Could Competition Law Bar the Enforcement of Anti-Competitive Arbitral Awards?

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Abstract

This article explores two possible pathways where arbitral awards may be refused enforcement, namely non-arbitrability and public policy. First, given that Hong Kong competition law contains a number of peculiarities that depart from the general international norm, there could be an argument that competition law issues may not be arbitrable. Second, courts are likely to find that Hong Kong competition law does relate to its local public policy. However, allegations of violation of competition law may not automatically mean that courts will intervene to refuse enforcement. There is strong argument that courts will only refuse enforcement where there are 'serious' violations.

A. Introduction

Two parties, one of which is a Hong Kong company (with assets in Hong Kong), entered into an anti-competitive agreement. Subsequently the parties commenced arbitration in country A, with the laws of country A as the governing law. The parties raised competition law arguments during the arbitration. The competition law arguments failed. The arbitral tribunal issued an award which stated that the anti-competitive agreement shall be specifically enforced. The winning party now seeks to recognise and enforce the anti-competitive award in Hong Kong. How should Hong Kong courts deal with the award? Can enforcement of the award be refused?

Refusal of enforcement of an arbitral award is notoriously difficult. This is especially so in arbitration-friendly jurisdictions such as Hong Kong. However, the relatively recent introduction of the Hong Kong competition law regime may have opened up some new pathways to refusal of enforcement of an arbitral award. Hong Kong does not have case law on this particular point, but theoretically speaking, there are two pathways where arbitral awards may be refused enforcement. The first is that competition law issues may be non-arbitrable. The second reason is that Hong Kong competition law may be related to public

policy, and enforcement of an anti-competitive award may violate public policy. This article explores the soundness and the merits of both pathways.

B. Grounds for Refusing Enforcement of Arbitral Award

As to the general law on refusal of enforcement of arbitral awards in Hong Kong, it has already been explored in various academic works, and my repetition of the same will not be of value. I shall simply briefly repeat them for the sake of completeness and ease of understanding for readers.

Enforcement of an arbitral award can be divided into three regimes in Hong Kong, with the applicable regime depending on the place of arbitration.[1] They are:-

1. Enforcement of an award in a country which is a party to the New York Convention[2] (which is contained in Part 10, Division 2 (ss87-91) of the Arbitration Ordinance (Cap 609) (**"AO"**));
2. Enforcement of an award where the place of arbitration is Mainland China (which is contained in Part 10, Division 3 (ss92-98) of the AO); and
3. All other cases, ie, where the place of arbitration is in Hong Kong, Taiwan, Macao or in one of the few foreign countries not party to the New York Convention (which is contained in the latter part of Part 10, Division 1 (ss85-86) of the AO).[3]

Under all three regimes, the reasons for refusal to enforce an arbitral award are more or less the same.[4] They reflect the wording of Article V of the New York Convention in that enforcement of an award in Hong Kong may not be refused unless one or more of the following prescribed reasons is established: (1) Invalidity of the arbitral agreement; (2) Incapacity of the parties; (3) No opportunity to present case; (4) Tribunal's lack of jurisdiction; (5) Compositional or procedural non-compliance; (6) Award not binding, set aside or suspended; (7) Non-arbitrability; and (8) Public policy.

[1] Graeme Johnston and Paul Harris, "*The Conflict of Laws in Hong Kong"* (Hong Kong, 2017), 3rd edn, [10.041].
[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.
[3] See, above fn 1.
[4] With the exception of enforcement of awards under the third regime, where s86(2)(c) of the AO, authorises the court to refuse enforcement *"for any other reason the court considers it just to do so."*

I. Arbitrability of Competition Law Issues

The first of the eight prescribed reasons that appears to be relevant to competition law is that of 'arbitrability'. Article V(2)(a) of the New York Convention states that recognition and enforcement of the arbitral award may be refused if *"[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country"*. This concept of 'arbitrability' under Article V(2)(a), is different from 'arbitrability' as decided by the arbitral tribunal under the principle of *kompetenz-kompetenz*. Using the example given by Gary Born as an illustration:-

> *"If parties from States A and B agree to arbitrate in State C (with the parties' arbitration agreement being governed by the law of State C) and an award is made in State C, which is then sought to be enforced in State D, State D may apply its own non arbitrability standards to deny recognition of the award."*

Hence, the mere fact that the arbitral tribunal ruled that the dispute under State C laws is arbitrable does not mean that the enforcing court cannot rule otherwise. This is simply the character of Article V(2)(a) as an exceptional device.[5]

