% of surveyed agreements contain arbitration clauses.

[4] Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (Survey, 2010) 5. This is a conservative estimate—the number is likely to be higher.

[5] See Part 'IV Arbitrability Of Competition Law'.

Competition law regimes vary in each jurisdiction. Generally, competition law is the body of law regulating the market behaviour of business entities and industrial organisations so as to preserve competition for the benefit of consumers.[6]

This article is not intended to be an extensive commentary on competition law, but instead competition law is used as a device to explore the landscape of international arbitration and public policy. Accordingly, for the present purposes, it is necessary to emphasise the public interest element of competition law enforcement and the role it plays in the public's confidence in the economy.

B *Arbitration*

Arbitration is a consensual means of resolving disputes where parties agree to submit their dispute to a decision-maker, selected either by or for the parties to render a final and binding decision.[7] There are many reasons why parties choose to arbitrate which include: the arbitral award's enforceability, both domestically and internationally;[8] confidentiality of proceedings; the neutrality of the forum; procedural flexibility; and the ability to choose decision-makers who have particular expertise.[9]

This paper is concerned with international commercial arbitration. An arbitration will be international if the parties' places of business are in different states, or if the place of arbitration or a substantial part of the obligation of the commercial relationship is outside of the state where the parties have their places of business, or if the parties agree that the subject matter of the dispute relates to more than one country.[10] An arbitration is "commercial" if the dispute is economic in character.[11]

1 *Legal Framework of International Arbitration*

The legal framework of an international arbitration depends on the seat of arbitration—the arbitration's legal place. Parties will usually specify a city to be the seat, for example London, New York or Perth. The seat's significance is that it determines the *lex arbitri*—the law applicable to the arbitration.[12] Most countries have their own legislative regime governing international arbitrations and are often based on the United Nations Commission on International Trade Law's *Model Law on International Commercial Arbitration* ("**Model Law**").[13] The *lex arbitri* is procedural but also includes dimensions such as the court's role in the arbitration and judicial rulings on arbitrability.

The *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("**N.Y. Convention**")[14] is another fundamental piece of law in international arbitration and has 166 state party signatories. It provides for reciprocal

[6] LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (LexisNexis Australia, 6th ed, 2020).
[7] Gary Born, *International Commercial arbitration* (Kluwer Law International, 2nd ed, 2014).
[8] This is due to the NY convention—with its 166 signatories.
[9] Born (n 7) § 1.02.
[10] United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration* (1985) UN Doc. A/40/17, art 1(3) ('*Model Law*').
[11] Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999).
[12] See, generally, Jan Paulson, 'Arbitration in Three Dimensions' (2011) 60 *International and Comparative Law Quarterly* 291. Paulson differentiates the law applicable *in* the arbitration viz. the substantive law and the law applicable *to* the arbitration viz. the procedural law – the *lex arbitri.*
[13] *Model Law* (n 10). The Australian legislation is the *International Arbitration Act 1974* (Cth); English legislation is the *Arbitration Act 1996* (UK).
[14] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) 330 UNTS 3 ('*N.Y. Convention*').

enforcement of an arbitral award from treaty states. The N.Y. Convention is often codified into state legislation.[15]

III THE DOCTRINE OF ARBITRABILITY

For a dispute to be referred to arbitration, or for the resulting award to be enforced, that dispute must be "capable of settlement by arbitration". This requirement is central to the N.Y. Convention[16] and the Model Law.[17] This requirement is essentially a threshold question left to individual states to decide what is and what is not to be left to private parties to resolve behind the closed doors of arbitration. This requirement acknowledges that some disputes have an unequivocally public dimension. Disputes may be considered incapable of settlement by arbitration for two broad reasons. First, the result of the arbitration might affect persons other than the parties to the dispute. Accordingly, there is a significant public interest in resolving the dispute by the courts of that state, as opposed to arbitration. Secondly, where the subject of the dispute is the "legitimate domain of the legislature or national courts" because it concerns areas of law over which the courts have an apparent exclusive jurisdiction, such as criminal or public law matters.[18] Since what is arbitrable is to be dealt with by the state, each jurisdiction varies with what they consider capable of settlement by arbitration. As will be discussed, this often depends on the state's public policy stance regarding international arbitration.

IV ARBITRABILITY OF COMPETITION LAW

Historically, competition law disputes have been considered among disputes incapable of settlement by arbitration. The public policy objectives that underpin competition law meant that many jurisdictions considered it more appropriate for the courts to decide competition disputes. Now, many jurisdictions consider that competition law disputes are arbitrable. This article will show that some jurisdictions are more developed in this area than others.

