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# ARBITRABILITY OF DISPUTES INVOLVING ANTITRUST ISSUES IN BRAZIL AND THE PROTECTION OF FREE COMPETITION[1]

# ARBITRABILIDADE DAS DISPUTAS RELACIONADAS AO DIREITO ANTITRUSTE NO BRASIL E A PROTEÇÃO DA LIVRE CONCORRÊNCIA

***Gustavo Flausino Coelho***
***Ricardo Villela Mafra Alves da Silva***

*Abstract*: Law no. 9,307/1996 (Brazilian arbitration law) was enacted as part of the liberalization process of the Brazilian economy with the purpose of providing a more reliable mechanism of dispute resolution for parties of a contract. A few years before, Law no. 8,884/1994 was enacted to strengthen the protection of competition in Brazil. Currently, Law no. 12,529/2011 is the antitrust law in force in Brazil, which introduced deep changes in competition policy. Due to the fundamental principles of the economy established by the Brazilian Constitution, disputes in connection with antitrust issues usually involve both patrimonial rights and matters of public policy. In this sense, the scope of this study is to verify the possibility of using arbitration to resolve disputes involving antitrust matters using a law-and-economics approach, in view of the incentives of a party to adopt anticompetitive behavior.

*Keywords*: Arbitration. Public policy. Arbitrability. Brazilian Antitrust Law. Law and economics. Competition.

*Resumo*: A lei nº 9.307/1997 (Lei de Arbitragem) foi promulgada como parte do processo de liberalização da economia brasileira, com o intuito de disponibilizar um mecanismo mais

[1] Artigo recebido em 01.03.2015 e aceito em 09.03.2015.

confiável para resolução de conflitos entre as partes de um contrato. Após alguns anos, a Lei nº 8.884/1994 foi sancionada para fortalecer a defesa da concorrência no Brasil. Atualmente, a Lei nº 12.529/2011 é a lei antitruste em vigor no país, introduzindo mudanças profundas na política de defesa da concorrência. Devido aos princípios fundamentais da ordem econômica, dispostos na Constituição Federal, litígios relacionados a matérias concorrenciais costumam envolver direitos patrimoniais disponíveis e matéria de política pública. Neste sentido, este trabalho visa verificar a possibilidade de adoção da arbitragem como meio de resolução de controvérsias relacionadas a aspectos concorrenciais utilizando a análise econômica do Direito, considerando os incentivos de uma parte realizar condutas anticompetitivas.

*Palavras-chave*: Arbitragem. Política pública. Arbitrabilidade. Lei Antitruste. Análise econômica do Direito, Defesa da concorrência.



## I. Introduction.

Law no. 9,307/1996 ("Arbitration Law") was enacted as part of the liberalization process of the Brazilian economy with the purpose of providing a more reliable mechanism of dispute resolution for parties of a contract. However, it was not until 2001 that the use of arbitration started to become a widespread practice in Brazil. The applicability of the Arbitration Law was often challenged due to certain provisions of the Brazilian Constitution that supposedly forbid

the settlement of disputes outside the judiciary. The controversy was decided by the Brazilian Supreme Court[2], ruling that the Arbitration Law is constitutional and the use of arbitration is a safe and reliable mechanism of dispute resolution.

Since Brazilian Supreme Court decided that the Arbitration Law was in accordance with the Constitution, arbitration has been used by companies and businessmen as the main mechanism of dispute resolution for their contracts, especially due to the long-standing inefficiency issues of the Brazilian courts. However, the Arbitration Law only allows parties to settle their disputes by arbitration if the controversy does not involve inalienable rights. Additionally, a foreign arbitration award may only be recognized and enforced in Brazil if: (i) the issue is capable of being resolved by arbitration in accordance with the law; and (ii) the procedure is not contrary to public policy and morality[3].

The arbitrability of a dispute refers to the possibility of resolving certain matters by arbitration. Some disputes cannot be resolved without the direct intervention of the state due to the importance of the issues under discussion. Therefore, the arbitration law determines that only matters involving patrimonial rights may be settled by arbitration[4]. Disputes involving constitutional rights, for example, cannot be submitted to arbitration.

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[2] BRAZIL. Supremo Tribunal Federal. SE no. 5,206. Reporting Judge Sepúlveda Pertence. Brasília. Judged on December 12, 2001.

[3] The same requirements are mentioned in the Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country".

[4] Cf. BRAZIL. Supremo Tribunal Federal. SE no. 5,206. Reporting Judge Sepúlveda Pertence. Brasília. Judged on December 12, 2001. Cf. article 1 of Law no. 9,307/1996.

