



**ARBITRATING ANTI-TRUST DISPUTES IN CHINA:
COMPARATIVE ANALYSIS BASED ON THE US AND EU**

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Abstract

The issue of the international arbitration of antitrust claims under a valid arbitration agreement is debatable in most countries. The US and the EU has generally recognized the arbitrability of antitrust disputes through its case law. However, it is ambiguous and controversial in China whether arbitral tribunals can arbitrate the antitrust disputes under a valid arbitration agreement. The antitrust law keeps silent on this issue and some courts recognized the arbitrability of these disputes while other courts denied. By denying the arbitrability of antitrust issues in China, parties' intention to seek a quick and effective arbitral award is destroyed. Under such background, it is of great significance to explore whether the antitrust issues should be or can be arbitrable in China. The core question of the thesis is to analyze whether antitrust claims are arbitrable in China. The thesis analyzes the ambiguity of the legal framework of China on this issue and explores the possibility to arbitrate such disputes under current legal framework. In addition to that, another aim of the thesis is to justify the arbitrability of antitrust issue in China from the comparative perspectives of the US and the EU on the issue of the arbitrability of antitrust claims. The thesis holds the view that the antitrust dispute is arbitrable in China. The methodology that the thesis adopts is comparative analysis, mainly by comparing the approaches of the US and the EU and applying such approaches to analyze the current practices of Chinese courts.

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1 Introduction

Parties are allowed to submit their disputes to arbitration in most countries. At the same time, nearly all countries impose restrictions on the arbitrability of certain types of disputes. The arbitrability of anti-trust claims has been important yet debatable issue for many years. Generally, the argument opposing the arbitrability of antitrust disputes is that antitrust law represents the public policy of a country and the public policy nature of these disputes makes international arbitration inappropriate.¹ However, the arbitrability of antitrust claims is recognized in the US by the US Supreme Court in the landmark case *Mitsubishi Motors Corporate v. Soler Chrysler-Plymouth, Inc.* removing the obstacle of public policy to the arbitration of antitrust claims, as well as in the judgement of European Court of Justice in *Eco Swiss China Time Ltd. v. Benetton International NV.* case.

The arbitrability of antitrust claims in China is still controversial and uncertain. In practice, unlike the US and the EU, China's approach to the issue of arbitrability of antitrust issue is ambiguous. Some courts have held that the antitrust dispute is arbitrable and others didn't accept the arbitrability of the antitrust issues considering its nature of public policy, such as in the case of *Nanjing Songxu Technology Co. Ltd. v. Samsung China Investment Co. Ltd.* In 2019, under the circumstances where two cases, namely *Shanxi Changlin Co. Ltd v. Shell China Co. Ltd* and *Huili Hohhot Co. Ltd v. Shell China Co. Ltd*, Beijing High Court in *Changlin* case in June 2019 recognized the arbitrability of the anti-trust dispute, whereas the Supreme Court in *Huili* case denied to refer the case to arbitration. But China's practice of refusing to recognize

¹ Vera Korzun, 'Arbitrating Antitrust Claims: From Suspicion to Trust' (2016) 48 New York University Journal of International Law and Politics 867, 900

the arbitrability of antitrust disputes destroy parties' intention even if there exists an effective arbitration agreement.

Under the current circumstances where antitrust disputes are arbitrable in the US and the EU, it is of great importance to explore whether China should do the same to respond to the trend of recognition of arbitrability of antitrust issue. Under the above-mentioned background, the central research question of the thesis is to analyze whether anti-trust disputes can be or should be referred to arbitration in China. Following the central question, subsidiary questions are as follows.

- 1) How EU and the US view the arbitrability of anti-trust disputes?
- 2) Is it arbitrable, or to what extent or under what circumstances it is arbitrable?
- 3) What elements are taken into account or what standards do they use to determine whether the antitrust dispute should be arbitrable? Whether, or to what extent, the EU and the US approaches are suitable for China?
- 4) Why the anti-trust disputes should or, can be arbitrable in China?
- 5) Is the lack of legislations or regulations in China regarding the arbitrability of anti-trust claims an obstacle to refer such claims to arbitration?
- 6) Is the nature of public policy of anti-trust disputes an obstacle to refer such claims to arbitration?

The thesis has two aims. The first one is to explore the possibility of arbitrating antitrust disputes under the legal framework of China. In this regard, the thesis will focus on not only the text of antitrust law of China, but also its legislative history and the intention. The second aim of the thesis is to justify the arbitrability of antitrust issue in China by comparing the approaches of the US and the EU with Chinese courts' reasoning on the issue in related cases.

Generally speaking, from the perspective of legal basis, Arbitration Law and Anti-Monopoly Law of China don't expressly rule out antitrust arbitration. Additionally, public policy nature of antitrust law is not obstacle to arbitrate antitrust disputes. This is because the supervisory court can review arbitral awards and annul them in the event of violation of public policy.

The proposition of the thesis is that arbitral tribunals can arbitrate the antitrust disputes in China. The thesis is divided into five parts. The thesis starts with a brief introduction of arbitrability of antitrust disputes, including the content of arbitrability and antitrust disputes and different views of supporters and opponents to the arbitrability of antitrust issue. Then the thesis introduces the approaches of the US and the EU on this issue on the second part and the third part respectively. The second part of the thesis will review the development of arbitrating antitrust issues through its case law in the US from suspicion to trust and analyze the considerations taken into account by the courts when deciding the arbitrability of antitrust claims. The third part of the thesis is to introduce the EU's approach on the issue and explore the elements of arbitrating antitrust disputes considered by the courts. The fourth part of the thesis will focus on China's legal framework and practice of courts. By focusing on the text, the legislative history and its purposes, this part tries to establish the legal basis to arbitrate antitrust claims in China. In addition, this part will analyze the court's practice on this issue by applying the approaches of the US and the EU. Upon above analysis, the thesis finally establishes the justification of arbitrating antitrust issues in China.

The thesis adopts the methodology of comparative analysis to conduct the research and compares the jurisdictions of the US and EU. The reason to do that is because the US and EU adopt different approaches about the arbitrability of antitrust dispute from China. To make China better engaged in the tendency of arbitrating antitrust disputes, it is important to explore

the reasons why the US and EU do so and the elements they considered, and whether China should also do the same if it is better.

2 Concepts and Different Views on Arbitrability of Antitrust Disputes

2.1 Concepts of Arbitrability and Antitrust Disputes

Arbitrability is one of the components of a valid international arbitration agreement. Generally, there are two types of arbitrability, namely objective arbitrability and subjective arbitrability.² Different national laws impose restrictions on what type of issues can be arbitrable.³ National laws may impose restrictions on ability of parties to enter into a valid international arbitration agreement and this is so called “subjective arbitrability”. For example, Arbitration law of China provides that natural persons under 18 years old are not capable of entering into a valid arbitration agreement. Objective arbitrability involves the question of what type of disputes or matters can be referred to international arbitration.⁴ Although the matters subject to arbitration vary from nation to nation, it is generally accepted in different countries that some categories of matters involving certain antitrust disputes, certain intellectual property claims, bankruptcy claims and company law issues are not arbitrable.⁵ Here, arbitrability in the thesis refers to the objective arbitrability, more specifically the arbitrability of antitrust disputes.