Coming back to the issue of arbitrability under Article V(2)(a), in principle, any dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a court, and hence enforceable.[6] On the other hand, there is the argument that matters involving public rights and values, or interests of third parties, should not be arbitrable because of the effect that a private arbitration would have in the public sphere. Historically, competition law issues were held by national courts and arbitral tribunals alike to fall within the latter category and were non-arbitrable.[7] Their logic was, amongst others, that (1) competition law was prone to be complicated and sophisticated, which was therefore ill-adapted to an arbitral process; (2) decisions on anti-competitive regulation of businesses were too important to be lodged with arbitrators chosen from the business community, particularly those from a foreign community who have had no experience with or exposure to the local laws and values;[8] and (3) there was an inherent public interest element in the enforcement of competition laws, hence arbitrators should not be the persons enforcing the same or carrying out the courts' functions in this context.[9]

[5] Gary B Born, "*International Commercial Arbitration"* (Int'l, 2014) 2nd edn, vol III, 3701.
[6] Nigel Blackaby and others, *"Redfern & Hunter on International Arbitration"* (6th edn, OUP 2015) [2.125].
[7] Above fn 5, vol I, 975.
[8] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* 473 US 614 (1985); 105 S Ct 3346 (1985).
[9] *American Safety Equipment Corp v JP Maguire & Co* 391 F2d 821 (1968).

These sentiments lasted until the mid-1980s.[10] Nowadays, competition law is universally held to be capable of settlement by arbitration. In the famous case of *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*[11], the US Supreme Court (**"SCOTUS"**), by a majority of five to three, rejected all of the above arguments and held that international competition law issues are indeed arbitrable. By way of background, the facts of *Mitsubishi* are as follows. Mitsubishi commenced arbitration against Soler for breach of a sales agreement, while Soler counterclaimed Mitsubishi, claiming that Mitsubishi and a Chrysler International SA conspired to divide the markets in an attempt to restrict trade. SCOTUS held, amongst other things, that potential complexity should not suffice to ward off arbitration. The anticipated subject matter may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or the tribunal itself. Most importantly, the court also held that under Article V of the New York Convention,

> *"the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art. V(2)(b), 21 U.S.T., at 2520; see Scherk, 417 U.S., at 519, n. 14, 94 S.Ct., at 2457, n. 14."*[12]

The ability for the court to take a 'second look' allows national courts to supervise and review the arbitral award at the enforcement stage to ensure that legitimate interests in the enforcement of competition laws have been addressed. This precisely allays the concern of public policy not being applied by arbitrators.

In a similar fashion, in the landmark case of *Eco Swiss China Time Ltd v Benetton International NV*[13], a dispute arose between the parties in relation to a licensing agreement. During the arbitration, neither parties raised any competition law issues. However, at the enforcement stage, Benetton for the first time, submitted that the award ought to be annulled on the basis that it was contrary to Article 81 of the EC Treaty[14]. The European Court of Justice (**"ECJ"**) was asked by the Supreme Court of the Netherlands to rule on whether a national

[10] Born, "*International Commercial Arbitration"*, vol I, 976.
[11] *Mitsubishi*.
[12] *Mitsubishi* [18].
[13] (Case C-126/97); [2000] 5 CMLR 816.
[14] Now art 101 of the Treaty on the Functioning of the European Union.

court, at the enforcement stage, should take into account competition law issues, subject to any judicial review.[15] The ECJ held that EU competition law does constitute EU public policy:-

> *"Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void."*[16]

Based on *Eco Swiss*, national courts within the EU are under a duty, at the stage of enforcing an award, to carry out (whether raised by the parties or at the court's own motion) a 'second look' at the award and provide an effective review of the award in question and to determine whether the award conforms with EU competition law principles.[17] The rationale behind the decision appears to be that the ECJ was legitimately concerned that the parties to the arbitration may collude and expressly decide not to raise any questions about the compatibility with competition law before the arbitration tribunal.[18] The ECJ held that,

> *'when one considers the interest of ensuring strict application of the provisions contained in Articles 85 et seq. of the Treaty, an interest that clearly extends beyond the interests of private parties to those of other undertakings, potential competitors and consumers. In other words, ... the need to supervise arbitration awards to ensure that they are compatible with Community law is particularly great in an area, such as competition, where there is a general interest in observance of the rules to ensure the smooth functioning of the Common Market.'*[19]

Redfern and Hunter however, noted that *Mitsubishi* and *Eco Swiss* did not directly answer the question of whether anti-trust issues are arbitrable.[20] The focus was more on the 'second look' doctrine, which allows courts to look into the merits and consider whether the award is in compliance with competition law policies, or parties who did not raise competition law issues during the arbitration, to have another opportunity to raise them again at the enforcement stage. The effect, nevertheless, is that it is now principally recognised throughout Europe that EU and domestic anti-trust claims are arbitrable in the same way US anti-trust claims are arbitrable.

