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ARBITRATING TRANSNATIONAL CARTELS: COMPETITION LAW, PUBLIC POLICY AND THE LIMITS OF PRIVATE ADJUDICATION

~ *Ryan Bang, Ankit Singh & Prajval Bargartra*

ABSTRACT

The intersection of international commercial arbitration and competition law presents significant legal and regulatory challenges, particularly in disputes arising from transnational cartels. While arbitration offers an efficient, neutral and confidential mechanism for resolving cross-border commercial disputes, its consensual and private character raises concerns regarding the enforcement of mandatory competition laws designed to protect market integrity and public welfare. This paper critically examines the arbitrability of cartel-related disputes through a comparative analysis of the legal frameworks and judicial approaches adopted in the United States, the European Union and India. It explores the evolving judicial recognition of competition disputes as arbitrable, particularly through the principles established in *Mitsubishi Motors* and *Eco Swiss*, while highlighting the uncertainties surrounding arbitrability under India's competition and arbitration regimes. The paper further analyses the challenges arising from overlapping jurisdictions, evidentiary limitations, arbitral confidentiality and divergent interpretations of public policy in the recognition and enforcement of arbitral awards. It argues that although private claims arising from cartel conduct may legitimately be resolved through arbitration, the investigation and punishment of anticompetitive practices must remain within the jurisdiction of competent regulatory authorities. Accordingly, the paper advocates a balanced framework based on the 'second look' doctrine, supported by effective judicial scrutiny, reasoned arbitral awards, institutional cooperation with competition authorities and appropriate procedural safeguards. It concludes that a carefully regulated approach to arbitration can reconcile party autonomy with mandatory competition law obligations, allowing arbitration to complement rather than undermine public enforcement in an increasingly interconnected global economy.

I. INTRODUCTION

The modern economy rests on a structural asymmetry. Commercial activity moves freely across borders, yet the legal rules that discipline it remain largely territorial. The asymmetry is sharpest where competition law meets international commercial arbitration. Competition law is a public regulatory instrument. It protects the competitive process and, through it, consumer welfare, and it does so chiefly by empowering agencies to investigate, prohibit and punish.¹ International arbitration is the default forum for cross-border private disputes, prized for its neutrality, flexibility, finality and confidentiality.² The first system answers to the state; the second answers to the consent of the parties.

Transnational cartels sit at the point of greatest friction. A cartel, meaning a covert agreement among competitors to fix prices, rig bids, restrict output or divide markets, is widely regarded as the gravest form of anticompetitive conduct.³ When its effects span several jurisdictions, it engages overlapping public enforcement regimes, a dispersed class of victims and, increasingly, commercial contracts that contain arbitration clauses. Three questions follow. First, are disputes touching cartel conduct arbitrable, or does their public character place them beyond private adjudication? Second, when a tribunal does decide such a dispute, how is the state's interest in competition law to be protected at the award stage, given the narrow grounds on which awards may be set aside or refused enforcement? Third, can arbitral confidentiality be reconciled with the transparency on which deterrence and follow-on claims depend?

This article argues that cartel-related disputes are not inherently inarbitrable, and that arbitration can be a legitimate and effective forum for the private disputes that cartels generate, provided it operates within a 'second look' framework. On that model, tribunals may decide private claims, but national courts retain the power, at the annulment or enforcement stage, to ensure that mandatory competition norms have not been disregarded. The argument is developed in five steps. Part II examines the doctrinal interface between the public and private paradigms. Part III compares the United States, the European Union and India, whose courts have answered the arbitrability question in markedly different ways. Part IV identifies the practical frictions that arise, namely jurisdictional overlap, evidence, confidentiality and the

¹ Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (7th edn, OUP 2019).

² Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).

³ OECD, *Recommendation of the Council concerning Effective Action against Hard Core Cartels* (adopted 25 March 1998, C(98)35/FINAL).

elasticity of public policy. Part V proposes institutional, procedural and judicial reforms. Part VI concludes.