A *Arbitrability of Competition Law in the United States*

The story of competition law arbitration begins in the U.S. Historically, U.S. courts took a conservative view to arbitration generally and were cautious of conceding matters that were not strictly private. Accordingly, for many years, U.S. courts considered competition law disputes incapable of settlement by arbitration. The authority for this view is the 1968 decision in *American Safety Equipment Corp v JP Maguire & C.O. Inc.* ("***American Safety***").[19] This case concerned a license agreement. The licensee, American Safety Equipment Corp ("**ASE**") submitted that their agreement with the licensor, Hickok, was void *ab initio* as it was in breach of provisions in the *Sherman Act*[20] due to certain restrictive provisions in the contract. This claim was likely being used as a shield against liability as the licensee owed several hundred thousand dollars

[15] In Australia see *International Arbitration Act 1974* (Cth) schedule 1; in U.S. see *United States Arbitration Act 1926* (US) § 201; in U.K. see *Arbitration Act 1996* (UK) s 101.
[16] *N.Y. Convention* (n 14) art 2(1).
[17] *Model Law* (n 10) arts 34(2)(b)(i), 36(1)(b)(i).
[18] *Comandate Marine Corp. v. Pan Australia Shipping Pty Ltd.* (2006) 157 FCR 45, 200 (Allsop J).
[19] *American Safety Equipment Corp v JP Maguire & Co Inc,* 391 F 2d 821, 827 (2d Cir, 1968) ('*American Safety*').
[20] *Sherman Act 1890,* 15 USC §§ 1–38 (1890).

in royalties to the licensor.[21] The agreement contained an arbitration clause. The question for the court was two-part. The first question was whether the scope of the arbitration clause included antitrust matters. The second question was whether antitrust claims under the *Sherman Act* are capable of being arbitrated and, therefore, whether the court is compelled to order the arbitration of the licensee's antitrust allegations.[22] The court held that antitrust matters are not arbitrable. The reasoning implied a distrust for arbitration and a desire to protect the interest of the public. The latter rationale is best summarised in the following quote:

> A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy… Antitrust violations can affect hundreds of thousands — perhaps millions — of people and inflict staggering economic damage.[23]

The court considered that arbitration was unsuitable for antitrust disputes given the nature and complexity of the law. The court evinced a distrust for the technical capacity of arbitrators. The court was also critical of the arbitrator's impartiality. They reasoned that antitrust law regulates the business community and that arbitrators are typically selected from the business community. Thus, it would be improper for them to be determining these issues.[24]

The decision in *American Safety* is reflective of the U.S. courts' general scepticism of arbitration. The policy objectives of Congress and the courts actions were at odds. Congress was seeking to reject the parochial hostility towards arbitration through the enactment of the *Federal Arbitration Act* ("FAA") in 1925.[25] The court, however, while claiming not to have a general distrust for arbitration,[26] exhibited a palpable suspicion of arbitration's ability to deal with disputes that are not strictly private. In other words, what the court said did not correspond with their actions.

1 *From Distrust to Embrace: The impact of the Mitsubishi Case*

Interestingly, the United States was not among the first 25 signatories of the N.Y. Convention of 1958. It was not until 1970 that the N.Y. Convention was acceded to and enacted into law as Chapter 2 of the FAA; this is two years after the decision in *American Safety* and reflects a significant turning point in the arbitrability doctrine. The next landmark decision on the arbitrability of competition law comes from the U.S. Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc.* ("***Mitsubishi***").[27] The case involved a distribution and sales agreement between a car dealer in Puerto Rico (Soler) and a car supplier (Mitsubishi Motors), a joint venture

[21] Often, parties will seek to invalidate an agreement of which they are likely in breach, by showing that the agreement itself is in breach of competition law and is therefore void. This is sometimes described as using competition law as a shield (against liability under the contract).

[22] More specifically, whether the lower court had erred in referring the matter to arbitration. As this case is an appeal against the United States District Court of the Southern District of New York.

[23] *American Safety* (n 19) 826.

[24] Ibid 827.

[25] It is often accepted that the creation of arbitration friendly legislation, such as the FAA, is designed to encourage arbitration, not limit its scope. This view was expressed in *Kulukundis Shipping CA S/A v Amtorg Trading Cor,* 126 F.2d 978, 985 (2d Cir, 1942): "It is our obligation to shake off the old judicial hostility to arbitration".

[26] *American Safety* (n 19) 827: "We express no general distrust of arbitrators or arbitration; our decisions reflect exactly the contrary point of view".