The subject of this study will be the arbitrability of disputes involving antitrust issues. Defining the possibility of submitting matters involving competition issues to arbitration is not an easy task, since antitrust matters in Brazil usually involve both constitutional matters and patrimonial rights. In this sense, the Brazilian Constitution sets forth the protection of free competition[5] and free enterprise[6] by the law as fundamental principles of the economy. Therefore, the protection of competition is a matter of public policy in Brazil.

Although the first Brazilian antitrust law was enacted in 1962[7], the protection of competition only became effective with the enactment of Law no. 8,884/1994, which transformed the Administrative Council for Economic Defense ("CADE") into an independent agency. Similar to the Arbitration Law, Law no. 8,884/1994 was issued as part of the liberalization process of the Brazilian economy. Law no. 8,884/1994 was recently replaced by Law no. 12,529/2011 ("Antitrust Law"), which introduced relevant changes to competition policy in Brazil and promoted a deep restructuring of CADE.

According to the Antitrust Law[8], free competition and free enterprise are collective rights. Notwithstanding, the Antitrust Law also states[9] that anyone injured by an anticompetitive practice may seek indemnification for losses in courts, regardless of prosecution by CADE. This indicates that, although disputes involving competition matters imply the existence of matters of public policy, it also involves patrimonial rights, to the extent that those injured by the anticompetitive practice have suffered a loss.

In this sense, the purpose of this study will be to address the question of whether or not disputes involving competition issues may

[5] Article 170, item IV, of the Brazilian Constitution.

[6] Article 170, sole paragraph, of the Brazilian Constitution.

[7] Law no. 4,137/1962.

[8] Article 1, sole paragraph, of the Antitrust Law.

[9] Article 47 of the Antitrust Law.

be submitted to arbitration according to the Brazilian legislation. Moreover, the use of arbitration to settle competition matters will be analyzed by taking into account the potential enhancement of antitrust private enforcement in Brazil, since arbitration provides the parties with a more efficient mechanism to seek indemnification for losses caused by anticompetitive behavior. In order to evaluate the benefits yielded by the use of arbitration in solving disputes involving competition issues and the potential enhancement of antitrust enforcement in Brazil, this study will adopt a law-and-economics approach based on the assumption that there are reduced incentives for a party to engage in anticompetitive behavior in connection with a subject that may be submitted to arbitration. The existence of such possibility may reduce the incentives for the abuse of economic power and collusion, since the party injured by the anticompetitive practice will have an effective mechanism to recover its losses in a timely manner.

## II. Arbitration in Brazil.

The arbitration as a dispute resolution mechanism in Brazil dates back to the nineteenth century, when it was introduced by the first Brazilian constitution, adopted in 1824, and upheld by specific laws regulating certain matters thereafter. The Brazilian Constitution of 1824 established that parties of civil and criminal lawsuits could appoint arbitrators to judge their controversies[10]. Subsequently, a number of laws were enacted setting forth specific provisions providing for arbitration to settle disputes, such as the Commercial Code of 1850, Regulation no. 737/1850 and Decree no. 3,900/1867[11].

[10] CARREIRA ALVIM, José Eduardo. *Direito Arbitral*. Rio de Janeiro: Forense, 2007. p. 5.

[11] Ibid. p. 5-6.

Notwithstanding, it was only in 1996 that the arbitration was formally introduced in Brazil with the enactment of the Arbitration Law. Its constitutionality was rapidly challenged on the basis that the Brazilian Constitution forbids any law to "exclude from the scrutiny of the Judiciary any damage or threat to a right"[12]. The Supreme Court analyzed the issue in a lawsuit requesting the recognition of an arbitration award that was rendered in Spain[13]. In its judgment, the Court held that what the Constitution forbids is the restraint to seek access to the judiciary in case of any damage or threat to a right. Arbitration, on the other hand, is an option that parties may or may not elect as their dispute resolution method. Accordingly, the use of arbitration is based on the mutual agreement between parties and is not against the Brazilian Constitution.

The Arbitration Law follows, to a great extent, the rules provided by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the UNCITRAL Model Law on International Commercial Arbitration[14]. In this sense, the submission of a controversy to arbitration must be based on a written agreement between the parties[15]. According to the Arbitration Law, parties may submit their disputes to arbitration through an arbitration convention, which is formed by (a) the arbitration clause and (b) the arbitration commitment[16]. The arbitration clause is the written agreement through

[12] Article 5, item XXXV, of the Brazilian Constitution.