Antitrust disputes may arise under contractual and non-contractual contexts.⁶ Antitrust issues under contractual context may arise out of vertical business agreement between parties to the dispute, such as distribution contracts and supply contracts.⁷ Additionally, competition disputes

² Julian David Mathew Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 187

³ *ibid* 187-188

⁴ *ibid* 187

⁵ Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 944

⁶ Korzun, ‘Arbitrating Antitrust Claims: From Suspicion to Trust’ (n 1) 882

⁷ *ibid*

may also derive from a horizontal business agreement between competitors.⁸ Due to the contractual nature of international arbitration, it is noted that antitrust claims arise under the context of international arbitration are most commonly of contractual nature and competition disputes under non-contractual contexts are rare.⁹

Antitrust disputes may arise in any of three stages of arbitral process.¹⁰ Firstly, prior to arbitration, a plaintiff brought a claim before a court seeking to enforce arbitration agreement while the counterparty argues that the plaintiff's violation of antitrust law makes the dispute not arbitrable. For example, in the *Mitsubishi* case, Mitsubishi brought an action before a court seeking arbitration while the defendant Soler claimed that Mitsubishi violated antitrust law of the US and that the dispute was not arbitrable. When parties submit the dispute to a court, one party may seek to enforce the valid arbitration agreement, the court then needs to decide whether such disputes are arbitrable and whether to refer such disputes to arbitration.¹¹ Secondly, during the arbitration, one party may allege the non-arbitrability of antitrust disputes to deny the jurisdiction of arbitral tribunal.¹² Thirdly, on the stage of the enforcement of an arbitral award, the country of enforcement may refuse to enforce the arbitral award on grounds of violation of public policy of that country or of the subject matter of the dispute incapable of settlement by arbitration under the law of that country pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹³

2.2 Different Views on the Arbitrability of Antitrust Disputes

⁸ *ibid*

⁹ *ibid*

¹⁰ *ibid* 878

¹¹ *ibid* 878

¹² *ibid* 878

¹³ *ibid* 876

There are different views on the arbitrability of antitrust disputes. Opponents of international arbitration of antitrust disputes are of the view that antitrust law is to preserve the public interest of that country and antitrust claims are of the nature of public policy, which makes it inappropriate to refer such disputes to international arbitration.¹⁴ It is argued by these opponents of non-arbitrability of antitrust disputes that antitrust law's nature of protecting public interest contradicts with the international arbitration's feature of contractual dispute resolution.¹⁵

The intended aim of antitrust law is to create a free competition market in a country by imposing liabilities on anti-competitive competitors and providing weaker parties like customers with remedies when they suffered antitrust behaviors.¹⁶ In this regard, it is said that antitrust disputes are concerned of interests of millions of people. Nevertheless, international arbitration is a type of alternative dispute resolution where parties to the disputes enter into an arbitration agreement to settle disputes quickly and confidentially.¹⁷ When parties to an antitrust dispute submit the dispute to arbitration, the inevitable result is that arbitrators appointed by parties to the antitrust dispute will issue an arbitral award which concerned with interest of lots of people in a country. Thus, where the matters involve public interest or concerns, the private arbitration agreement to settle this dispute should not be valid and enforceable.¹⁸

¹⁴ Gordon Blanke and Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International 2011) 24

¹⁵ Korzun, 'Arbitrating Antitrust Claims: From Suspicion to Trust' (n 1) 868

¹⁶ *ibid* 869

¹⁷ *ibid* 870

¹⁸ Born (n 5) 945

By contrast, supporters of international arbitration of antitrust disputes argue that public policy is distinguishable from the concept of non-arbitrability and that public policies of a country does not necessarily preclude international arbitration of antitrust claims.¹⁹ This is because that the arbitrability of a particular type of disputes depends on the intent of concerned legislation, namely antitrust laws.²⁰ If the legislation does not expressly preclude the arbitration of antitrust disputes, then the public policy nature of such a dispute will not become an obstacle to arbitrating such disputes.²¹ For example, according to the US Supreme Court, unless the Congress expressly stated the non-arbitrability of antitrust disputes, otherwise such claims should be deemed to be arbitrable.²²

¹⁹ *ibid* 950

²⁰ *ibid* 951

²¹ *ibid* 945

²² *ibid* 958

3 Antitrust Arbitrability from the US Perspective

3.1 The Arbitrability of Antitrust in the US: From Suspicion to Trust

In the US context, arbitrability by definition covers not only the issue of whether a dispute is capable of settlement by arbitration, but also it is used in a wider sense including the jurisdiction of arbitral tribunal and tribunal's power to grant treble damages.²³ For instance, it is held in the case *Smith Enron Cogeneration Limited Partnership Inc. v. Smith Cogeneration International Inc.* that before deciding whether a dispute is arbitrable, a court should first decide whether parties agree to arbitrate.²⁴ Additionally, it is well-established in the US case law that treble damages are arbitrable,²⁵ and that “arbitrators are entitled to determine whether they have jurisdiction to grant punitive damages”²⁶

There has been a change of the view of US courts on the issue of arbitrability of antitrust disputes. In 1968, the US courts suspected the arbitrability of antitrust disputes in the case of *American Safety Equipment Corp. v. J.P. Maguire & Co.*, US courts and this was changed in 1985 by the US Supreme Court's decision in the case of *Mitsubishi* where arbitrators are able to arbitrate antitrust disputes.

3.1.1 American Safety Doctrine

²³ Richard Levin, ‘On Arbitrating Antitrust/Competition Disputes’ (*Kluwer Arbitration Blog*, 20 August 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/08/20/on-arbitrating-antitrustcompetition-disputes/>> accessed 1 May 2020

²⁴ *Smith Enron Cogeneration Limited Partnership Inc. v. Smith Cogeneration International Inc.* 198 F.3d 88 (2d Cir. 1999)

²⁵ Blanke and Landolt (n 14) 31

²⁶ *ibid*

It is established in the case of *American Safety Equipment Corp. v. J.P. Maguire & Co.* by the court that the agreement between parties to arbitrate their antitrust issues are not enforceable in all of the federal courts.²⁷

In objecting to the arbitrability of competition disputes, the court initially stated several reasons for the unsuitability of international arbitration of antitrust disputes.²⁸ First of all, the court in *American Safety* case emphasize the public interest nature of antitrust law, and antitrust disputes representing public interest of a community makes them inappropriate for international arbitration.²⁹ Secondly, there may exist the contract of adhesion between alleged monopolists and their customers and the court doubted that “whether such adhesion contracts should determine the forum for trying antitrust violations”.³⁰