II. THE DOCTRINAL INTERFACE

Competition law is public law in both purpose and method. Its object is the integrity of the market as a whole, and its remedies (infringement decisions, fines, prohibition orders and structural measures) are directed at that object rather than at the vindication of an individual claimant's rights. In this sense its effects are in rem: a finding that a cartel exists bears on every competitor, supplier and consumer in the affected market, and not only on the parties before the decision-maker.⁴ Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements that restrict competition and renders them automatically void.⁵ India's Competition Act 2002 has the same orientation. It creates a specialist regulator, the Competition Commission of India (CCI), presumes an appreciable adverse effect on competition where competitors fix prices, limit supply or allocate markets, and attaches penalties calibrated to profit or turnover.⁶ The Indian Supreme Court has described the CCI's functions as a blend of the administrative, expert and adjudicatory, exercised in the public interest.⁷

International arbitration is the opposite in structure. It is a consensual process that derives its authority from the parties' agreement and produces an award that binds only those parties, which is to say it operates in personam.⁸ The arbitrator has no sovereign office. The tribunal's mandate is conferred by contract and bounded by it, and its discretion is exercised within procedural rules that the parties have chosen or accepted.⁹ There is no forum state whose laws a tribunal is bound to vindicate. That is why the treatment of mandatory rules, meaning norms that apply regardless of the law chosen by the parties because of the interests they protect, has long been a central problem of arbitral theory.¹⁰ Competition law is the paradigm example of such a rule.

⁴Jones, Sufrin and Dunne (n 1).

⁵Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 101(1)–(2).

⁶Competition Act 2002 (India), ss 3(3), 19, 27.

⁷*Competition Commission of India v Steel Authority of India Ltd* (2010) 10 SCC 744.

⁸Born (n 2).

⁹William W Park, 'Arbitration's Protean Nature: The Value of Rules and the Risk of Discretion' (2003) 19 *Arbitration International* 279.

¹⁰Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 *Arbitration International* 274.

Three fault lines follow from this contrast. The first is arbitrability: whether a tribunal whose power rests on consent can be trusted to apply and interpret public-law norms. Courts in many systems once answered no. They reasoned that competition law was reserved to public courts and specialist agencies, and that private arbitrators lacked the impartiality, expertise and investigative tools to assess market-wide harm.¹¹ The question is partly one of legal competence, and partly one of capacity, since a tribunal cannot compel non-parties to give evidence or conduct a market inquiry.

The second fault line is confidentiality against transparency. Confidentiality is among the main reasons commercial parties choose arbitration. Yet cartels depend on secrecy, and publicity is an instrument of deterrence: publicised decisions educate the market, encourage leniency applications and equip victims to sue.¹² A cartel dispute resolved behind closed doors leaves the public unaware of the infringement and weakens both deterrence and the prospects of follow-on claims.

The third fault line lies at the enforcement stage. Even if the dispute is arbitrable, an award may give effect to an unlawful arrangement or ignore mandatory competition rules. The New York Convention permits a court to refuse recognition where the subject matter is not capable of settlement by arbitration under the law of the enforcing state, or where recognition would be contrary to that state's public policy.¹³ The UNCITRAL Model Law reproduces those grounds for setting aside awards.¹⁴ However, 'public policy' is an elastic concept whose content varies between systems, and that variation generates uncertainty and invites forum shopping.

It helps to be precise about what is actually at stake in a cartel-related arbitration. Public enforcement, which includes investigation, fines and findings of infringement binding on all, remains the preserve of competition authorities and no tribunal can or should supplant it. The disputes that reach arbitration are private-law disputes with a competition dimension. They arise in four principal ways. A respondent may defend a contractual claim by alleging that the contract is a vehicle for, or tainted by, a cartel and is therefore void.¹⁵ Participants in an arrangement may fall out and bring claims inter se, including claims for contribution after a

¹¹Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003).

¹²Richard Whish and David Bailey, *Competition Law* (10th edn, OUP 2021).

¹³Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention), arts V(2)(a)–(b).

¹⁴UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006), art 34(2)(b).

¹⁵TFEU (n 5) art 101(2).

damages award. A purchaser may claim damages from a cartel member under a supply contract containing an arbitration clause. Or the parties, after the dispute arises, may agree to submit it to arbitration. The reach of the first three depends on interpretation of the clause: the Court of Justice has held in the analogous context of jurisdiction clauses that a clause covers cartel damages claims only if it can be read as extending to liability arising from participation in an unlawful cartel.¹⁶ Where no arbitration agreement exists, as is typical for indirect purchasers who never contracted with the cartelists, arbitration is simply unavailable and the arbitrability debate is academic.