[13] BRAZIL. Supremo Tribunal Federal. SE no. 5,206. Reporting Judge Sepúlveda Pertence. Brasília. Judged on December 12, 2001.

[14] LOBO, Carlos Augusto da Silveira. Uma Introdução à Arbitragem Internacional. In: ALMEIDA, Ricardo Ramalho. *Arbitragem Interna e Internacional*. Rio de Janeiro: Forense, 2003. p. 3.

[15] See Article II of the Convention: "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

[16] Article 3 of the Arbitration Law.

which the parties of a contract undertake to submit the controversies arising out of such contract to arbitration[17]. The arbitration commitment, on its turn, is the agreement through which the parties effectively submit an existing dispute to arbitration and specify all the aspects of the procedure, such as: (i) information of the parties involved; (ii) information of the appointed arbitrators or the entity that was chosen to appoint the arbitrators; (iii) description of the dispute; and (iv) the place where the award shall be issued[18].

Prior to submitting a dispute to arbitration, the parties must ensure that it involves only patrimonial rights[19]. Disputes involving inalienable rights that cannot be subject to negotiation are forbidden to be resolved through arbitration. If, during the arbitration procedure, a controversy arises involving inalienable rights, the subject must be solved by the judiciary before the arbitration continues its course[20]. Also, arbitral decisions awarded abroad cannot be enforced in Brazil if: (i) the subject cannot be settled through arbitration under Brazilian law, *i.e.*, if it involves inalienable rights; and (ii) the decision is against public policy[21].

Therefore, in order to verify whether disputes involving competition issues may be solved by arbitration, it is necessary to assess if such disputes involve patrimonial rights that can be (a) freely negotiated by parties; and (b) subject to a consensual dispute resolution mechanism. If the claims are related to inalienable rights, they can only be addressed by the judiciary. Furthermore, for the purposes of this study, it is important to verify if competition issues are a matter of public policy, which may be a key factor in cross-border arbitration.

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[17] Article 3, paragraph 1, of the Arbitration Law.

[18] Articles 9 and 10 of the Arbitration Law.

[19] Article 1 of the Arbitration Law.

[20] Article 25 of the Arbitration Law.

[21] Article 39 of the Arbitration Law.

## III. Brazilian antitrust law.

While the Antitrust Law in Brazil has an evident public policy aspect, competition matters also involve patrimonial rights that may be subject to negotiation. The main purpose of the Antitrust Law is to protect free competition and free enterprise, which are fundamental rights deemed as essential features of the Brazilian economic order provided by the Constitution[22].

The economic order, as entitled by the Constitution, is a group of principles, fundaments and ideas that shape the Brazilian economy and establish the ideology according to which the markets must be organized in Brazil[23]. In this context, protecting free competition becomes not only an end in itself, but also a means to achieve certain broader and more important goals[24]. The economic order translates a set of ideologies, ideas and guidelines to organize markets in a way deemed by the Constitution to be the most beneficial to Brazilian society. Therefore, protecting free competition and free enterprise is, without a doubt, a matter of public policy in Brazil. As a general rule, matters of public policy impose limitations on the private autonomy by preventing parties from agreeing on subjects that may offend national interests, and restricting the application of laws that may conflict with specific goals and objectives of the nation[25].

The nature of the antitrust enforcement as a matter of public policy in Brazil leads to another equally important conclusion: the Antitrust Law may be considered a mandatory rule (*lois de police*). Mandatory rules are those that must be applied in specific situations

[22] See Article 170 of the Brazilian Constitution.

[23] For a detailed and extensive discussion about the nature of the concept "economic order" as set forth by the Brazilian Constitution and the ideologies that arise from it, see GRAU, Eros Roberto. São Paulo: Malheiros, 2012. p. 187-188.

[24] FORGIONI, Paula Andrea. Os fundamentos do Antitruste. São Paulo: Revista dos Tribunais, 2012. p. 186-188.

[25] ALMEIDA, Ricardo Ramalho. *Arbitragem Comercial Internacional e Ordem Pública*. Rio de Janeiro: Renovar, 2005. p. 25-28.

due to certain national policies. The mandatory application of these rules in such situations is justified on the basis that they must be enforced in order to meet the objectives of public policy[26]. Despite academic opinions towards the idea that the concepts of public policy and mandatory rules are not necessarily associated with each other[27], it seems clear that, under the Brazilian legal system, the characterization of the Antitrust Law as a mandatory rule derives from the nature of the antitrust enforcement as a matter of public policy. Considering that the protection of competition is a means to achieve the goals set forth by the Brazilian Constitution, the Antitrust Law must be applied and enforced in the situations defined thereby[28].