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[15] Mark Brealey and Kyla George, *"Competition Litigation: UK Practice and Procedure"* (UK, 2019), 2nd edn, [21.11].
[16] *Eco Swiss* [36].
[17] *Eco Swiss* [32] and [49]; Born, "*International Commercial Arbitration"*, vol I, 978; Brealey, *"Competition Litigation: UK Practice and Procedure"* [21.34].
[18] *Eco Swiss* [24].
[19] ibid [35].
[20] Blackaby, *"Redfern & Hunter on International Arbitration"* [2.137].

Parallel to the US and EU, various jurisdictions within Europe[21], Australia[22], New Zealand[23] and Canada[24] similarly held that arbitrations can indeed deal with competition law issues. Gary Born even stated that *"there are virtually no reported contemporary decisions holding competition claims nonarbitrable."*[25]

II. Are Competition Law Issues Arbitrable in Hong Kong?

With this in mind, there is really little room for one to argue that competition law issues are not arbitrable in Hong Kong. Nevertheless, the issue of arbitrability and competition law has not yet been explored in the context of Hong Kong, and therefore warrants some discussion.

As a start, 'arbitrability' is not clearly defined under the AO. The only guidance that one has under the ordinance is whether it is *"capable of settlement by arbitration under the law of Hong Kong"*.[26] As the wording of the legislature make clear, 'arbitrability' means arbitrability under Hong Kong laws. It is irrelevant whether the issue is arbitrable under foreign law especially if the award has some connection with Hong Kong (such as a party originating from Hong Kong). Whilst there is no clear indication as to the scope of what is arbitrable in Hong Kong, there is some authority to suggest that Hong Kong has not overcome the pre-1980s mentality that competition law issues are non-arbitrable. *Halsbury's Hong Kong* explained that:-

> *"Disputes falling within the following categories may not, however, be referred to arbitration: criminal charges,[sic] disputes relating to any form of intellectual property, such as patents, trade marks,[sic] copyright and registered designs (except where enforcement of rights against particular persons is sought), competition and anti-trust, marriage, divorce,[sic] relations between parents and children, personal status, actions in rem against vessels [sic] and matters reserved for resolution by state agencies and tribunals (such as taxation,[sic] development control, immigration,[sic] nationality and social welfare entitlements)."*[27]

[21] *ET Plus SA v Welters* [2005] EWHC 2115; *Thalès Air Defence BV v GIE Euromissile & Ors* (2005) Rev Arb 750), translated in Denis Bensaude, *"Thalès Air Defence BV v. GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law"* (2005) 3 J Int Arbitr 239, 242; (*Republic of Latvia v JSC Latvijas Gaze* (Case T 6730-03); *Marketing Displays International Inc v VR Van Raalte Reclame BV* (XXXI YB Com Arb 808-820), translated in *"Netherlands No. 29, Marketing Displays International Inc. v. VR Van Raalte Reclame B.Vc., Voorzieningenrechter, Rechtbank, The Hague, 27 May 2004 and Gerechtshof, The Hague, 24 March 2005"* in Albert Jan Van den Berg (ed), *"Yearbook Commercial Arbitration 2006 – XXXI"*, vol 31.
[22] *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 175 ALR 725.
[23] *A-G v Mobil Oil NZ Ltd* [1989] 2 NZLR 649.
[24] Born, "*International Commercial Arbitration"*, vol I, 979.
[25] ibid 980.
[26] This reflects the wording of the New York Convention.
[27] Halsbury's Laws of Hong Kong, vol 25, [25.003].

There is no supporting reference for the claim that "*competition and anti-trust"* claims are not arbitrable. However, the above list is endorsed by the learned authors of *Arbitration in Hong Kong: A Practical Guide*[28], in which Ma CJ, the previous Chief Justice of Hong Kong, was the editor-in-chief. Similarly, in a report compiled by the Committee on Hong Kong Arbitration Law in 2003, it was explained that common examples of non-arbitrable issues included anti-trust matters.[29] It is questionable whether the above authorities have paid tribute to the latest developments in this area of law.[30] Yet, despite support from some (with respect, arguably weak) secondary sources, there is a further argument in favour of competition law being non-arbitrable in Hong Kong.