III. THE ARBITRABILITY DEBATE: A COMPARATIVE ANALYSIS

Comparative analysis reveals a general movement towards a more permissive stance on arbitrability, but with significant variation in the intensity of judicial oversight that accompanies it.

A. The United States: The Mitsubishi Paradigm

For much of the twentieth century American courts treated antitrust claims as inarbitrable. The leading authority was *American Safety Equipment Corp v JP Maguire & Co*, in which the Second Circuit reasoned that antitrust claims carry a pervasive public interest, that they are too complex for arbitrators who are not bound by the rules of law or subject to judicial scrutiny, and that the commercial context in which arbitrators ordinarily work is ill-suited to the protection of the public.¹⁷

The first cracks appeared in *Scherk v Alberto-Culver Co*, where the Supreme Court enforced an international arbitration clause in a securities dispute and stressed the importance of predictability in international commerce.¹⁸ The decisive shift came in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*. A Puerto Rican car distributor, sued by the Japanese manufacturer, counterclaimed under the Sherman Act. The manufacturer sought to compel arbitration in Japan pursuant to the parties' contract. The Supreme Court held that the antitrust claims were arbitrable, notwithstanding their statutory and public character.¹⁹ Its reasoning rested on the international dimension of the transaction. Concerns of international comity, respect for the capacities of foreign and transnational tribunals and the need for predictability

¹⁶Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH* EU:C:2015:335.

¹⁷*American Safety Equipment Corp v JP Maguire & Co* 391 F 2d 821, 826–28 (2d Cir 1968).

¹⁸*Scherk v Alberto-Culver Co* 417 US 506, 516–17 (1974).

¹⁹*Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614, 628–40 (1985).

in the international commercial system counselled in favour of enforcing the agreement to arbitrate.²⁰ A party that agrees to arbitrate a statutory claim, the Court said, does not forgo the substantive rights the statute affords, but only submits their resolution to a different forum.

The Court did not, however, grant arbitrators unfettered authority. Two qualifications give the decision its analytical significance. The first is the 'prospective waiver' principle, sometimes called effective vindication: if the arbitration clause and the choice-of-law clause operated together as a prospective waiver of a party's right to pursue statutory remedies, the Court would have little hesitation in condemning the agreement as against public policy. The second is the 'second look'. The Court emphasised that American courts would have the opportunity at the award-enforcement stage to ensure that the legitimate interest in enforcing the antitrust laws had been addressed.²¹ Arbitrability was thereby married to residual judicial review. The result is a two-tier system in which the first tier is a private tribunal that may hear and decide the claim, and the second is a national court that may refuse to give effect to an award that fails to honour mandatory competition norms.

The model has attracted both praise and criticism. Its defenders see it as a pragmatic balance that allows commercial parties to enjoy arbitration's efficiency while preserving the state's ultimate power to enforce public law.²² Its critics observe that the second look is, in practice, thin. The Federal Arbitration Act's grounds for vacatur are exclusive and narrow,²³ and the public policy defence to enforcement of a foreign award under the New York Convention is applied restrictively by American courts.²⁴ The Supreme Court has since confined the effective vindication principle to clauses that bar the assertion of statutory rights or make pursuit of them prohibitively expensive, declining to extend it to class-action waivers that merely make individual claims economically unattractive.²⁵ Whether a second look that is this deferential can catch a deliberately anticompetitive award remains an open question, and it is one that matters acutely in the cartel setting.

²⁰*Mitsubishi* (n 19) 628–29.

²¹*Mitsubishi* (n 19) 637 n 19, 638.

²²RC Levin, 'A Tribute to Mitsubishi' (2018) 73 *Dispute Resolution Journal* 50.

²³*Hall Street Associates LLC v Mattel Inc* 552 US 576 (2008).

²⁴Federal Arbitration Act 1925, 9 USC §§ 10, 201–208.

²⁵*American Express Co v Italian Colors Restaurant* 570 US 228, 235–36 (2013).