Notwithstanding, in addition to the damages inflicted by anticompetitive practices upon society as a whole, which materialize into loss of welfare by the collectivity, some individuals are directly affected by such practices. Companies that form a cartel to raise prices, for example, may have supply agreements in place to provide their clients with products or services. Such clients are directly affected by the cartel and suffer a measurable loss that can be recovered in a lawsuit.

Because of such duality of damages caused by an anticompetitive practice – inflicted both upon society in general and upon companies and individuals directly impacted by the practice – the Antitrust Law establishes that any party affected by an

[26] GAILLARD, Emmanuel; SAVAGE, John. *Fouchard Gaillard Goldman on International Commercial Arbitration*. London: Kluwer Law International, 1999. p. 847.

[27] For an extensive discussion regarding the relationship between these concepts, see ALMEIDA, Ricardo Ramalho. *Arbitragem Comercial Internacional e Ordem Pública*. Rio de Janeiro: Renovar, 2005. p. 52-57.

[28] The Antitrust Law must be applied whenever a practice fits into the description set forth by article 36 thereof: "Art. 36. The acts that under any circumstance have as purpose or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved: I - to limit, restrain or in any way injure free competition or free initiative; II - to control the relevant market of goods or services; III – to arbitrarily increase profits; and IV - to exercise a dominant position abusively."

anticompetitive practice may seek indemnification in the judiciary branch regardless of CADE's prosecution[29].

The wording of the Antitrust Law leads to two different conclusions: (i) private antitrust enforcement is independent from the public antitrust enforcement by CADE; and (ii) those injured by anticompetitive practices may seek indemnification in the judiciary, but they are not forced to do so. Accordingly, as opposed to CADE's obligation to prosecute and punish anticompetitive practices, those directly affected by such practices can choose whether or not to seek indemnification in Courts. In fact, indemnification claims for damages and losses in connection with anticompetitive behavior are very unusual in Brazil[30]. In this sense, the possibility to choose whether to exercise the right to seek indemnification demonstrates that such right may be freely disposed by the injured party and, therefore, may also be subject to negotiation and resolution by arbitration.

## IV. Arbitrability of disputes involving antitrust issues.

After a brief outline of the most important aspects of the Arbitration Law and the Antitrust Law and prior to addressing the issue under Brazilian legislation, it is important to take into consideration some of the implications of solving antitrust matters by arbitration under the experience of the U.S. and E.U. case law.

[29] Article 47 of the Antitrust Law.

[30] Recent research compared the antitrust private enforcement in Brazil and the U.S. (GÂNDARA, Lívia. Responsabilidade civil concorrencial: elementos de responsabilização civil e análise crítica dos problemas enfrentados pelos tribunais brasileiros. *Revista do IBRAC – Direito da Concorrência, Consumo e Comércio Internacional*. v. 21. São Paulo: Revista dos Tribunais, jan. 2012.). According to this paper, only twenty two antitrust private damages claims were filed in Brazil in the last ten years, while in the U.S. seven hundred and fifty claims are filed per year. Also, refer to CARVALHO, Vinícius Marques de, et al. Nova lei de defesa da concorrência comentada. São Paulo: *Revista dos Tribunais*, 2011. p. 137.

**(i) Resolving competition matters by arbitration: pros and cons.**

In 2010, the Organization for Economic Co-operation and Development ("OECD") published a report addressing the question of whether or not antitrust matters could be solved by arbitration. In its report, the OECD[31] stated that the settlement of antitrust matters by arbitration had the following advantages: (i) flexibility over choice of arbitrators and process; (ii) detachment from a particular legal order; (iii) speed of process; and (iv) wide enforcement of decision. On the other hand, the report also listed the following disadvantages: (i) lack of rigor; (ii) no powers of investigation; (iii) lack of transparency; (iv) conflict between approaches; and (v) lack of precedents.

According to the OECD, arbitration allows parties to choose their arbitrators, as well as to choose the law applicable to their controversy and the procedural rules to be adopted during the proceeding. Consequently, arbitration would also not be attached to a specific legislation, which can lead to a controversy being diverted from its usual legal order. In addition, arbitration would allow parties to solve their disputes in an expedited and efficient manner, which can be particularly advantageous in complex antitrust matters. Finally, arbitration provides for a wider enforcement of a decision, considering that an arbitral award may be enforced in an indefinite number of countries due to treaties and international conventions.