In *Competition Commission v Nutanix Hong Kong Ltd & Ors*[31], the Hong Kong Competition Tribunal held, applying the Hong Kong Court of Final Appeal case of *Koon Wing Yee v Insider Dealing Tribunal*[32], that the criminal standard was applicable in the light of the criminal character of the proceedings which flowed from the presence of the power to impose penalty by a regulatory body.[33] This is because, first, the decision of *Koon Wing Yee* is binding to the Hong Kong Competition Tribunal. Second, Hong Kong courts also consider that violations of competition law draws strong stigma and obloquy since competition law constitutes a pervasive societal norm of acceptable behaviour.[34] Finally, it appears to be the legislative intent that the criminal standard of proof would apply in competition law proceedings in Hong Kong.[35] In *Competition Commission v W Hing Construction Co Ltd & Ors (No 2)*[36] the Hong Kong Competition Tribunal also held that, in relation to raising the efficiency defence under s1 of sch 1 of the Competition Ordinance (**"CO"**), the constitutionally protected presumption of innocence is engaged.[37] These principles are foreign to 'normal' civil proceedings. In contrast, the civil standard of proof on the balance of probabilities is uniformly applicable in other common law jurisdictions including Australia, Canada, New Zealand,

[28] (Hong Kong, 2017) 4th edn, chap 20, fn 147.
[29] Hong Kong Institute of Arbitrators, *"Report of Committee on Hong Kong Arbitration Law"* (LC Paper No. CB(2)2261/08-09(03) fn 20.
[30] The strongest indicator is that since 2017, the legislature has already confirmed that disputes relating to intellectual property is arbitrable. See part 11A of the AO.
[31] [2019] HKCT 2; [2019] 3 HKC 307.
[32] [2008] HKCFA 21; (2008) 11 HKCFAR 170.
[33] *Nutanix* [50]-[72].
[34] *Television Broadcasts Ltd v Communications Authority & Anor* [2016] HKCFI 135; [2016] 2 HKLRD 41, [76].
[35] Note however, that these legislative materials were held to be inadmissible in the determination of the standard of proof in *Nutanix*. See, *Nutanix* [65]-[69].
[36] [2019] HKCT 3; [2019] 3 HKLRD 46.
[37] ibid [188].

Singapore and the UK.[38] Hong Kong's competition law regime is no doubt the outlier. Given that Hong Kong courts and legislatures appear to view violations of competition law as so serious that a heightened standard of proof is needed, Hong Kong courts may be inclined to consider competition law issues as non-arbitrable.

Nevertheless, one must not detract from the fact that there is virtually no modern overseas case law in favour of competition law being non-arbitrable. There is no legitimate reason to doubt that Hong Kong courts will go on a tangent and depart from the international norm. As is held in *A Solicitor (24/07) v The Law Society of Hong Kong*[39],

> *"it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. … Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them."*

III. Competition Law as Part of Public Policy

The second of the eight prescribed reasons for refusing enforcement that appears to be relevant is the ground of public policy. Compared to 'arbitrability', the debate as to whether violations of competition law would equate to violations of local public policy is alive and well.

What is meant by 'public policy' merits an article for discussion in its own right, but generally, to trigger 'public policy' as a means to refuse enforcement of an arbitral award, the act in question must be contrary to the fundamental conceptions of morality and justice in the forum.[40] Courts ought to give a narrow interpretation of 'public policy' in order to further the object of the New York Convention, which is to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced.[41] Of course, not every violation of a mandatory provision of national law amounts to a violation of public policy as not all laws are an affront to concepts of morality and justice. Only provisions of law that are fundamental to the legal order or basic morality of a state are grounds for public policy violation.[42]

[38] *Nutanix* [70].
[39] [2008] HKCFA 15; (2008) 11 HKCFAR 117, [16].
[40] *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] HKCFA 40; (1999) 2 HKCFAR 111, 139F-G.
[41] ibid, 139D-E.
[42] *Desputeaux v Éditions Chouette (1987) Inc* 2003 SCC 17; [2003] 1 SCR 178, 181.