B. The European Union: Conditional Arbitrability

The European Union's position was fashioned by the Court of Justice in *Eco Swiss China Time Ltd v Benetton International NV*. The case concerned a licence agreement containing an arbitration clause. After an award was made against Eco Swiss, it sought annulment before the Dutch courts on the ground that the licence infringed what was then Article 85 EC (now Article 101 TFEU), a point it had not raised in the arbitration. The Court of Justice was asked whether a national court must annul an award that is contrary to the Union's competition rules where its domestic law permits annulment only for breach of public policy and the competition point was raised late.²⁶

The Court's answer has two limbs. First, it held that Article 101 is a fundamental provision essential to the accomplishment of the Union's tasks and, in particular, to the functioning of the internal market, so that it constitutes a matter of public policy within the meaning of the New York Convention.²⁷ Second, it held that a national court seised of an application for annulment must grant it if it considers the award to be contrary to Article 101, where its domestic rules of procedure require it to grant an application founded on failure to observe national rules of public policy.²⁸ The rationale was explicit. Arbitral tribunals are not courts or tribunals of a Member State for the purposes of Article 267 TFEU and cannot refer questions to the Court of Justice,²⁹ a position the Court has since reaffirmed.³⁰ Because the uniform interpretation of Union law cannot therefore be secured within arbitration, it must be secured by review of the award in national courts.³¹

Eco Swiss thus established conditional arbitrability. Nothing forbids arbitrators from deciding competition issues, and indeed they are expected to apply Article 101 where it is relevant, but the award is exposed to public policy review in the courts of the seat and of enforcement. The decision should not be overread. The obligation to annul is formulated by reference to the equivalence of domestic procedural rules, and the Court left to national law the question of how intensively the review should be conducted. National approaches have accordingly diverged. French courts, for example, confine review to violations that are flagrant, effective

²⁶Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.

²⁷*Eco Swiss* (n 26) paras 36–37.

²⁸*Eco Swiss* (n 26) paras 39–41.

²⁹Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* [1982] ECR 1095.

³⁰Case C-125/04 *Denuit and Cordenier v Transorient—Mosaïque Voyages et Culture SA* [2005] ECR I-923.

³¹*Eco Swiss* (n 26) paras 32–35.

and concrete, and refuse to reopen the merits of the tribunal's assessment.³² Germany treats claims involving an economic interest as arbitrable and admits public policy review only as a ground for setting aside.³³ Switzerland likewise treats any dispute involving a pecuniary interest as arbitrable.³⁴

The Union's legislative framework has also pushed in the direction of private enforcement. The Court of Justice has held that any person who has suffered harm from an infringement may claim compensation, and that the full effectiveness of Article 101 would be put at risk if that right did not exist, and that national law may not render its exercise practically impossible.³⁵ The Damages Directive now harmonises key features of such claims, including the presumption that cartels cause harm, the joint and several liability of cartel participants, the rules on passing-on of overcharges and the binding effect of national authority decisions.³⁶ Private enforcement is conceived as a complement to public enforcement, serving both compensation and deterrence.³⁷ Arbitration can play a part in this scheme so long as the tribunal applies those substantive rules and judicial review is sufficiently robust to ensure that it does.³⁸

C. India: A Cautious and Unsettled Position

The Indian position is the least settled of the three and, on the better reading, the most cautious. Neither the Arbitration and Conciliation Act 1996 nor the Competition Act 2002 expressly excludes competition disputes from arbitration. Yet the Competition Act contains features that point towards a statutory channelling of competition questions into a specialist forum. Section 61 ousts the jurisdiction of civil courts in respect of matters the CCI is empowered to determine, and section 53N provides that compensation for loss caused by a contravention is to be claimed before the National Company Law Appellate Tribunal following a finding by the CCI.³⁹ On the other hand, section 62 states that the Act's provisions are in addition to, and not in derogation of, other laws, which supports an argument that arbitration, as a separate statutory

³²Cass 1e civ 4 June 2008, *SA Thalès Air Defence BV v GIE Euromissile* [2008] Rev arb 473.

³³Zivilprozessordnung (German Code of Civil Procedure), ss 1030(1), 1059(2).

³⁴Swiss Federal Act on Private International Law 1987, arts 177(1), 190(2)(e).

³⁵Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297; Joined Cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

³⁶Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, arts 9, 11, 12–14, 17(2).

³⁷Niamh Dunne, 'The Role of Private Enforcement within EU Competition Law' (2013–14) 16 Cambridge Yearbook of European Legal Studies 143.