[27] 473 US 614 (1985) ('*Mitsubishi*').

incorporated in Switzerland. The agreement contained an arbitration clause with the seat in Japan, under the rules of the Japan Commercial Arbitration Association. The dispute arose when Soler found difficulty meeting sales quotas in Puerto Rico. As a response, Mitsubishi withheld shipments. Soler then requested that Mitsubishi send some car parts to Soler so they could retrofit their Puerto Rican cars to make them fit for sale on the United States mainland to make up sales quotas. Mitsubishi refused.

2 *The Mitsubishi Case*

Mitsubishi instituted proceedings in the Puerto Rican District Court to compel arbitration in accord with the agreement. Soler counterclaimed alleging, among other things, breaches of antitrust law under the *Sherman Act*. The question for the court was whether the claims should be referred to arbitration, specifically whether the antitrust claims should be referred to arbitration. The matter made its way to the U.S. Supreme Court.

The Supreme Court held that antitrust disputes were arbitrable. The leading judgement was delivered by Blackmun J, where his Honour rejected the decision in *American Safety*.

The Court began by acknowledging the policy tension between the desire to enforce domestic laws in the courts and the needs of international comity, which would favour enforcing agreements to arbitrate.[28] The Court observed that American business would hardly be encouraged if "[they] insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[29] This also goes some way to address the public policy concern of arbitrating competition law because it considers that there might be a required trade-off between policy objectives of antitrust law enforcement in the U.S. courts and the policy objectives of encouraging international commerce and respect for freedom of contract.

The court goes on to make two emphatic rejections of the "*American Safety* doctrine." First, regarding the idea that arbitration is not suitable for the complex legal and economic analysis required by an antitrust dispute, the court suggests that this is untrue and emphasises the point that "adaptability and access to expertise are hallmarks of arbitration"[30] which means that parties can tailor their dispute and appoint arbitrators who are leading experts in the subject matter of their dispute, which would provide for the best outcome even in a particularly complicated matter. The second major rejection of the decision in *American Safety* is the issue of arbitral impartiality—this is a confirmation by the U.S. Supreme Court that, although arbitrators are drawn from the legal and business community, it would be wrong to assume that the "parties and the arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators."[31]

The court then addresses the significant public policy concern of arbitrating antitrust disputes by establishing the "second look" doctrine. The court explains that the U.S. courts "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".[32]

[28] Ibid 629.
[29] Ibid.
[30] Ibid 633.
[31] Ibid 634.
[32] Ibid 638 (Stevens J).

3 *Take Away's From the Mitsubishi Case and the Current State of the Law in the U.S.*

Mitsubishi was an explicit endorsement of the arbitrability of competition law disputes. It promoted federal and international policy favouring arbitration and rejected parochial criticisms of arbitration generally. Although the decision was clear, it did leave at least one controversy in its wake. Much debate was sparked about the extent of this so-called "second look" that courts are to take at the enforcement stage of a competition law arbitration. If a party seeks to set aside an award, raising concerns of the application of competition law in the arbitration, what approach is a court supposed to take? The tension in this question lies in two competing fundamental pillars of law—the finality principle of arbitration on the one hand,[33] and the public policy element of competition law on the other. Essentially the debate is whether courts should take a maximalist approach, which would involve an in-depth review of the award to ensure perfect compliance with competition law,[34] or a minimal "look" that rests largely on the notion that considerable deference should be afforded to arbitrators and their ability to solve the dispute at hand and gives respect to the principle of finality.[35]

The U.S. approach to this debate appears to prefer the minimalist approach. An authority for this proposition is the 7th Circuit Court of Appeals' decision in *Baxter International v Abbott Laboratories*.[36] The Court noted that "legal errors are not among the grounds that the [N.Y.] Convention gives for refusing to enforce international awards"[37] and went on to explain that "*Mitsubishi* did not contemplate that, once arbitration was over, the federal courts would throw the result in the wastebasket and litigate the antitrust issues anew. That would just be another way of saying that antitrust matters are not arbitrable."[38] The extent of the "second look" judicial review in the U.S. is essentially to ensure the arbitral tribunal took cognisance of any competition law claims and actually decided on the matter—anything beyond that would be outside the scope of the review.

Thirty-five years on, the question of arbitrability of competition law disputes in the U.S. seems to be relatively uncontroversial.[39] The decision in *Mitsubishi* confirmed that competition law disputes are arbitrable, and subsequent decisions confirmed that, at the enforcement stage, the review of the award should be minimal.