The question, therefore, becomes whether a violation of competition laws amounts to a violation of law that is fundamental to the legal order or basic morality of a state. Overseas authority clearly suggests that there is a strong link between a country's own competition law and its local public policy. For instance, the SCOTUS in *Mitsubishi* hinted the relevancy of 'public policy' by stating *"each signatory country [has] the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country."*[43] Similarly, in *Eco Swiss*, the ECJ held that *"the provisions of Article 81 E.C. (ex Article 85) may be regarded as a matter of public policy within the meaning of the New York Convention."*[44] This stance is the same in most of continental Europe.[45]

Curiously, in *Tensacciai SpA v Freyssinet Terra Armata Srl*[46], the Swiss Federal Supreme Court was faced with an agreement under which each company undertook to refrain from any separate agreements with other companies and from bidding individually in answer to their tenders. A dispute arose and the parties submitted the agreement to arbitration, during which Tensacciai submitted that the contract in dispute was contrary to Italian and EU competition laws.[47] A final award was given in Freyssinet's favour. Tensacciai sought to challenge the enforcement of the award. However, the Swiss court refused to entertain the appeal by ruling that *"the provisions of competition laws, whatever they may be, do not belong to the essential and broadly recognized values which, … would have to be found in any legal order."*[48]

However, a closer look at *Tensacciai* reveals that the Swiss court actually ruled that the competition law of a foreign jurisdiction does not form part of Swiss national/local public policy[49], rather than refusing the notion that competition law in general forms part of public policy in its entirety. Indeed, the court in *Tensacciai* held *that "[i]n reality, the differences between the various laws on competition are too acute – specially between Switzerland and*

[43] *Mitsubishi* [].
[44] *Eco Swiss* [39].
[45] Above fn 21.
[46] (ATP 132 III 389), translated in *"X. S.p.A. v. S.r.l., Swiss Supreme Court, 4P.278/2005. 8 March 2006"* (2006) 3 ASA Bulletin 4/2006, 521.
[47] Bearing in mind that Switzerland is not part of the EU, and so it is not necessarily bound by EU law.
[48] David Bailey and Laura Elizabeth John, *"Bellamy & Child: European Union Law of Competition"* (UK, 2018) 8th edn, [16.167]; *X SpA v Y Srl*, 558.
[49] *X SpA v Y Srl* 545.

the European Union – to allow a finding that a transnational or international rule public policy would have to be found there".[50] This would suggest that had EU competition law been more similar to that of the Swiss competition law, the court may well have arrived at a different conclusion.

What is clear, however, is that overseas authority clearly come to a consensus that (at least) local competition laws have a close connection with local public policy. Once again, there is no Hong Kong case law on this point, but there is no reason to believe that Hong Kong courts will detract from the generally accepted view of foreign courts. There is a strong case that Hong Kong's competition laws will have a bearing on Hong Kong's public policy.

IV. Balance Between the Underlying Principles in Competition Law and Arbitration

A more difficult issue that one needs to consider is when courts should intervene and refuse enforcement of the award. The difficulty arises from the fact that courts will need to balance between the:-

> *"fundamental opposition along the public-private dichotomy. Antitrust laws seek to protect public interests by preserving free competition in the markets. Public antitrust or competition agencies commonly enforce these laws by imposing fines, injunctions, or even criminal penalties pursuant to domestic antitrust laws. By contrast the international arbitration is a form of private, contractual, ordering, aimed at dispute resolution".*[51]

The fundamental conflict between competition law and arbitration has been a subject of heated debate amongst scholars.[52] National courts around the world are also split between two factions. On the one side of the spectrum, there is the 'minimum' approach. In short, the 'minimum' approach,

> *"means that not every conceivable violation of or noncompliance with a mandatory rule, and specifically with a rule of competition law, can be characterized as a breach of public policy under Article V(2)(b) of the New York Convention or under national provisions on annulment of awards. It is only the most serious violations of these rules that rise to the level of breaches of public policy."*[53]

[50] ibid, 557.
[51] Valentin Pepeljugoski and Ana Pepeljugoska, *"Arbitrability of Competition Law (Antitrust) Disputes"* (2018) 11 BSSR 7, 8.
[52] OECD, *"Hearings: Arbitration and Competition"* (DAF/COMP(2010)40).
[53] Gordon Blanke and Phillip Landolt, *"EU and US Antitrust Arbitration: A Handbook for Practitioners"* (US 2011) 763.

Under the 'minimum' approach, minimum intervention or review will be devoted by courts when enforcing the arbitral awards concerning competition law issues. The rationale for the 'minimum' approach is that if a full review of the award is carried out, this arguably defeats the purpose of going into arbitration in the first place and undermines the trust afforded to arbitrators and the institution of arbitration.[54]

Meanwhile, on the other side of the spectrum, there is the 'maximum' approach. The 'maximum' approach favours, *"a full-fledged review by the court of the award's findings of fact and of law to verify its flawless compliance with competition law even in the face of a mere allegation of its violation."*[55] The rationale for this approach is to avoid the risk that arbitration will be used to circumvent competition law. Courts can therefore consider in detail whether competition law has been applied 'correctly'.[56] I will not go into the details of the merits and preferability of either approach, as discussion of the same has been explored elsewhere.[57] However, suffice it to say that both approaches have a sound and logical basis. One's preference over the other could very well be considered a value-judgment, depending on one's views on the importance of the policy behind competition law and arbitration.