Thirdly, the court referred that antitrust disputes are so complex, and evidences involved are so diverse.³¹ Thus, in the eye of the court, the complexity of such disputes makes it inappropriate for international arbitration.³² Finally, the court expressed the dual nature of antitrust law, which provides private parties with remedies and has direct consequence to public interest.³³ And arbitrators appointed by parties may not have sensitivity to public interest involved in antitrust disputes and are not capable of performing both private and public interests.³⁴

²⁷ *American Safety Equipment Corp. v. J.P. Maguire & Co.* 391 F.2d 821 (2d Cir.1968)

²⁸ Korzun, ‘Arbitrating Antitrust Claims: From Suspicion to Trust’ (n 1) 900

²⁹ Blanke and Landolt (n 14) 23-24

³⁰ *American Safety Equipment Corp.* (n 29)

³¹ *ibid*

³² Ronald E M Goodman, ‘Arbitrability and Antitrust: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth’ (1985) 23 Columbia Journal of Transnational Law 655, 666

³³ *American Safety Equipment Corp.* (n 29)

³⁴ Korzun, ‘Arbitrating Antitrust Claims: From Suspicion to Trust’ (n 1) 900

As shown in the case of *American Safety*, it is evident that objections to arbitrability of antitrust disputes, are based on the public interest nature of antitrust disputes, and the complexity as well as the diversity of evidence in antitrust issues. Arbitrators are suspected to lack enough legal and economic knowledge to settle such disputes and perform private and public interest in a community.³⁵ But these considerations have been repudiated in the latter case.

3.1.2 *Mitsubishi Case Affirming the Arbitrability of Antitrust Dispute*

The US court firmly established the arbitrability of federal antitrust claims in the landmark case of *Mitsubishi*. It is concluded that in international business contract, arbitral tribunals are capable of determining the antitrust issues.³⁶

The dispute in the case of *Mitsubishi Motors Corporate v. Soler Chrysler-Plymouth, Inc.* concerned a distribution agreement entered between two companies from Japan and US, which is about distributing motor vehicle in Puerto Rico and the distribution outside this district is prohibited.³⁷ There is an arbitration clause in the agreement for arbitration in Japan under the rules of Japan Commercial Arbitration Association.³⁸ When a dispute arose, Mitsubishi brought an action in the US court alleging that the dispute should be referred to arbitration.³⁹ Soler denied the breaches alleged by Mitsubishi and counterclaimed various breaches by

³⁵ *ibid* 901

³⁶ Loukas A. Mistelis and Stavros Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2014) 250

³⁷ *Mitsubishi Motors Corporate v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985)

³⁸ *ibid*

³⁹ *ibid*

Mitsubishi because Mitsubishi divided the market by prohibiting distribution outside Puerto Rico in violation of Sherman Act.⁴⁰

The issue before the US Supreme Court has been that whether the court should submit a dispute involving the US antitrust law to international arbitration.⁴¹ In deciding this case, the US Supreme Court first of all applied the principle that “the question of arbitrability must be addressed with a health regard for the federal policy favoring arbitration”.⁴² Then the court concluded that, with respect to the antitrust issue, such claims are arbitrable provided that claim squarely falls within the scope of arbitration agreement.⁴³ Indeed, the court stated that “concerns of international comity, respect of the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”⁴⁴

In addition to establishing the arbitrability of antitrust disputes, the court in this case also analyzed and doubted the considerations in the case of *American Safety*. First of all, the court found that the adhesion contracts are unjustified.⁴⁵ The complexity of antitrust claims is by itself not a bar to international arbitration of antitrust claims.⁴⁶ Secondly, according to the court, the appearance of antitrust issue does not necessarily invalidate the arbitration agreement which

⁴⁰ *ibid*

⁴¹ *ibid*

⁴² Laurence M Smith, ‘Determining the Arbitrability of International Antitrust Disputes’ (1986) 8 *Journal of Comparative Business and Capital Market Law* 197, 206

⁴³ *Mitsubishi Motors Corporate* (n 39)

⁴⁴ *ibid*

⁴⁵ Korzun, ‘Arbitrating Antitrust Claims: From Suspicion to Trust’ (n 1) 902

⁴⁶ Mistelis and Brekoulakis, *Arbitrability* (n 38) 251

was freely negotiated between parties to the dispute.⁴⁷ Furthermore, international arbitrators have the combination background of legal and economics and the court should presume that the parties to the disputes are capable of appointing “competent, conscientious and impartial arbitrators” which are capable of understanding and applying antitrust law in a proper manner.⁴⁸

With respect to the public policy nature of antitrust disputes and the importance of enforcement of antitrust law in a community, it should be noted that the court in this case established the two-tier system for correct application of antitrust laws.⁴⁹ The first tier is that international arbitrators are capable of arbitrating antitrust disputes.⁵⁰ The second tier, which is termed as “second look doctrine”, is that national courts reserve the right to review the award at the recognition and enforcement stage to ensure that antitrust law are applied in a proper way and the public interests represented in antitrust claims are observed.⁵¹ However, there are some doubts with respect to the “second look doctrine”, that what type of review the court should conduct on an arbitral award to ensure the observation of public policy.⁵² There are two approaches to this question. One is Maximalist approach under which the reviewing court should conduct a full review of the facts and laws in an arbitral award.⁵³ Another one is Minimalist approach, for example in the *Baxter International Inc. v. Abbott Labs* case, meaning that the court doesn’t need to review the arbitrators’ findings of facts or laws and that the public policy is also achievable.⁵⁴

⁴⁷ Korzun, ‘Arbitrating Antitrust Claims: From Suspicion to Trust’ (n 1) 902

⁴⁸ Mistelis and Brekoulakis, *Arbitrability* (n 38) 251

⁴⁹ *ibid* 252

⁵⁰ *ibid*

⁵¹ *ibid*

⁵² Luca G. Radicati di Brozolo, ‘Mandatory Rules and International Arbitration’ (2012) *American Review of International Arbitration*, 49,53

⁵³ *ibid*

⁵⁴ Carlos Ragazzo and Mariana Binder, ‘Antitrust and International Arbitration’ (2015) 15 *UC Davis Business Law Journal* 173, 186

Starting from the *Mitsubishi* case, the court thus expressed its trust on international arbitrators to arbitrate antitrust disputes, even if the seat of international arbitration is outside the US. Complexity of antitrust disputes, diverse evidence involved, and the combined knowledge of arbitrators are not obstacles any more to international arbitration of antitrust disputes. The reason is that parties to the disputes are presumed to be capable of selecting competent arbitrators to settle the disputes. Furthermore, the public interest represented by antitrust claims and the public policy nature of antitrust law are recognized, they do not nevertheless prevent arbitrating antitrust disputes. This is because, following the establishment of “second look doctrine”, national courts reserve the right to review the arbitral award to ensure the observance of public interest in the enforcement of antitrust laws.⁵⁵ But there is still uncertainty as to whether the reviewing court should conduct a strict or lenient review to arbitral awards.