4 *Developments Post-Mitsubishi and the E.U. Perspective*

The E.U. courts were traditionally reluctant to allow competition law arbitration.[40] However, following the U.S. Supreme Court in Mitsubishi, there is now a Europe-

[33] The finality principle refers to the notion that the arbitrarily award is final and not subject to review. The second look doctrine undermines this, by potentially allowing courts to review an arbitral award.
[34] See, generally, Luca G. Radicati Di Brozolo, 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators' (2011) 27(1) *Arbitration International* 1.
[35] Ibid.
[36] *Baxter International,* 315 F 3d 829 (7th Cir, 2003) ('*Baxter International*').
[37] Ibid 831.
[38] Ibid 832.
[39] See *Baxter International* (n 36); *J.L.M Industries Inc v Stolt-Nielsen S.A* 387 F.3d 163 (2d Cir, 2004).
[40] Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration 180* (Quorum Books, 1994). This again is owing to the mandatory and public policy nature of competition law. It was thought that these laws were within the exclusive jurisdiction of the state. This reasoning is akin to the *American Safety* doctrine.

wide consensus on the issue—competition law disputes are arbitrable.[41] An interesting development post-*Mitsubishi* is the fact that many courts in Europe did not feel the need to re-state what was said by the U.S. Supreme Court but rather seemingly proceeded to follow the trend set forth in the *Mitsubishi* Case. This is reflected in the most commonly cited authority for arbitrability of competition law in Europe—the Court of Justice of the European Union's ("**CJEU**") decision in *Eco Swiss China Time Ltd v. Benetton International N.V.* ("***Eco Swiss***").[42] *Eco Swiss* was an application from the highest court in the Netherlands to the CJEU for a ruling on whether an arbitral award could be annulled because the agreement on which it was based was in breach of E.U. competition law. The facts of the case are interesting because the breach of competition law argument was not raised during the arbitration proceedings. It was at the enforcement stage that the party who lost the arbitration sought to escape liability under the arbitral award by claiming that the entire agreement which the dispute was based was void *ab initio* due to being contrary to E.U. competition law. The CJEU held that:

> [a] national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85[43] of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy.[44]

This is a ruling by the CJEU that if an arbitral award is contrary to rules of public policy—such as competition law—then a court *must* annul that award, seemingly even if no competition law disputes were raised during the arbitration. The court did not answer whether the tribunal has a duty to raise competition law disputes *sua sponte*, but an argument could be made that if an arbitrator has a duty to render an enforceable award, they should ensure that the award is free from any breaches of competition law, at least in the E.U.[45]

The court in *Eco Swiss* did not expressly state that competition law is arbitrable, but rather their decision is strong authority for that proposition because, arguably, what that court is effectively doing is extending the *Mitsubishi* doctrine from the idea that competition law disputes *may* be arbitrated to suggesting that they *must* be arbitrated. In other words, the arbitrator, has a duty to render an enforceable award, and a court will not enforce the award if the agreement is contrary to competition law. Accordingly, it is incumbent on the arbitrator to ensure that any competition law issues are resolved during the arbitration. This is the essence of the *may vs must* argument—in order to ensure an enforceable award, an arbitrator *must* consider any competition law issues because if they do not, a court will.

[41] Alexis Mourre, 'Arbitrability of Antitrust Law from the European and US Perspectives' in Gordon Blanke and Philip Landolt (eds), *EU and US Antitrust Arbitration A Handbook for Practitioners* (Wolters Kluwer, 2011) vol 1, 36.

[42] *Eco Swiss China Time Ltd v Benetton International NV* (Court of Justice of the European Union, C–126/97, 1 June 1999) [1999] ECR 1–3055; [1999] 2 All ER (Comm) 44 ('*Eco Swiss*').

[43] EU Market power abuse provision now 102 TFEU.

[44] *Eco Swiss* (n 42) [41] (emphasis added).

[45] Robert B. Von Mehren, 'The Eco-Swiss Case and International Arbitration' (2003) 19(4) *Arbitration International* 465. The author discusses the arbitrators' dilemma with regards to the *sua sponte* issue, suggesting that, although it is ultimately a case by case decision, on balance it would be best for an arbitrator to address competition law issues to ensure an enforceable award.