Generally, national courts within the EU adopts a 'minimal' approach. This is because, under the guidance in *Eco Swiss*, it was held that *"it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances."*[58] Following this, for instance, in *Thalès Air Defence*, the case concerned an agreement for a grant of exclusive rights to produce and distribute missiles. Thalès and Euromissile were unable to agree on the purchase price, and the parties filed a request for arbitration at the International Chamber of Commerce. With the award in favour of Euromissle, Thalès sought to have the award annulled on the basis that it violated competition law. The Paris Court of Appeal took a narrow approach and held that they would only set aside awards on EU competition law grounds if they show a *"flagrant, specific and concrete breach"* of French international public policy.[59] Since the issues have not been previously raised, this suggests that the issue was not

[54] OECD, *"Hearings: Arbitration and Competition"*, 13.
[55] Blanke, *"EU and US Antitrust Arbitration: A Handbook for Practitioners"*, 761.
[56] OECD, *"Hearings: Arbitration and Competition"*, 13.
[57] For instance, see OECD, *"Hearings: Arbitration and Competition"*, 38.
[58] *Eco Swiss* [35].
[59] Blackaby, *"Redfern & Hunter on International Arbitration"*, [11.121].

"as plain as the nose on the face"[60]. This 'minimal' approach is also followed by various jurisdictions in Europe.[61]

Similarly, In *A-G v Mobil Oil NZ Ltd*[62], the High Court of New Zealand declined to review the arbitral award in violation of New Zealand competition law on the basis that the parties must have fully considered the various restrictions, and there is no overriding consideration for the court to exercise its discretion.

In contrast, the Dutch[63] and Belgian[64] courts have taken a maximalist approach and were ready to undertake a substantive review of awards from a competition law perspective and have not refrained from subsequently annulling awards that were found to be in violation of EU competition law.[65]

Worst still, some countries have conflicting views within their own jurisdiction. In *Baxter International, Inc v Abbott Laboratories*[66], the US Court of Appeals Seventh Circuit gave extreme deference to the arbitral tribunal and held that once argued, an arbitration panel's determination of anti-competitive issues could not be re-argued again on the ground of mistake of law. *Baxter* was described as giving extreme amount of deference to an arbitral award that interprets federal statute, even when the award might be based on an incorrect interpretation of that statute and thus permitting illegal conduct on the part of the parties to an agreement.[67] On the other hand, in, *American Central Eastern Texas Gas Co v Union Pacific Resources Group, Inc*[68], the US Court of Appeals Fifth Circuit had no hesitation in scrutinising the reasoning of the arbitral tribunal.

Confusing as it may seem, these contradictory rulings serve to show that resolving the balance between the competition law principle of ensuring public interest is adequately

[60] *Thalès*.
[61] ibid; OECD, *"Hearings: Arbitration and Competition"*, 38.
[62] Above fn 23.
[63] *Marketing Displays*.
[64] *SNF SAS v Cytec Industrie BV* (2007) 127 GP No 112-114, 53.
[65] Blackaby, *"Redfern & Hunter on International Arbitration"*, [11.121].
[66] 315 F3d 829 (7th Cir 2003).
[67] Brenda M Williamson, *"Recent Developments: Baxter International, Inc. v Abbott Laboratories"* [2004] 19(3) Ohio St J Dis Res 1119.
[68] 93 Fed Appx 1, 2004 WL 136091 (5th Cir 2004).

protected, and the arbitration principle that awards should be final and readily enforceable is a difficult task.

V. How Will Hong Kong Courts Approach these Issues?

Whilst academics seem to suggest that the 'minimal' approach appears to be more favourable and popular,[69] there is particular difficulty in predicting when Hong Kong courts will intervene when enforcing an anti-competitive arbitral award.

On one hand, Hong Kong is a very *"arbitration friendly"* jurisdiction.[70] Enforcement of an arbitral award is even described as *'subject to the narrowly confined exceptions, "almost as a matter of administrative procedure"'*.[71] In this sense, adopting the 'minimal' approach is no more than adopting the *status quo* of not interfering with the decision of an arbitral tribunal unless the award is a clear and blatant breach of the competition law.