³⁸A de Paola, 'Arbitrating Competition Law Disputes in the EU' (2024) 56 NYU Journal of International Law and Politics 99.

³⁹Competition Act 2002 (India) (n 6) ss 53N, 61.

regime, is not displaced.⁴⁰ No decision of the Supreme Court appears squarely to have determined whether cartel claims, or competition claims more broadly, are arbitrable.

The governing framework is supplied by *Vidya Drolia v Durga Trading Corp*. The Supreme Court held that a dispute is non-arbitrable where the cause of action relates to actions in rem that do not pertain to subordinate rights in personam; where it affects third-party rights or has erga omnes effect and requires centralised adjudication; where it relates to inalienable sovereign and public-interest functions of the State; or where it is expressly or by necessary implication non-arbitrable under a statute.⁴¹ This refined the earlier distinction, drawn in *Booz Allen & Hamilton Inc v SBI Home Finance Ltd*, between rights in rem, which require adjudication by public fora, and rights in personam, which are amenable to arbitration.⁴² Applied to cartels, the test is instructive. A declaration that a cartel exists, and the imposition of a penalty for it, plainly engage the second and third limbs, because they affect the market at large and are an exercise of sovereign regulatory power. A claim by a purchaser for damages under a supply contract, or a defence that a contract is void for illegality, concerns subordinate rights in personam and is more naturally arbitrable. The fourth limb, concerning statutory exclusion by necessary implication, is where sections 53N and 61 do their work and where the real controversy will lie.

Competition Commission of India v Bharti Airtel Ltd is often cited in this connection, though it needs to be read with care. The case concerned the allocation of jurisdiction between the CCI and a sectoral regulator, not arbitration. The Supreme Court held that the CCI retains jurisdiction over alleged abuses in the telecommunications sector, but that the sectoral regulator should first determine the technical questions that fall within its remit.⁴³ Its relevance is by analogy. The decision reflects judicial insistence that adjudication of anticompetitive conduct be placed with a body equipped for market-wide inquiry and attentive to public rather than private interests, which is the intuition that animates the in rem analysis.

India's enforcement stage adds a further layer. Section 34 of the 1996 Act permits annulment of a domestic award that conflicts with the public policy of India, and section 48 supplies the equivalent ground for refusing enforcement of a foreign award.⁴⁴ The scope of public policy

⁴⁰ Competition Act 2002 (India) (n 6) s 62.

⁴¹ *Vidya Drolia v Durga Trading Corp* (2021) 2 SCC 1, para 76.

⁴² *Booz Allen & Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532, paras 35–36.

⁴³ *Competition Commission of India v Bharti Airtel Ltd* (2019) 2 SCC 521.

⁴⁴ Arbitration and Conciliation Act 1996 (India), ss 34(2)(b)(ii), 48(2)(b).

has oscillated. *Renusagar Power Co Ltd v General Electric Co* read it narrowly in the enforcement context,⁴⁵ *Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd* expanded it to include patent illegality,⁴⁶ and Parliament in 2015 re-confined it to fraud or corruption, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of morality or justice, adding patent illegality as a separate ground for domestic awards only.⁴⁷ The Supreme Court has since held that review of foreign awards under section 48 does not permit scrutiny of the merits.⁴⁸ Whether violation of Indian competition law would amount to a contravention of the 'fundamental policy of Indian law' has not been authoritatively decided. There is, however, a respectable argument that it would, given the Competition Act's overriding public objectives and the penalties it attaches to cartels.⁴⁹

Taken together, the Indian position is that the in personam aspects of a competition-related dispute may well be arbitrable, while the determination of the existence of a cartel as a matter of public regulation, and the attendant penalties, remain with the CCI and the public fora. That is a coherent line, but it is also an uncertain one. Absent a clear judicial or legislative statement, parties who arbitrate competition-sensitive claims in India do so with an awareness that the award may later be challenged on arbitrability or public policy grounds.