3.1.3 Antitrust Arbitrability Development After Mitsubishi

After *Mitsubishi*, the content of antitrust arbitrability in the US context have been enriched. First, the antitrust arbitrability is limited to international context as shown in *Mitsubishi* case, but arbitration has been extended to domestic antitrust disputes.⁵⁶ The Supreme Court in the *Shearson/American Express v. McMahon* case, which was about domestic securities claim though, relied heavily on *Mitsubishi* and held that “while the *Mitsubishi* is limited to international context, much of its reasoning is applicable here”.⁵⁷ Since *McMahon* case, courts

⁵⁵ Michael R Voorhees, ‘International Commercial Arbitration and the Arbitrability of Antitrust Claims: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*’ (1987) 14 Northern Kentucky Law Review 65,80

⁵⁶ Darren S. Tucker, *Antitrust Law Developments* (8th edn, American Bar Association 2017) 813

⁵⁷ *Shearson/American Express v. McMahon*. 482 U.S. 220 (1987)

have generally accepted the application of *Mitsubishi* in purely domestic claims⁵⁸, and it is established in the *Gilmer v. Interstate/Johnson Lane Corp.* that Sherman Act are arbitrable.⁵⁹

Second, horizontal price fixing claims are also arbitrable.⁶⁰ Horizontal price-fixing occurs where competitors in a market agreed to fix the price for goods or services provided by them, rather than allowing it to be determined by free market.⁶¹ In the *JLM Industries v. Stolt-Nielsen S.A.* case, the court rejected the argument that “horizontal price-fixing disputes are so complex for arbitration”, rather held that horizontal price-fixing claims are subject to arbitration based on the arbitration clause contained in the consumer’s purchase agreement.⁶²

Third, the arbitrability of class claims are also acknowledged.⁶³ In the *In re Currency Conversion Fee Antitrust Litigation* case, where plaintiffs brought a class claim against defendants credit card network and banks asserting that defendants conspired to fix the foreign conversion fee in violation of Sherman Act and to impose arbitration in the underlying agreements with card owners, the court agreed the class-wide arbitration of antitrust claims.⁶⁴ In addition to that, the waiver of class arbitration in the contract was held unenforceable and thus the arbitrability of class antitrust claims has been strengthened. Companies may include waiver of class arbitration actions in the underlying contract to avoid the risk of class action, and individuals are forced to initiate arbitration on an individual basis.⁶⁵ For instance, the court stated in the *In Re American Express Merchants Litigation* case that the class arbitration

⁵⁸ Tucker (n 58) 813

⁵⁹ Scott S. Megregian and Todd Babbitz, ‘The Use of Mandatory Arbitration to Defeat Antitrust Class Actions’ (1999) 13 Antitrust 63, 64

⁶⁰ Deason ‘Perspectives on Decision-Making from the Blackmun Papers’ (n 27) 1168

⁶¹ Will Kenton, ‘Price Fixing’ (*Investopedia*, 16 September 2019)

<www.investopedia.com/terms/p/pricefixing.asp> accessed 1 May 2020

⁶² *JLM Industries v. Stolt-Nielsen, S.A.* 387 F.3d 163 (2d Cir.2004)

⁶³ Tucker (n 58) 814

⁶⁴ *In re Currency Conversion Fee Antitrust Litigation* 361 F.Supp.2d 237, 258 (S.D.N.Y. 2005)

⁶⁵ Tucker (n 58) 814

waivers are unenforceable where such waivers actually preclude a plaintiff from vindicating his statutory rights.⁶⁶ Thus, one can conclude that class actions are also subject to arbitration.

From above demonstration, the scope of antitrust arbitrability is wider than ever before since arbitration is extended to purely domestic antitrust disputes, horizontal price-fixing claims as well as class antitrust claims. However, it should be noted that the arbitrability of antitrust claims is not unlimited. There is a trend to protect individuals from forced arbitration clause with companies, because individuals may not initiate arbitration due to high arbitration cost. Arbitration Fairness Act of 2013 aiming to protect interest of individuals against companies provides that any pre-dispute arbitration agreement is invalid or unenforceable if it requires arbitration of antitrust, employment, consumer, civil rights claims.⁶⁷ It should be noted that this Act doesn't prohibit arbitration, rather it stipulates that individuals still have rights to initiate arbitration after disputes.⁶⁸ It still allows pre-dispute arbitration agreement between companies.⁶⁹

3.2 Lessons learned from the US and Conclusion

As reflected in the *American Safety* case, the main obstacles raised by the court to international arbitration of antitrust disputes are the observance of public interest in the enforcement of antitrust laws, the complexity of such disputes and diversity of evidence involved, and the arbitrators in lack of legal and economic knowledge to complicated antitrust disputes.

⁶⁶ *In Re American Express Merchants Litigation* 554, F.3d 300 (2d Cir. 2009)

⁶⁷ Arbitration Fairness Act 2013 (US)

⁶⁸ Ragazzon and Binder, 'Antitrust and International Arbitration' (n 56) 174

⁶⁹ Ellen Taverna, 'The Arbitration Fairness Act of 2013-Protect Consumers and Employees from Forced Arbitration' (*National Consumer Law Center*, 12 September 2019) <www.nclc.org/images/pdf/arbitration/ib-arbitration-fairness-act-nov-2013.pdf> accessed 24 April 2020

But these have been changed in the case of *Mitsubishi*. Complexity of antitrust disputes, diverse evidence involved, and the combined knowledge of arbitrators are not obstacles any more to international arbitration of antitrust disputes. The reason is that parties to the disputes are presumed to be capable of selecting competent arbitrators to settle the disputes. Furthermore, the public interest represented by antitrust claims and the public policy nature of antitrust law are recognized, they do not nevertheless prevent arbitrating antitrust disputes under the second look doctrine.

It is well-established that arbitration has been extended to purely domestic or international antitrust claims after *Mitsubishi* case.⁷⁰ Furthermore, class claims and claims involving horizontal price-fixing agreement are arbitrable.⁷¹ But the extension of antitrust arbitration is not unlimited. In order to protect individuals from forced arbitration, Arbitration Fairness Act of 2013 prohibits any pre-dispute arbitration agreement or arbitration clause contained in contracts to arbitrate their antitrust disputes between individuals and companies, but the pre-dispute agreement between business-business to arbitrate antitrust disputes are still valid and enforceable.⁷²

⁷⁰ Deason 'Perspectives on Decision-Making from the Blackmun Papers' (n 27) 1168

⁷¹ Calder and Stoner, 'Arbitration, 24 years after Mitsubishi' (n 28)

⁷² Arbitration Fairness Act of 2013 (US)