B *Arbitrability of Competition Law in the U.K.*

The English High Court in *E.T. Plus S.A. v Welters* ("***E.T. Plus***")[46] gave a rather concise ruling on the matter, where Gross J held simply "there is no realistic doubt that such 'competition' or 'antitrust' claims are arbitrable: the matter is whether they come within the scope of the arbitration clause, as a matter of its true construction".[47]

Commentators have considered this judgement peculiar, given that prior to this decision, there was no substantive English authority on the arbitrability of competition law. To that end, Gross J did not evoke any of the authority that is considered *loci classici* on the matter, such as the aforementioned *Mitsubishi* and *Eco Swiss* cases. As Gordon Blake wrote when the ruling was published, "what is striking about the court's approach in *E.T. Plus* is the nonchalance with which it confirms arbitrability of E.C. [now E.U.] competition law".[48]

Notwithstanding the apparent casualness with which the court confirmed the arbitrability of competition law, subsequent cases have upheld a consistent approach of construing arbitration clauses broadly enough to encompass competition law disputes and thus evincing a healthy expansion of the arbitrability doctrine—even in some cases going further than other jurisdictions in Europe. An example of the development of competition law arbitration in England is a recent High Court decision in *Microsoft Mobile O.Y. (Ltd) v Sony Europe Limited et al.* ("***Microsoft***").[49] In that case, the English High Court stayed proceedings within the jurisdiction of the court in favour of an arbitration agreement—construing the agreement broadly to encompass competition disputes.[50] The court made a comprehensive endorsement of authorities such as *Eco Swiss*[51] and arguably expanded on the European position, in favour of arbitration. For example, the court referred the matter to arbitration, despite the risk of creating a fragmentation of claims for the claimant (Microsoft).[52] In the past, the CJEU had erred in construing an arbitration agreement to *not* include competition law disputes (particularly in cartel claims) primarily due to the risk of creating a fragmentation of claims.[53] The court's decision in *Microsoft* shows the progressive approach to competition law arbitration in England. The court has expanded on the CJEU jurisprudence and has demonstrated a pro-arbitration policy that is consistent with global developments.[54]

1 *Brexit and English Competition Law Arbitration*

An exciting question, unique to the English experience, is how competition law

[46] *E.T. Plus S.A. v Welters* [2005] ALL ER (D).
[47] Ibid [51].
[48] Gordon Blanke, 'Arbitrating Competition Disputes: The English High Court has Confirmed the EC Competition Law Claims are Arbitrable in Principle' (2005) *Competition law Insight* 5.
[49] *Microsoft Mobile O.Y. (Ltd) v Sony Europe Limited et al.* [2017] EWHC 374 (Ch) ('*Microsoft*').
[50] The court at [45] cites the decision in *Fili Shipping Co Ltd v. Premium Nafta Products Ltd* [2007] UKHL 40 as authority for the proposition that parties intend on a "one-stop-shop" for resolving disputes. The question then turns to weather the dispute arises out of the parties relationship in which case they answered in the affirmative.
[51] *Microsoft* (n 49*)* [123]-[125].
[52] The matter would be referred to arbitration without the joinder of the other defendants, in other words, the claimant (Microsoft) would have to go to arbitration with Sony but the other defendants would need to be pursued separately in other courts—thus, a fragmented dispute.
[53] See the CJEU decision in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV et al* (Court of Justice of the European Union, Case No. C-352/13, 21 May 2015), [69]-[70].
[54] See the English Court of appeal in *Attheraces Ltd et al v Brittish Horseracing Board et al* [2007] EWCA Civ 38, [7] for a confirmation of the English pro-arbitration disposition.

arbitration might be affected by Brexit. This is because, as a member of the E.U., the English courts and tribunals must also apply E.U. competition law. Likewise, English courts are bound by CJEU decisions such as *Eco Swiss.* The significance of this is that, having left the E.U., the U.K. is no longer bound by E.U. law. This might affect both the state of the law in England and also might change their position as an eminent venue for resolving E.U. disputes.

It appears that there would be no material change whether England is in the E.U. or not. The position on competition law in England has had the benefit of the E.U. experience; however, over time, the English courts have developed enough of a body of case law to be clear on many issues that might arise. Although they would no longer be bound by the CJEU decisions, arbitrators in England might still want to consider whether the award is enforceable under E.U. law.[55] Additionally, England's membership to the N.Y. Convention is not dependent on its membership to the E.U. Whether or not they are a member of the E.U., it does not affect the certainty of a party in England concerning the recognition of agreements to arbitrate and enforcement of the arbitral award.[56]

C *Competition Law Arbitration in Australia*

Unlike in the U.S. and U.K., competition law arbitration in Australia is still uncertain. There is no direct authority for the arbitrability of competition law disputes, and there is also conflicting authority for whether arbitration clauses are to be construed to include claims under the *Competition and Consumer Act 2010* (Cth) ("**CCA**").[57]

1 *Construction of Arbitration Clauses*

Australian courts must stay proceedings in favour of an arbitration agreement in respect of all claims that come within the scope of that agreement. The courts have the power to determine what claims are within the scope. There are conflicting approaches in Australia regarding whether CCA claims fall within the scope of an arbitration agreement and, accordingly, whether they can be referred to arbitration. The trend in the authorities suggests a preference for a more liberal approach that interprets arbitration clauses broadly to include claims under the CCA. However, conflicting decisions have adopted a more restrictive approach, creating uncertainty around how arbitration clauses will be construed.