IV. PRACTICAL FRICTIONS

A. Jurisdictional Overlap

Where cartel conduct is in issue, the tribunal and a competition authority may operate simultaneously. Their mandates differ: the authority investigates the market, may reach non-signatories and can impose sanctions, while the tribunal decides a bilateral dispute between consenting parties. The risks are twofold. A party may invoke arbitration tactically to delay or complicate a public investigation or to obtain a confidential ruling that an arrangement is lawful. Conversely, a tribunal may find no infringement just as the authority imposes a substantial fine, producing conflicting outcomes and commercial uncertainty.⁵⁰

Within the Union, a number of rules are designed to prevent inconsistency between national courts and authorities. National courts may not take decisions running counter to a Commission

⁴⁵*Renusagar Power Co Ltd v General Electric Co* 1994 Supp (1) SCC 644.

⁴⁶*Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705.

⁴⁷*Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India* (2019) 15 SCC 131.

⁴⁸*Vijay Karia v Prysmian Cavi e Sistemi SRL* (2020) 11 SCC 1.

⁴⁹*Excel Crop Care Ltd v Competition Commission of India* (2017) 8 SCC 47.

⁵⁰Whish and Bailey (n 12).

decision, and a national authority's final infringement decision is accorded binding or presumptive effect before the courts of its own Member State.⁵¹ Those rules are drafted for courts. Nothing in them binds an arbitral tribunal in terms, so that the coherence the Union legal order seeks is achieved, if at all, only at the second look. In India, similarly, the structure of the Competition Act presupposes that determinations of infringement are made by the CCI, and a tribunal that purported to decide such a question as a matter of public regulation would invite annulment.

B. Evidence and Non-Parties

Cartels are covert, documentary evidence is dispersed, and proof frequently turns on econometric analysis of overcharge and causation. Tribunals have extensive powers over the parties, including document production under institutional rules and the widely used IBA Rules, which permit objection on grounds of legal impediment or privilege.⁵² But they have no direct power to compel non-parties. They depend on court assistance, which is available in many seats,⁵³ and which is exercised unevenly. Leniency materials raise a further problem. Under the Damages Directive, leniency corporate statements and settlement submissions enjoy absolute protection from disclosure in damages proceedings, in order to preserve the incentive to apply for leniency.⁵⁴ A tribunal that ordered disclosure of such material could expose the award to challenge and undermine the leniency programme on which public enforcement depends. Arbitral evidentiary practice must therefore be calibrated to competition policy as well as to party autonomy.

C. Confidentiality and Transparency

The tension between confidentiality and transparency is the most structural. Institutional rules and many national laws impose or presuppose confidentiality: India, for instance, codified a statutory duty of confidentiality in arbitral proceedings in 2019, subject to exceptions for disclosure necessary to implement or enforce an award.⁵⁵ The ICC Rules allow the tribunal to make orders concerning confidentiality, and the LCIA Rules impose a general duty of confidentiality on parties subject to exceptions for legal duty and for the protection or pursuit

⁵¹Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, arts 11, 16; Directive 2014/104/EU (n 36) art 9.

⁵²IBA Rules on the Taking of Evidence in International Arbitration (2020), arts 3, 9(2).

⁵³UNCITRAL Model Law (n 14) art 27; Arbitration and Conciliation Act 1996 (India) (n 44) s 27.

⁵⁴Directive 2014/104/EU (n 36) art 6(6).

⁵⁵Arbitration and Conciliation Act 1996 (India) (n 44) s 42A.

of legal rights.⁵⁶ These arrangements serve legitimate commercial purposes, but they have a cost in the cartel context. Public decisions have an educative and deterrent function, and they provide the evidential base for follow-on claims. If the dispute is resolved in secret, a cartel may be resolved without ever being exposed, and other victims will be unaware of a claim that they might themselves bring.

The deficiency is compounded by a structural gap in the second look. The doctrine presupposes that someone will invite a court to examine the award. If the award is performed voluntarily, or if the parties are in fact cartelists who are content to be bound by an arbitral outcome that implements their arrangement, no court may ever see it. A second look that depends on a challenge by an aggrieved party cannot catch an award that no party has an interest in challenging. That is a serious objection, and it is the principal reason why the second look needs to be supplemented by mechanisms for information-sharing with competition authorities, discussed below.