4 Antitrust Arbitrability from the EU Perspective

4.1 General Admission of Antitrust Arbitration in the EU

It is generally admitted that antitrust law issues can be submitted to arbitration in the EU.⁷³ Unlike the US, there is no cases where the European Court of Justice directly determine the issue of the arbitrability of antitrust disputes.⁷⁴ However, it is commonly understood that the attitude of European Court of Justice on the issue of international arbitration of antitrust disputes is indirectly reflected in the case of *Eco Swiss China Time Ltd v. Benetton International NV*.⁷⁵ It is well-established in this case by the European Court of Justice that an arbitration agreement entered by parties to arbitrate their claims regarding the EU competition should be given effect and thus the arbitrability of antitrust disputes is recognized.⁷⁶

4.1.1 Eco Swiss Case and Subsequent Development

The Eco Swiss case concerned with a licensing agreement of manufacturing and selling watches, entered into by a Hong Kong company Eco Swiss, a Dutch company Benetton and an American company Bulova watch company.⁷⁷ Under this agreement, Eco Swiss was granted the right by Benetton watch company to manufacture “watches and clocks with the words ‘Benetton by Bulova’, which could then be sold by Eco Swiss and Bulova”.⁷⁸ The agreement contained an arbitration clause which provides that all disputes related to the agreement are

⁷³ Korzun, ‘Arbitrating Antitrust Claims: From Suspicion to Trust’ (n 1) 903

⁷⁴ *ibid* 904

⁷⁵ *ibid* 904

⁷⁶ Born (n 5) 978

⁷⁷ Case C-126/97. *Eco Swiss China Time Ltd v. Benetton International NV*. [1999] ECR I-03055

⁷⁸ *ibid*

submitted to arbitration in the Netherlands and a Dutch choice of law clause.⁷⁹ Additionally, there is a market sharing provision in the agreement under which Eco Swiss was not permitted to sell watches and clocks in Italy.⁸⁰ When a dispute arose, parties proceeded to arbitration, but neither parties raised the argument that the market sharing provision violated the EU Competition law.⁸¹ The arbitral tribunal issued an award that Benetton compensate Eco Swiss and Bulova for damages.⁸² Benetton then brought an action in the Dutch court seeking to the annulment of the arbitral award on the ground that the market sharing provision in the agreement was in violation of the EU Competition law, specifically Article 101 of the TFEU which prohibits the restrictive vertical and horizontal agreement having the effect of restricting competition inside the market of EU.⁸³ The issue was then referred to the European Court of Justice for a preliminary ruling.

The European Court of Justice first affirmed the core role of the EU Competition law plays in the accomplishment of the free market at both national and EU level, and observance of public policy in its enforcement.⁸⁴ In the meantime, the court emphasized the principle that the review of the arbitral award should be limited, and only under certain exceptional circumstances the court annul the arbitral award.⁸⁵ Therefore, the court concluded that where the arbitral tribunal failed to apply the EU competition law, Member States can annul an arbitration award on the ground of the violation of public policy pursuant to New York Convention.⁸⁶ It can be

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² Ragazzon and Binder, 'Antitrust and International Arbitration' (n 56) 173

⁸³ *ibid*

⁸⁴ *Eco Swiss China Time Ltd* (n 79)

⁸⁵ Korzun, 'Arbitrating Antitrust Claims: From Suspicion to Trust' (n 1) 905

⁸⁶ *ibid*

concluded that the arbitral awards which settle the EU Competition claims are subject to the judicial review similar to the “second look doctrine” in the US.⁸⁷

It seems uncertain in *Eco Swiss* case as to the standard of review of arbitral awards that a court should conduct.⁸⁸ In *SNF v. Cytec Industries* case, for instance, where the losing party sought to set aside an arbitral award deciding EU competition claims in a Belgium court and challenge the enforcement proceeding before a French court, both Belgium appeal court and French appeal court conducted minimalist standard of reviews to uphold the arbitral award.⁸⁹ The French court held that “the court only exercise an extrinsic review of the award recognizing the arbitral award in France”, and it also rejected to review the damages in the arbitral award saying that reviewing court only examined whether there was “a flagrant, real and concrete” violation of international public policy, which is not happened in this case at hand.⁹⁰ The Belgium appeal court overturned the previous decision of the lower court which performed the extensive review of the decision.⁹¹

Regarding the arbitrability of cartel damage claims shown in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV et al* where defendants contested the jurisdiction of a German court because of the arbitration clause in the contract, it is unclear whether an arbitration clause contained in an underlying contract covers cartel damage claims.⁹² Cartel

⁸⁷ Born (n 5) 979

⁸⁸ Simen Klevstrand, ‘Arbitration Awards and Antitrust Appeals’ (*Nordic Competition Blog*, 24 July 2015) <www.nordiccompetitionblog.com/?p=450> accessed 1 May 2020

⁸⁹ Pierre Heitzmann and Jacob Grierson, ‘SNF v Cytec Industries: National Courts within the EC Apply Different Standards to Review to International Award Allegedly Contrary to Article 81 of EC’ [2007] *Stockholm International Arbitration Review*, 39, 40

⁹⁰ *ibid* 42

⁹¹ Ragazzon and Binder, ‘Antitrust and International Arbitration’ (n 56) 187

⁹² Rupert Bellinghausen and Julia Grothaus, ‘The CJEU’s Decision in CDC v Akzo Nobel et al: A Blessing or a Curse for Arbitrating Cartel Damage Claims?’ (*Kluwer Arbitration Blog*, 31 July 2015) <<http://arbitrationblog.kluwerarbitration.com/2015/07/31/the-cjeus-decision-in-cdc-v-akzo-nobel-et-al-a-blessing-or-a-curse-for-arbitrating-cartel-damage-claims/>> accessed 1 May 2020

refers that a group of companies in a market reach a formal agreement to regulate or manipulate price for goods or services they provided, therefore avoid competition among them against antitrust law.⁹³ CJEU didn't address the issue of arbitrating cartel damage claims, but just saying that cartel damage claims falls within the scope of jurisdictional clause only when the victim has explicitly consented, while Advocate General Jääskinen argued that cartel damages should be "by analogy" covered by arbitration agreement.⁹⁴ Some argues that the approach of CJEU in *CDC* case is not applicable when it comes to arbitration, while others opposed it.⁹⁵ In subsequent case-law, different courts adopted different views to the arbitrability of cartel damage claims. For instance, Court of Appeal of Amsterdam in *Kemira Chemicals OY v. CDC* followed the decision of CJEU and held that cartel damage claims are not subject to arbitration.⁹⁶ However, English court in *Microsoft Mobile OY (Ltd) v. Sony Europe Limited & Ors* held that cartel damages claims are arbitrable where there is an arbitration clause.⁹⁷

4.2 Lessons Learned from the EU

Though the court in this case did not explain the arbitrability of antitrust disputes from the perspective of the complexity of such disputes and diverse evidence involved, it adopts the same approach towards to concern of public policy nature of EU Competition laws. Regarding the concern of public policy nature of EU competition laws, the European Court of Justice first

⁹³ James Chen, 'Cartel' (*Investopedia*, 12 February 2020) <[investopedia.com/terms/c/cartel.asp](https://www.investopedia.com/terms/c/cartel.asp)> accessed 1 May 2020