The approach taken by the Full Federal Court in *Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc. (No. 5)* ("***Hi-Fert***")[58] is an example of a restrictive approach in construing arbitration clauses. The court adopted a semantic approach and undertook a detailed analysis of the language used in the agreement, ultimately concluding that the words used in the arbitration clause[59] did not include 'non-contractual' claims such as those under the *Trade Practices Act 1974* (Cth) ("**TPA**") (now the CCA).

[55] For a detailed commentary see Richard Kreindler, Paul Gilbert and Ricardo Zimbron, 'Impact of Brexit on UK Competition Litigation and Arbitration' (2016) 33 *Journal of International Arbitration* 521.

[56] Jane Wessel, *European Union: Competition Litigation After Brexit* (Web Page, 28 March 2010) <https://www.arnoldporter.com/en/perspectives/publications/2019/03/competition-litigation-after-brexit>, archived at <https://perma.cc/H3TL-7GUC>.

[57] *Competition and Consumer Act 2010* (Cth) ('CCA'), formerly the *Trade Practices Act 1974* (Cth).

[58] *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No. 5)* (1998) 90 FCR 1, [24] (Emmett J).

[59] The words in the agreement were *"*[*any dispute arising from* this charter or any Bill of Lading issued hereunder]" (emphasis added).

In contrast, the Full Court in *Comandate Marine Corp. v Pan Australia Shipping Pty. Ltd.* ("***Comandate***") rejected the semantic approach taken in *Hi-Fert* in favour of a liberal approach to construction, holding that a similar clause to that in *Hi Fert* was sufficiently wide to encompass claims under the TPA.[60] Allsop J, delivering the leading judgement, held that the liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places.[61] After considering a wealth of authority, his Honour found this approach to favour party autonomy and "common sense commercial agreements".[62] It is submitted that the liberal approach to construction is consistent with how courts in Europe and the U.S. construe arbitration clauses and therefore should be preferred.

Six months after the decision in C*omandate,* Gilmour J delivered a Judgement in *Clough Engineering Limited v Oil & Natural Gas Corporation Ltd* ("***Clough Engineering***")[63] whereby his Honour held that the Australian Federal Court had jurisdiction to hear a TPA claim despite an arbitration agreement existing between the parties. The rationale for this decision was a suspicion that allowing a TPA action go to arbitration was an attempt to contract out of the statutory remedies provided by the TPA. His Honour cited *Hi-Fert* as authority for this proposition, despite the Full Court in *Comandate* holding (in o*biter*) that that case is no longer good law.[64] The decision in *Clough Engineering* casts doubt on which approach courts will take when construing arbitration clauses. Although the approach to construction in *Comandat*e is preferred and in line with other jurisdictions, such as the U.S. and the U.K., the case law is inconsistent—it is an open question whether CCA claims will come within the scope of arbitration agreements.

2 *Competition Law Arbitrability in Australia*

Even if the courts do construe a dispute resolution clause to include CCA claims, it is unclear if competition law claims are arbitrable in Australia. There is ample authority to suggest that CCA claims are arbitrable, for example, the NSW Court of Appeal in *IBM Australia Ltd. v. National Distribution Services Ltd*[65] held that, provided the claim falls under the scope of the arbitration clause, TPA claims can be referred to arbitration.[66] Austin J in *ACD Tridion Inc. v.Tridon Australia*[67] held "there is nothing about legislation such as the Trade Practices Act [CCA] that would prevent the parties to an arbitration clause from referring disputed claims to [arbitration]".[68]

On its face, it would appear that competition law claims are arbitrable in Australia, as would be suggested by the clear authority in support of CCA arbitration; however, that proposition would be misleading. In nearly every case that has stayed a TPA/CCA claim in favour of arbitration, the claim in question is a contravention of s 52 (now s 18), which is the prohibition on misleading and deceptive conduct. The only connection that

[60] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, [175], [176], [187] ('*Comandate*').
[61] Ibid [165]; cf *Microsoft* (n 49).
[62] Ibid [165]-[167].
[63] *Clough Engineering Limited v Oil & Natural Gas Corporation Ltd* [2007] FCA 88 ('*Clough Engineering*').
[64] See *Comandate* (n 63) [185]; S R Luttrell, 'Public Policy Conflicts in the Arbitrability of the Trade Practices Act 1974 (Cth) – A Comment on Clough Engineering' (2007) *Macquarie Journal of Business Law* 139.
[65] (1991) 22 NSWLR 466.
[66] Ibid [481].
[67] [2002] NSWSC 896.
[68] [2002] NSWSC 896, [184] (Austin J).