Moreover, apart from the reasons in favour of the 'minimal approach' as explained above, the CO still contains a great number of exclusions[72] and exemptions[73] despite the heightened standard of proof in Hong Kong's competition law regime. Notably, under sch 1 of the CO, unless the acts in question involved 'serious anti-competitive conduct' the first conduct rule (which is akin to art 101 of the TFEU) does not apply to an agreement or concerted practice between undertakings in any calendar year if the combined turnover of the undertakings for the turnover period does not exceed HK$200,000,000. The second conduct rule (which is akin to art 103 of the TFEU) does not apply to conduct engaged in by an undertaking if the turnover of which does not exceed HK$40,000,000 for the turnover period.

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[69] Jürgen Basedow, Stéphanie Francq and Laurence Idot, "*International Antitrust Litigation: Conflict of Laws and Coordination"* (UK 2012) 214, 218.
[70] *Wing Bo Building Construction Co Ltd v Discreet Ltd* [2016] HKCFI 485; [2016] 2 HKLRD 779, [55].
[71] *Shandong Hongri Acron Chemicaljoint Stock Co Ltd v Petrochina International (Hong Kong) Corporation Ltd* [2011] HKCA 168; [2011] 4 HKLRD 604, [12].
[72] These include: (1) Agreements enhancing overall economic efficiency; (2) Compliance with legal requirements; (3) Services of general economic interest; (4) Mergers; (5) Agreements of lesser significance; and (6) Conduct of lesser significance. See sch 1 of the CO.
[73] These include: (1) Exemption under regulations from the Competition Rules in respect of specified persons and persons engaged in specified activities (ss4-5 of the CO); (2) The Chief Executive in Council may, publish an order in the Gazette specifying that a particular agreement or conduct or a particular class of agreement or conduct is exempt from the Conduct Rules on public policy grounds (s31 of the CO); (3) The Chief Executive in Council may publish an order in the Gazette specifying that a particular agreement or conduct or a particular class of agreement or conduct is exempt from the Conduct Rules to avoid a conflict with international obligations that directly or indirectly relate to Hong Kong (s32 of the CO); (4) Statutory body exemption (s2 of the CO); and (5) Block exemption order.

In other words, many undertakings may, upon fulfilment of certain requirements, be excluded or exempted from punishment under the CO. The Hong Kong Competition Commission even publishes a guideline for the public on to how to apply for the exclusions and exemptions.[74] These 'loopholes' exist by design. The creation of these loopholes, amongst other things, was viewed as a 'toothless tiger' even by Hong Kong legislators.[75] The 'minimum' approach is a mere reflection of this fact.

Another argument is that, in practice, and as a matter of policy, taking a 'maximum' approach would *"provide a formidable tool for dilatory and bad faith tactics by the losing party in the arbitration, whose motivation is merely self-interest and not the 'correct' application of the law."*[76] Judges may also suffer from an innate bias of finding faults in what has been done by others, which would increase the likelihood of annulment or non-enforcement of awards as a consequence of the courts second-guessing the arbitrators' appreciation of the facts and the law.[77]

Finally, the case of *Eco Swiss*, being a decision by the ECJ, is a strong and persuasive authority. This is especially so when the Hong Kong competition law regime is modelled after the EU legislation, and the legislature intended the courts to draw reference from EU case law.[78] *Eco Swiss* states that "*refusal to recognize an award should be possible only in exceptional circumstances"*. Hong Kong courts will likely follow suit and adopt the same approach.

On the other hand, the obvious counterargument is of course that case law around the world is not unanimous. It is open for the Hong Kong courts to follow the minority of case law where the 'maximum' approach is adopted.

Second, as has been explored above, Hong Kong courts deem violation of its local competition law as strong stigma and obloquy, which implies a strong linkage with public policy. This necessarily means that courts in Hong Kong may apply the 'maximum' approach

[74] Competition Commission, *"The Guideline on Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders"*.
[75] Clara Ingen-Housz and Anna Mitchell, *"Antitrust Awakening"* (2016) 34 Int'l Fin L Rev 41.
[76] Legislative Council, "Official Record of Proceedings, Wednesday, 6 June 2012: The Council met at Eleven O'clock".
[77] ibid.
[78] Legislative Council, *"Report of the Bills Committee on Competition Bill"* (LC Paper No. CB(1)1919/11-12) [22].

to ensure that conduct which may intrude on the *"pervasive societal norm of acceptable behaviour"*[79] will not be perpetrated by private parties within Hong Kong.

There is another unique feature with regards to Hong Kong competition law regime – it adopts a judicial enforcement model to credible and impartial institutional framework which, as the Hong Kong Bills Committee hopes, allows for effective and efficient enforcement of the competition law.[80] Put simply, the legislative intent of the CO is to give deference to the courts as the overseer and enforcer of competition law in Hong Kong.