D. The Elasticity of Public Policy

The public policy exception is the legal instrument through which the second look is exercised, but its content is contested. The International Law Association has recommended that courts apply an international conception of public policy, confined to fundamental principles, and that they avoid reopening the merits.⁵⁷ Yet the exception is applied with markedly different degrees of intensity, from the near-deference of the French and American courts to the more interventionist posture associated with the Indian cases in the era of *Saw Pipes*.⁵⁸ Such variation undermines predictability and encourages forum shopping, so that the fate of an award implicating cartel conduct may depend as much on where it is challenged as on what it decided.

V. TOWARDS A HARMONIOUS FRAMEWORK

Reconciling the public and the private requires a combination of judicial, institutional and procedural reform. No single measure is sufficient: the second look supplies the legal backstop, institutional cooperation supplies information and expertise, and procedural safeguards supply the process through which both operate.

⁵⁶ICC Arbitration Rules (2021), art 22(3); LCIA Arbitration Rules (2020), art 30.

⁵⁷International Law Association, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (New Delhi Conference 2002).

⁵⁸*Thalès* (n 32); *Saw Pipes* (n 46).

A. Calibrating the Second Look

The second look is the most widely accepted device for reconciling arbitration with mandatory rules. Properly understood, it does not invite courts to re-decide the merits. Its function is narrower: to verify that the tribunal identified and applied the mandatory competition norms that were engaged and that the award does not give effect to an arrangement that the law of the forum condemns.⁵⁹ The comparative literature supports a liberal approach to arbitrability coupled with a disciplined approach to review, and argues that national courts should resist the temptation to resolve doubts about arbitrability by declining jurisdiction.⁶⁰ Doctrinal convergence is more realistic than formal harmonisation, since the major systems already share the premise that judicial abstention is unacceptable where competition law is engaged.

Three refinements would make the second look more effective in the cartel context. The first is a requirement of reasoned awards. A court cannot assess whether a tribunal applied competition law if it cannot see how the tribunal reached its conclusion, and the principal institutional rules already require reasons unless the parties agree otherwise.⁶¹ Parties who waive reasons in competition-sensitive disputes defeat the purpose of the second look and should be understood to risk the award's enforceability. The second is a consistent standard of review, along the lines recommended by the ILA: deferential as to the merits and vigilant as to flagrant disregard of mandatory rules.⁶² The third is a recognition that tribunals themselves bear responsibility. The ICC Rules direct the tribunal to make every effort to ensure that the award is enforceable at law,⁶³ and in a competition-sensitive case that duty properly includes engaging with the mandatory rules at the seat and the likely place of enforcement, whether or not the parties have pleaded them.

B. Cooperation and Information-Sharing

The second look is necessarily retrospective and, as explained above, depends on a challenge. Cooperation between tribunals and authorities addresses both limits by supplying information and expertise during the proceedings. European law already contemplates a version of this for courts. A competition authority may submit written observations to a national court on the application of Articles 101 and 102, and the court may ask the Commission for information or

⁵⁹*Mitsubishi* (n 19) 638; *Eco Swiss* (n 26) paras 36–37.

⁶⁰R Sørensen and J Torp, 'Deciding Arbitrability of Competition Law Disputes: Making a Case for Adoption of Liberal Standards by National Courts' (2018) RMLNLU Law Review.

⁶¹ICC Rules (n 56) art 32(2).

⁶²ILA (n 57).

⁶³ICC Rules (n 56) art 42.

an opinion.⁶⁴ These mechanisms do not extend to arbitral tribunals, and the gap is not principled, since the interests that justify them are present in arbitration too. They could be replicated by soft law. Arbitral institutions might adopt protocols under which a tribunal that identifies a serious competition issue may stay the proceedings, invite a non-binding view from the authority, and take account of any parallel investigation.

Amicus participation offers a second route. It has been argued that amicus submissions by competition authorities help bridge the knowledge gap between regulators and adjudicators and enhance the legitimacy of the resulting decision in the eyes of reviewing courts.⁶⁵ In arbitration such participation would require the consent of the parties or the direction of the tribunal, but institutional rules could expressly authorise tribunals to invite it. A third element is limited and carefully controlled disclosure to authorities. Institutional rules could provide that, where a tribunal considers that the dispute reveals evidence of a possible infringement, it may, with appropriate safeguards, notify the competent authority. Such a mechanism would have to respect the protection of leniency materials and the legitimate confidentiality of commercial information, and it would require a clear legal basis in the rules or the arbitration agreement. But it would address the structural gap identified above, because it would allow the state to learn of an arrangement that no party has any incentive to challenge.