this claim has with competition law is that they are derived from the same legislative regime—the CCA.[69]

Cases that have considered competition law arbitration have consistently suggested that such claims are *inarbitrable* in Australia. The Federal Court in *Petersville Ltd v Peters (W.A.) Ltd*[70] took a similar approach to that in *American Safety,*[71] claiming that competition law matters "involve complex legal and factual questions" that the court "has special expertise in Pt IV matters arising under the Trade Practices Act [*CCA*] and associated common law restraint trade issues" and that "questions of market behaviour, competition with relevant markets and anticompetitive behaviour are better dealt with by a court with appropriate jurisdiction, rather than an arbitrator."[72] Interestingly, this is ten years after the U.S. Supreme Court in *Mitsubishi* where Blackmun J expressly and persuasively rejected precisely this reasoning.

Allsop J in *Comandate* accepted the arbitration of TPA claims but also commented in *obiter* that antitrust claims are among those that are inarbitrable,[73] ostensibly making the distinction from general consumer protection provisions and competition law proper. In *Nicola v Ideal Image Development Corp Inc,*[74] the court cited *Comandate* as authority for the non-arbitrability of competition law disputes.[75]

Currently, it appears that disputes under the CCA are likely to be referred to arbitration because the courts are likely to take a sufficiently liberal reading of the arbitration clause to include CCA claims. The courts are unlikely, however, to stay matters in the court in favour of arbitration when the issues involve competition law because there is a "sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate."[76] This position is inconsistent with the experience in the U.S. and the U.K., which creates issues for Australia's position in the global arbitration architecture.

V THE CASE FOR A DIFFERENT APPROACH IN AUSTRALIA

The resistance for Australian courts to allow for competition law disputes to proceed to arbitration rests primarily on the concern that doing so would be contrary to the overwhelming public policy dimension that underpins the CCA.[77] The following sections submit that competition law arbitration is consistent with both the policy objectives of the CCA and Australia's international arbitration policy.

A *Competition Law Arbitration Promotes Competition Law Policy*

Allowing competition law arbitration would increase enforcement of the CCA, ultimately benefitting the public. Currently, the Australian Competition and Consumer Commission ("**ACCC**") is the authority that enforces the CCA. The ACCC, like

[69] *Competition Consumer Act 2010* (Cth) competition law Part IV / consumer law Sch 2.
[70] (1997) ATPR 41, [566] ('*Petersville*').
[71] *American Safety* (n 19).
[72] *Petersville* (n 70) [847] (Lockhart J).
[73] *Comandate* (n 63) [200].
[74] (2009) 261 ALR 1.
[75] Ibid [58]-[60]. The decision did not confirm the non-arbitrability of competition law disputes *per se* because the court distinguished the claim from a 'competition law' dispute.
[76] *Comandate* (n 63) [58].
[77] CCA s 2 "[enhancement of] the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

all enforcement bodies, cannot ensure that all matters are addressed. The ACCC's compliance and enforcement policy outlines that they will only pursue matters that have, among other things, a certain level of significance with regards to public interest or concern.[78] This creates a threshold whereby many instances of anticompetitive conduct go unchecked. The concern is that smaller-scale, less significant claims will not meet the level of egregiousness for enforcement by the ACCC, but cumulatively they will pose a significant risk to the promotion of competition and fair trading for consumers. This is where private enforcement of competition law plays an essential role in promoting the policy of the CCA. Private litigants of antitrust matters in *Mitsubishi* were referred to as "Private-Attorneys General".[79] As it stands in Australia, parties can use litigation to enforce competition law matters privately; however, as mentioned at the outset of this paper, the current trend is that most commercial parties agree on arbitration to resolve their disputes. This means that parties in a dispute are unlikely to seek a competition law claim if they cannot raise it in an arbitration as doing so would create a fragmentation of disputes. I submit that allowing the arbitrability of competition law in Australia would enable parties to enforce the less significant matters that go unaddressed by the ACCC. This, in turn, would promote the growth of competition law enforcement in Australia, thus ultimately serving the public interest.[80]