Moreover, the absence of a standalone right of action under the current CO also points to the indication that the legislature does not want private parties (even *via* the appointment of arbitrators) to manoeuvre issues revolving around competition law. Under the current CO, a party who suffers loss and damage as a result of another's anti-competitive conduct has no standalone right of action, unless that conduct has been 'determined' to be a contravention of Hong Kong competition law.[81] A conduct is taken to have been determined to be a contravention if it has been ruled so by the Hong Kong Competition Tribunal, the Hong Kong courts, or an admission (accepted by the Hong Kong Competition Commission) of a contravention.[82] The removal of a standalone right of action was in fact an intentional decision by the Hong Kong government. During public consultations prior to the enactment of the CO,

> *"[s]ome members and deputations including trade associations of SMEs are concerned that large companies could make use of the stand-alone right of private action to harass SMEs. They are worried that larger companies, which have more resources, could resort to or threaten litigation as a means to drive out or affect the business of smaller competitors…"*[83]

And so, the government's solution was to remove a right of standalone action entirely,

> *… to reduce the anxiety and concerns of SMEs, … At the initial stage, enforcement will be carried out by the Commission, supplemented by the follow-on right of action for determined contraventions… The Administration has proposed to introduce amendments to take out the relevant provisions (clauses 111 to 114) on the stand-alone right of private action."*

[79] *Television Broadcasts*.
[80] ibid [101].
[81] S111(1) of the CO.
[82] See also, *Taching Petroleum Co Ltd v Meyer Aluminium Ltd* [2020] HKCT 2, [210].
[83] Legislative Council, *"Report of the Bills Committee on Competition Bill"* [76].

Prof Luca G Radicati Di Brozolo once said that *"[d]eference to the arbitrators' decision is also justified by the fact that arbitration is recognised by states as a means of settlement of disputes on a par with recourse to national courts"*[84] The reverse is true in Hong Kong. The lack of a recourse to national courts, and indeed the implementation of a judicial enforcement model, could mean that there is no intention by the legislature to defer the same to arbitrators, and courts will likely follow this legislative intent.

As such, there are sound arguments to speculate that courts in Hong Kong may depart from the 'minimal' approach and take the view that it should not stand by and assist in the enforcement of violations of competition law. Balancing the above, in my humble view, the 'minimal' approach is more likely to be adopted by the Hong Kong courts. This is because jurisdictions that adopt the 'maximum' approach appear to be in the minority. Given that the CO is modelled after EU law, EU case law would by definition by more persuasive than, for instance, Dutch and Belgian authorities. Moreover, it is doubtful whether the Hong Kong legislature had in mind the inherent conflict between competition law and arbitration at the time when the CO was enacted. Specifically, the removal of a standalone right of action was only to reduce the anxiety and concerns of small and medium enterprises. As such, perhaps drawing a link between the removal of a standalone right of action and enforceability of an arbitral award may be a bit of a stretch. Of course, at the end of the day, how and the extent to which Hong Kong courts will resolve the conflict between the arbitration and competition law still remains to be seen.

C. Conclusions

The issue of enforcement of arbitral awards in Hong Kong and Hong Kong competition law has not yet been academically explored. There is also no Hong Kong case law on this point. However, through a comparative analysis of the approach taken overseas, we can draw the following conclusions. First, given that Hong Kong competition law contains a number of peculiarities that depart from the general international norm,[85] there could be some argument that competition law issues may not be arbitrable. Second, courts are likely to find that Hong Kong competition law does relate to its local public policy. However, allegations of a violation

[84] Luca G Radicati Di Brozolo, *"Arbitration and Competition Law: The Position of the Courts and of Arbitrators"* (2011) 27(1) Arb Int'l 1, 5.
[85] For a list of peculiarities, see Kelvin Hiu Fai Kwok, *"The New Hong Kong Competition Law: Anomalies and Challenges"* (2014) 37 World Competition 541.

of competition law at the enforcement stage may not automatically mean that courts will intervene to refuse enforcement. There is strong argument that courts will only intervene and refuse enforcement where there are 'serious' violations of competition law. On the other hand, given Hong Kong's peculiar characteristics of competition law, it is not without argument that Hong Kong courts may commence a full-fledged review of the award to ensure strict compliance.

There will no doubt be significant and exciting developments to Hong Kong competition law and the law of arbitration in the years to come. Hopefully Hong Kong courts will provide an answer to the above issues soon.