C. Procedural and Substantive Safeguards

Four further safeguards would reinforce confidence in arbitration as a forum for competition-sensitive disputes. First, parties should give serious attention to the competence of the tribunal. Competition disputes call for economic analysis and for understanding of the public-policy stakes, and the appointment of arbitrators with expertise in both arbitration and competition law improves the prospect that mandatory norms are correctly identified and applied.

Second, arbitration clauses can be drafted to reflect the mandatory character of competition law, by stipulating that the tribunal shall apply the relevant competition rules and may award the remedies they require. This protects the tribunal's mandate and reassures reviewing courts that the parties did not intend to exclude public-law considerations. It also bears on the scope of the clause, since a clause expressly covering competition-law liability avoids the interpretive difficulty identified in *CDC Hydrogen Peroxide*.⁶⁶

⁶⁴Regulation 1/2003 (n 51) art 15.

⁶⁵DD Sokol and S Waller, 'Antitrust and Amici' (2012) 100 Georgetown Law Journal 1427.

⁶⁶*CDC Hydrogen Peroxide* (n 16).

Third, procedural rules should offer flexibility to deal with competition-sensitive disputes. Tribunals should be willing to bifurcate liability and quantum where the question whether an arrangement infringes competition law is logically anterior, to stay proceedings in the presence of a parallel investigation, and to adopt protocols for expert evidence on overcharge and passing-on that reflect the substantive framework applied in damages litigation.⁶⁷ Confidentiality regimes should include carve-outs permitting disclosure to competition authorities where required by law, an exception the LCIA Rules already contemplate.

Fourth, reviewing courts should apply the public policy exception with discipline. Awards that disregard mandatory competition rules should not be enforced, but courts must resist the temptation to relitigate. That approach respects finality, which is an important value in its own right, while preserving the inviolability of competition law. In India, where the content of public policy remains in flux, a clear articulation by the Supreme Court of whether, and in what circumstances, breach of the Competition Act engages the fundamental policy of Indian law would do much to reduce uncertainty.⁶⁸ Legislative clarification of the relationship between sections 53N, 61 and 62 of the Competition Act and the arbitration regime would be a more satisfactory means of addressing arbitrability, and the recent amendments introducing settlement and commitment mechanisms show that Parliament is willing to adjust the architecture of enforcement when the need is clear.⁶⁹

VI. CONCLUSION

The meeting of competition law and arbitration is among the most contested frontiers of modern commercial law. Competition law protects the market and, through deterrence, the public. Arbitration offers parties an efficient, neutral and confidential means of resolving their disputes. The tension between them is real, but it is not irreconcilable.

The comparative survey shows a clear if uneven direction of travel. The United States, through *Mitsubishi*, accepted that antitrust claims are arbitrable while reserving a second look at the enforcement stage. The European Union, through *Eco Swiss*, accepted arbitration while treating Article 101 as public policy that national courts must be able to enforce on review. India has taken a more guarded course, emphasising the in rem character of competition adjudication and the specialist role of the CCI, while leaving room for arbitration of disputes that are

⁶⁷Directive 2014/104/EU (n 36) arts 12–14.

⁶⁸*Vijay Karia* (n 48); *Ssangyong* (n 47).

⁶⁹Competition (Amendment) Act 2023 (India).

primarily private. Behind these differences lies a shared premise: private adjudication of competition-sensitive disputes is acceptable only if the state retains a credible means of ensuring that mandatory norms are respected.

That premise is not self-executing. The second look is thin where review is deferential, it depends on a challenge that may never be made, and its content differs from one jurisdiction to the next. Confidentiality, jurisdictional overlap and the limits of tribunals' evidentiary powers compound the difficulty. The proposals advanced here, namely a disciplined and consistent second look, reasoned awards, structured cooperation with competition authorities, appropriate expertise and carefully drafted clauses, are designed to make the premise real. They do not subordinate competition law to arbitration, nor exclude arbitration from competition disputes. They aim to make each a check on the other. If they are adopted with care, arbitration can complement the public enforcement of competition law rather than undermine it, and in a world of transnational cartels that is both a desirable and a necessary outcome.