B *Competition Law Arbitration Promotes Australian Arbitration Policy*

As the global economy shifts towards the Asia-Pacific region, Australia has an opportunity to position itself as a frontrunning player in international commercial arbitration. Over the past decade, it is clear there is a policy objective to encourage disputants to choose Australia as the seat of their arbitration.[81] Parties "shopping" for their arbitration are primarily looking for an "arbitration-friendly" jurisdiction.[82] Australia has displayed a pro-arbitration attitude in many recent decisions; however, the Court's continuance to restrict the arbitrability of competition law creates a perception to the rest of the world that Australia is still an interventionalist jurisdiction, who jealously guards their own laws, harbouring parochial attitudes towards arbitration. This could deter parties from choosing Australia as the seat of their arbitration. Arguably, aligning the Australian approach to competition arbitrability with jurisdictions such as Europe and the U.S. would assure parties that Australia is an arbitration-friendly jurisdiction, assuring prospective disputants of a smooth process and, consequently, promoting the policy objective of encouraging Australia-based arbitrations.

The non-arbitrability of competition law is in conflict with the transnational public policy that underpins international arbitration. Much of the discussion thus far has focused on the public policy element of the CCA. However, what is often missed, the *International Arbitration Act 1974* (Cth) ("**IAA**") is also underpinned by a transnational

[78] ACCC, *Compliance*-enforcement-policy-priorities (Web Page, 2020) <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>, archived at <https://perma.cc/XG4A-HR4Z>.

[79] *Mitsubishi* (n 28) [635].

[80] This proposition is supported by Colette Downie, 'Will Australia Trust Arbitrators with Antitrust?' (2013) 30(3) *Journal of International Arbitration* 221. Colette Downie suggests the EU benefitted from a growth of enforcement due to the arbitrability of competition law.

[81] Justice Clyde Croft, 'Can Australian courts get their act together on international commercial arbitration?' (Conference Presentation, Financial Review International Dispute Resolution Conference 2010, 15 October 2010) <http://www.austlii.edu.au/au/journals/VicJSchol/2010/21.pdf>. This proposition is supported by the so called 'reinvigoration' of the arbitration regime.

[82] Ibid.

public policy; it is in the public's interest across the globe for efficient resolution of commercial disputes. The IAA ensures that agreements to arbitrate are upheld across borders, and awards from foreign jurisdictions are recognised domestically. The refusal to stay court proceedings in a competition law claim allows parties to escape their bargain to arbitrate and the lack of enforcement of an award that deals with competition law matters conflicts with the global trend towards enforcement. As Dr. Luttrell commented, "courts of many states [should] refrain from applying their own public policies because of counter-veiling systemic interests in permitting consensually arranged certainty in [international commercial] disputes."[83] This paper submits that the domestic policy considerations justifying the non-arbitrability of competition law are outweighed by the harm non-arbitrability does to the transnational public policy that underpins international arbitration.

VI CONCLUSION

Thirty-five years on from the hallmark U.S. Supreme Court decision in *Mitsubishi,* competition law arbitration in most jurisdictions remains relatively uncontroversial. The jurisprudence in Europe and the U.S. has converged and settled on similar principles and policies on dealing with competition law arbitration—this includes how arbitration clauses are construed and how courts review the award before enforcement. These jurisdictions have maintained a pro-arbitration attitude that strikes a balance between maintaining the transnational public policy that underpins international arbitration while ensuring that their domestic public policy regarding competition law is not compromised. The Australian position, which could be described as parochial and restrictive, is inconsistent with the position in Europe and the U.S. Australian courts have displayed inconsistent approaches to the arbitration of the CCA while consistently holding that competition law is inarbitrable. The justification for this derives from the particularly high status the CCA has as a public protection statute; this is propounded by the CCA containing both competition law and consumer protections generally. This paper argues that allowing the arbitration of competition law will increase the enforcement of competition law provisions, ultimately benefitting the public. Aligning with other jurisdictions puts Australia in a better position to be a global player as an international arbitration hub. This paper further argues that too much weight is given to domestic public policy compared to the transnational public policy that underpins international arbitration. Chief Justice Robert French, when delivering the 2016 Goff Lecture on arbitration and public policy,[84] concluded that arbitration is "not like a football code"—it is not a "for us or against us" system.[85] Judicial decision making should not be about attracting labels such as "pro-arbitration" or "arbitration-friendly", especially at the detriment of public policy.[86] However, the experience in the U.S. and Europe over three decades serves as proof that Australia would stand in good company if competition law arbitration were to be accepted.

[83] SR Luttrell, 'Public Policy Conflicts in the Arbitrability of the Trade Practices Act 1974 (Cth) – A comment on Clough Engineering' (2007) 4 *Macquarie Journal of Business Law* 139.

[84] Chief Justice Robert French AC, 'Arbitration and Public Policy' (2016 Goff Lecture, 18 April 2016).

[85] Ibid

[86] Ibid.