⁹⁴ Bellinghausen and Grothaus, The CJEU's Decision in *CDC v Akzo Nobel et al* (n 94)

⁹⁵ *ibid*

⁹⁶ Jean-Yves Garaud and others, 'European Court of Justice Issues Important Judgement Related to Jurisdiction Clauses for Antitrust Actions' (*Cleary Gottlieb*, 26 November 2018) <www.clearygottlieb.com/-/media/files/alert-memos-2018/european-court-of-justice-issues-important-judgment-related-to-jurisdiction-clauses-v2.pdf> accessed 2 May 2020

⁹⁷ Rupert Bellinghausen and Julian Grothaus, 'Do Arbitration Clauses Catch Cartel Damage Claims' (*Linklaters Insights*, 9 January 2018) <www.linklaters.com/en/insights/blogs/arbitrationlinks/2018/january/do-arbitration-clauses-catch-cartel-damages-claims> accessed 4 May 2020

of all affirmed the important role of EU competition law in the creation of a free market and the protection of public interest in the community. Meanwhile, it attached the importance of the principle of favoring arbitration agreement. It established the similar “second look doctrine” to subject the arbitral award to the review of national courts for the purpose of the observance of public interest in a country.⁹⁸

It should be noted that after *Eco Swiss* case, there is uncertainty whether the reviewing court conducts an extensive or strict standard of review on an arbitral award deciding EU competition law. Additionally, it is ambiguous whether arbitration clauses cover cartel damage claims from the decision of CJEU in *CDC* case, therefore it is inconsistent regarding the arbitrability of cartel damage claims among courts of EU member states.

⁹⁸ Born (n 5) 978

5 Antitrust arbitrability in China

This chapter will analyze the issue of international arbitration of antitrust disputes in China. To do that, this chapter will first outline the legal framework about arbitrating antitrust disputes, the rules of which are set forth in primarily Arbitration Law of China and Anti-Monopoly Law of China. The chapter then analyzes the current cases about international arbitration of antitrust disputes, in order to understand how courts treat the issue of antitrust arbitration in practice under the legal framework and their reasoning. After that, the chapter will do a comparative analysis on Chinese courts' practice in this issue with the application of the approaches adopted, or considerations taken into account in the US and the EU. Finally, the chapter will establish the jurisdictions for arbitrating antitrust disputes in China from the perspectives of current legal framework and analysis of public policy nature of such claims.

5.1 Legal Framework About the Arbitrability on Antitrust Issues

The rules related to the issue of international arbitration of antitrust disputes in China are mainly set forth in Arbitration Law of China and Anti-Monopoly Law of China. The Arbitration Law of China entered into force in 1995 and it aims to arbitrate disputes related to economy between parties promptly. Article 2 and 3 of Arbitration law regulate issues that are arbitrable and non-arbitrable respectively.⁹⁹ Under Article 2 of Arbitration Law, contractual disputes and those disputes about rights and interest in properties between natural persons and legal persons are arbitrable.¹⁰⁰ According to Article 3 of Arbitration Law, matters related to marriage, adoption, guardianship and inherit, as well as administrative disputes are not capable

⁹⁹ Liyu Jin and Kailuo Wang, 'The Arbitrability of Anti-Monopoly Disputes' (*Zhichanli*, 9 October 2016) www.zhichanli.com/article/2930 accessed 2 May 2020

¹⁰⁰ *ibid*

of resolution of arbitration.¹⁰¹ It is evident that there are no ambiguous rules in Arbitration Law of China about the arbitrability of disputes.¹⁰²

Anti-Monopoly Law of China was passed by legislature in 2008 for the purposes of protecting fair competition in the market and the public interest in the society pursuant to Article 1. Firstly, it should be noted that in the Anti-Monopoly law, there are two types of antitrust disputes including the civil antitrust disputes between two companies and the administrative disputes between competent authorities in charge of antitrust issues and companies. According to Article 3 of Arbitration Law, antitrust disputes between competent authorities and companies fall within the scope of administrative disputes and are not arbitrable. With respect to civil antitrust disputes between companies, however, Article 50 of Anti-Monopoly Law provides that companies carrying out monopoly activities and causing damages to others shall be liable for those activities. It is clear that the arbitrability of civil antitrust disputes between companies should be assessed in the context of the Arbitration Law of China and this analysis will be conducted in detailed below.

5.2 The Current Practice

Different courts treat differently to the issue of international arbitration of antitrust disputes in China. Generally, the arbitrability of antitrust disputes is not recognized by courts in China. For instance, in 2016, the court in the *Songxu* case held that antitrust disputes are not arbitrable under current legal framework. In June 2019, Beijing High Court established in the *Changlin* case that the arbitration agreement to arbitrate antitrust disputes between parties is valid and

¹⁰¹ *ibid*

¹⁰² *ibid*

effective and such disputes should be referred to arbitration. However, the Supreme Court of China in the *Huili* case denied the arbitrability of antitrust disputes in August 2019, under the circumstance where the *Huili* case had the exact the same facts and issues as the *Changlin* case.

5.2.1 *Samsung case*

Samsung Case was concerned with two distribution agreements concluded between Samsung (China) and Nanjing Songxu company, under which Songxu distributed products of Samsung in China.¹⁰³ These distribution agreements contained two different arbitration clauses, one provides that all disputes arising from the agreement or related to the agreement should submitted to Beijing Arbitration Commission and another one provides for arbitration in China International Economic and Trade Arbitration Commission (“CIETAC”) under their effective arbitration rules.¹⁰⁴ A dispute arose and Songxu brought an action to Nanjing Intermediate Court of Jiangsu, alleging that Samsung abused its dominant market position to conduct antitrust behaviors.¹⁰⁵ But Samsung counterclaimed that there was an arbitration clause contained in the agreement and the disputes should be referred to arbitration.¹⁰⁶

Nanjing Intermediate Court in its decision recognized the arbitrability of antitrust disputes for two reasons. First, there is no provisions in Anti-Monopoly Law of China which expressly provides that antitrust disputes are not capable of arbitration. Second, under Article 2 of Arbitration Law of China, contractual disputes and other disputes over rights and interests in properties between natural persons and legal persons are arbitrable. In this case, the antitrust

¹⁰³ *Nanjing Songxu Technology Co. Ltd. v. Samsung China Investment Co. Ltd* [2015] (Su Zhi Min Xia Zhong No. 00072)

¹⁰⁴ *ibid*

¹⁰⁵ *ibid*

¹⁰⁶ *ibid*

disputes between Samsung and Songxu is concerned with the dispute over rights and interests in properties between legal persons and is thus arbitrable under Article 2 of Arbitration Law of China. But Nanjing Intermediate Court finally held that, though antitrust disputes are arbitrable, the arbitration clauses contained in two distribution agreement are invalid under China law, since they provided two different arbitration institutions and cannot agreed to the one arbitration institution where they wanted to submit the dispute.

Samsung appealed to Jiangsu High Court alleging that the arbitration clauses should be valid. With respect to the issue of arbitrability of antitrust disputes, Jiangsu High Court adopted a different view and made a decision of non-arbitrability of antitrust disputes for several considerations. First of all, Anti-Monopoly Law is enacted for the purpose of preventing monopolistic conducts, protecting fair competition in the free market and the public interests.¹⁰⁷ And the law is primarily implemented through the administrative authorities, including anti-monopoly commission responsible for organizing and guiding antitrust work, and Anti-monopoly Law Enforcement Agency responsible for the enforcement of antitrust work. Furthermore, Supreme Court of China considers private litigation as the sole proper dispute resolution for antitrust disputes.¹⁰⁸

Second, the antitrust dispute is of nature of public policy, and such claims are non-arbitrable in most countries for a long time. Though there are some countries like the US recognizing the arbitration of antitrust disputes, arbitrators in China lacked efficient skills in the enforcement of antitrust laws and there is no developed system on arbitrating antitrust disputes. It is therefore inappropriate to refer such claims to arbitration.¹⁰⁹ Third, the present antitrust claim

¹⁰⁷ *ibid*

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

concerned not only the interests between Songxu and Samsung, but also the interests between Samsung and other distributors as well as customers. The arbitration clauses contained in the distribution agreements only set forth the dispute resolution when disputes between parties to the agreement arose, and the arbitration clauses could not provide dispute resolution for disputes concerned with public interests.¹¹⁰ In conclusion, where there is no provisions that expressly stipulate the arbitration of antitrust disputes and antitrust disputes concerned with public interests in a country, antitrust disputes here could not submitted to arbitration.¹¹¹

5.2.2 *Huili case and Changlin case*

There are two cases involving the Shell company and its two distributors in China, one is Changlin company and another one is Huili company. These two cases had the same facts and issues of arbitrability of antitrust disputes, but courts treated absolute differently to the same issue.

Beijing High court in the *Changlin* case held that antitrust disputes are arbitrable in June 2019. The *Changlin* case concerned with a distribution agreement between Shell company and Changlin company, which contained an arbitration clause provides arbitration for all disputes arising out of the distribution agreement. Shell company is the company which manufactures and sell lubricating oil in China and it has dominant market position in this field. Then, Changlin Company brought an action against Shell company alleging that Shell company abused its dominant position to carry out anti-monopoly activities. Shell company denied the claims of Changlin and counterclaimed that the existence of a valid arbitration clause in the

¹¹⁰ *ibid*

¹¹¹ *ibid*

contract barred Changlin from submitting the dispute to courts, and that the dispute should be submitted to arbitration. The issue at question before the court is the arbitrability of antitrust disputes.

According to Beijing High Court, first of all, the arbitration clause saying that “all disputes arising out of or related to the distribution agreement” should be referred to arbitration.¹¹² In the *Changlin* case, Changlin company filed a suit against Shell company on the ground of breach of Anti-Monopoly Law, alleging that Shell company abusing its dominant position to carry out antitrust activities.¹¹³ Beijing High Court held that the suit filed on the basis of Anti-Monopoly Law, rather than of the underlying contract, is in fact that *Changlin* Company exercise its option to base its suit either on the underlying distribution contract or the Anti-Monopoly Law.¹¹⁴ And the alleged antitrust activities are related to the underlying distribution contract, and the disputes should be submitted to arbitration.¹¹⁵

The *Huili* case had the exact same facts and issues as the *Changlin* case and the Supreme Court of China in this case held that antitrust disputes are not arbitrable in August 2019. The Supreme court stated several reasons to deny international arbitration of antitrust disputes in China. First, it emphasized that Anti-Monopoly Law aims to protect a healthy market. Regarding the dispute resolution of antitrust claims, it stated that there are no express provisions for arbitrating antitrust disputes in Anti-Monopoly Law, instead only litigation is set forth.¹¹⁶ Second, in interpreting Article 2 of Arbitration Law which provides that contractual disputes and those

¹¹² *Shanxi Changlin Co. Ltd v. Shell China Co. Ltd* [2019] (Jing Min Xia Zhong No.44)

¹¹³ *ibid*

¹¹⁴ *ibid*

¹¹⁵ *ibid*

¹¹⁶ Terence Wong and Ya’nan Zhao, ‘Recent Ruling Confirms that Monopoly Disputes are not Arbitrable in China’ (Winston and Strawn, 9 March 2020) <www.winston.com/zh/thought-leadership/recent-ruling-confirms-that-monopoly-disputes-are-not-arbitrable-in-china.html#!/en/thought-leadership/recent-ruling-confirms-that-monopoly-disputes-are-not-arbitrable-in-china.html?aj=la> accessed 1 May 2020

disputes over rights and interest in properties are arbitrable, the Supreme Court held that jurisdiction of courts would be established where the present disputes don't fall within the scope of arbitrable issues and one party to the dispute has brought an action in courts. In this case, the Supreme court believed that the disputes at question is based on breach of Anti-Monopoly Law, not based on the distribution agreement and it is thus not contractual dispute.¹¹⁷ Third, though the arbitration clause set forth in the distribution agreement is valid and effective, the public policy nature of antitrust disputes refers that the current dispute is no longer the dispute between two legal persons, but has an impact on public interest in the community.¹¹⁸ Therefore, the current antitrust dispute is not capable of international arbitration.

5.3 The Justifications to Arbitrate Antitrust Issues in China

As shown in the *Samsung* case and the *Huili* case where courts denied the arbitrability of antitrust disputes, the considerations taken into account by courts are primarily the public policy nature of antitrust claims and the interpretation of arbitrable issues set forth in the Article 2 of Arbitration Law. This part will analyze these two considerations, specifically by applying the approaches developed in the EU and the US towards the public policy nature of antitrust laws, and then establish the justifications to arbitrate antitrust disputes in China.

5.3.1 Legal Basis

¹¹⁷ *Huili Hohhot Co. Ltd v. Shell China Co. Ltd* [2019] (Zhi Min Xia Zhong No.47)

¹¹⁸ *ibid*

Arbitration Law and Anti-Monopoly Law of China regulate the arbitrability of antitrust disputes. Neither Arbitration Law nor Anti-Monopoly Law rule out the possibility of antitrust arbitration.

First, antitrust disputes are of property nature and are arbitrable according to Article 2 of Arbitration Law. Article 2 and 3 of Arbitration Law of China set forth arbitrable and non-arbitrable issues respectively.¹¹⁹ Under Article 2, contractual issues and disputes over rights and interests in property are arbitrable.¹²⁰ However, administrative disputes or personality disputes including marital or adoption disputes cannot be arbitrated under Article 3 of Arbitration Law.¹²¹ Therefore, matters are not arbitrable if they aren't "contractual issues and disputes over rights and interests in property", or they fall within the scope of non-arbitrable disputes under Article 3.

Evidently, antitrust disputes are not within the scope of non-arbitrable disputes. This is because such disputes occur without involvement of administrative authorities and they aren't not administrative disputes. Most these disputes also are related to property interests rather than personality relationships.¹²² Additionally, antitrust disputes fall within the scope of arbitrable disputes under Article 2. This is because these disputes always occur between equal parties.¹²³ The underlying contract between them are about the business transactions, and disputes arising from the contract are contractual disputes or disputes of property nature. For example, the antitrust dispute in *Changlin* case arose out of the distribution contract between two companies

¹¹⁹ Liang Gao, 'Arbitrability of Antitrust Law in China and the EU: A Comparative Perspective' (*Global Legal Updates*, 26 October 2016) <www.glo.com.cn/en/content/details_13_647.html> accessed 1 May 2020

¹²⁰ *ibid*

¹²¹ *ibid*

¹²² *ibid*

¹²³ *ibid*

and the property interests of both parties were reflected in the contract. Thus, antitrust disputes are arbitrable under Arbitration Law.

Second, Article 50 of Anti-Monopoly Law doesn't exclude arbitration for antitrust dispute resolution. Article 50 of the Anti-Monopoly Law stipulates that companies carrying out monopoly activities and causing damages to others shall bear civil liabilities for those activities. However, civil liabilities can be imposed by courts in civil litigation, or by arbitrators in arbitration.¹²⁴ Furthermore, from the perspective of historical interpretation, this article doesn't follow Article 20 of Anti-Unfair Competition Law of China setting litigation as the only dispute resolution.¹²⁵ Thus, one cannot conclude that Article 50 of Anti-Monopoly Law rule out the forum of arbitration of antitrust disputes.¹²⁶

5.3.2 Public Policy Analysis

It is undoubted that antitrust law is of a public policy nature and decisions of antitrust claims may have an impact on public interests in the country. But the mere public policy nature of antitrust laws should not be the obstacle to arbitration of antitrust disputes.¹²⁷ There are ways for courts to ensure the perseverance of public policy in the case of antitrust arbitration. For example, reviewing courts can conduct strict standard of review on arbitral awards deciding antitrust disputes.

¹²⁴ Jin and Wang, 'The Arbitrability of Anti-Monopoly Disputes' (n 101)

¹²⁵ Zhixun Cao, 'The Judicial Review Standard of Arbitrability: Investigation Based on American Antitrust Arbitration Experience' [2012] Legal Forum 56,63

¹²⁶ Jin Sun and Gui Wang, 'Judicial Considerations of Arbitrability of Antitrust Disputes: Comments on the objection to Jurisdiction of a Monopoly Disputes' [2017] Journal of Law Application 39,42

¹²⁷ Jiang Wan and others, 'The Arbitrability of Antitrust Civil Disputes in China' (*Global Law Updates*, 11 August 2019) <www.lexology.com/library/detail.aspx?g=0cb7b498-12fd-4b8c-9db4-b1a8cac1b93c> accessed 1 May 2020

As shown in the practice of the EU and the US, to ensure the observance of public interest in a country, national courts can establish the second look doctrine to subject the arbitral awards to the courts' review in the recognition and enforcement stage of the arbitral awards.¹²⁸ In this way, when national courts found that the arbitral award didn't understand or apply the antitrust laws in a proper manner, or the enforcement of the arbitral award is contrary to the public policy, then national courts can set aside the award on the ground of the violation of public policy.

With respect to the standard of review on arbitral award deciding antitrust disputes, reviewing courts can adopt a maximalist approach on arbitral awards deciding antitrust disputes. This means that the supervisory court should conduct a full *de novo* review on arbitral awards as to the public policy issues. Once the public policy is infringed by arbitral award, national courts can annul the arbitral award. Though the maximalist approach is not predominant around the world,¹²⁹ it is appropriate for China in the first instance. This is because that antitrust arbitration is still new, and courts need to ensure that the public policy isn't violated.

Additionally, there should be limitations on arbitrability of antitrust. That is, the pre-dispute agreement to arbitrate antitrust disputes between individuals and company should be unenforceable.¹³⁰ And only pro-dispute arbitration agreement on antitrust disputes is valid. Such an agreement always leads to injustice. Under such an arbitration agreement, if enforceable, individuals could not file lawsuit before a court and have to initiate arbitration. High arbitration cost may bar individuals from exercising their rights, while companies

¹²⁸ *ibid*

¹²⁹ Mihai Păun, 'EU Competition Law and International Arbitration' (Master thesis, University of Bucharest 2017) 37

¹³⁰ Ragazzon and Binder, 'Antitrust and International Arbitration' (n 56) 174

immune from such an arbitration agreement. Only when individuals and companies agree to arbitrating disputes after disputes, will the arbitration agreement be valid. Thus, for the purpose of protection on individuals, any pre-dispute arbitration agreement on antitrust disputes should be invalid.

6 Conclusion

The arbitrability of antitrust disputes has been controversial in China for a long time. Some courts in China recognized the arbitrability of such claims, but others not. The main considerations are the legal basis for arbitrating antitrust disputes and the public policy nature of such issues.

From my perspective, these concerns are not the obstacles to arbitration of antitrust disputes and antitrust disputes should be arbitrable in China. Firstly, relevant laws regulating arbitrability of antitrust disputes, including Arbitration Law and Anti-Monopoly Law of China, don't expressly rule out the possibility of arbitrating antitrust disputes. On one hand, antitrust claims by itself fall within the scope of arbitrable disputes of "contractual disputes and those disputes over rights and interests related to properties" set forth in Article 2 of Arbitration Law. Antitrust suit can be filed on the basis of the underlying contract and then the disputes is "contractual disputes" which are arbitrable. Or, one party can base its antitrust suit on the breach of Anti-Monopoly Law, and the damages suffered by one party from the potential antitrust activities can be interpreted as "rights and interest related to the properties" and thus such dispute can also be arbitrated. In addition to that, Article 50 of Anti-Monopoly Law providing that companies carrying out antitrust activities shall bear civil liabilities for that. And this article which is about the liabilities for companies, not about the forum, arbitration or litigation, to settle antitrust disputes. Thus, this article doesn't rule out the forum of arbitration for the settlement of antitrust claims.

Secondly, it is commonly accepted that antitrust laws are of nature of public policy and that antitrust claims are concerned with public interests in a community, and the party-appointed

arbitrators may not be sensitive to the public interests. But this is no longer a problem in the US and the EU because the establishment of the second look doctrine. National courts review the arbitral award and can set aside the concerned arbitral award when it is in violation of public policy of that country. In this way, courts can ensure the observance of public policy reflected in antitrust laws.

From my perspective, Chinese Courts can also establish the similar second look doctrine to subject the arbitral award to the courts' review. To ensure the full perseverance of public policy, courts can conduct a full *de novo* on arbitral awards deciding antitrust disputes. Furthermore, making arbitration agreements on antitrust disputes between individuals and companies unenforceable can contribute to the protection of individuals' interests and public policy.

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