As a downside aspect to the use of arbitration, the OECD's report mentioned the lack of rigor, since arbitration is not deemed to have the same rigor as public enforcement by antitrust authorities. Also, antitrust authorities usually have very broad and extensive investigatory powers, which arbitrators do not have as a general rule. In addition, arbitration lacks transparency since most of the procedures are carried out confidentially, which leads to the

[31] OECD. Directorate for Financial and Enterprise Affairs - Competition Committee. *Arbitration and Competition*. Available at: <http://www.oecd.org/competition/abuse/49294392.pdf>. Accessed on: February 28, 2015.

conclusion that there are not enough precedents in terms of arbitral decisions, since most of them are not made public. Finally, an arbitration award may conflict with the decision rendered by the relevant antitrust authority.

It is important to note, as a preliminary conclusion, that some of the implications pointed out by OECD that derive from the use of arbitration to solve antitrust matters may not be applicable under Brazilian legislation. For example, given the nature of the antitrust enforcement as a matter of public policy and the characterization of the Antitrust Law as a mandatory rule, it does not seem reasonable to assume that parties can choose not to apply the Antitrust Law to a certain controversy in which an anticompetitive practice with effects in Brazil may be involved. Thus, the supposed advantage of detaching a specific controversy from its particular legal order may not be possible as well if the arbitrator faces a potential anticompetitive practice in Brazil. This also leads to the conclusion that the advantage of wide enforcement may be prejudiced (at least if the prevailing party wishes to have the arbitral award recognized in Brazil) if the decision failed to address, under the Antitrust Law, an anticompetitive practice with potential effects in Brazil.

The disadvantage of having conflict between the arbitration award and CADE's decision does not seem to be applicable as well. According to the Antitrust Law, the private antitrust enforcement is completely independent from the public enforcement, which means that they may lead to different conclusions.

**(ii) U.S. case law.**

The enforcement of antitrust laws in the United States of America is made through the application of a number of laws and statutes, particularly the Sherman Act, enacted in 1890.

Due to long-standing enforcement of the antitrust policy and strong private antitrust enforcement in the United States, the issue of resolving antitrust matters by arbitration was addressed in a relevant

number of cases[32]. In this context, it is important to analyze the most important cases addressing the arbitrability of competition matters under U.S. law.

Initially, the understanding of U.S. courts was that, although there were no rules explicitly forbidding antitrust matters to be settled by arbitration, controversies involving competition issues should not be solved by arbitration due to reasons of public policy[33]. In *American Safety Equipment v. J. P. Maguire & Co.*[34], the Court of Appeals reversed a decision that had previously ruled in favor of submitting claims of violations under the Sherman Act to arbitration. According to the Court of Appeals, antitrust claims should not be resolved by arbitration due to the pervasive public interest in enforcing antitrust laws and the nature of the injuries and damages caused by antitrust violations[35].

A similar decision was held in *Aimcee Wholesale Corporation v. Tomar Products, Inc.*[36]. In this case, the plaintiff-appellant had purchased certain products from the defendant-appellee and sought arbitration to recover damages arising out of defective shipping and a lack of allowances that had been advertised. The defendant-appellee agreed to the arbitration but offered a counterclaim based on supposedly discriminatory price reductions in violation of the antitrust

[32] For a detailed description of some of the cases addressed herein and an extensive discussion of their consequences and implications, see FINN, John J. Private arbitration and antitrust enforcement: A conflict of policies. *Boston College Law Review*, Boston, v. 10, p. 406, 1969.

[33] Id, Ibid. p. 407, 1969.

[34] *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 2d. Cir., 1968.

[35] "A claim under the antitrust laws is not merely a private matter [...] Antitrust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage. We do not believe Congress intended such claims to be resolved elsewhere than the Courts." (*American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 2d. Cir., 1968).

[36] *Aimcee Wholesale Corporation v. Tomar Products, Inc.*, 1968, 21 N.Y.2d 621, 289 N.Y.S.2d 968, 237 N.E.2d 223 (holding state antitrust claims not arbitrable).

laws. The plaintiff-appellant requested that such antitrust claims were also solved by arbitration. In its decision, the New York Court of Appeals decided that commercial arbitration was inappropriate to address antitrust matters.

This understanding was overruled in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[37]. In this case, related to a controversy between Mitsubishi Motors Corp. and a retailer; a number of allegations of violations to Sherman Act were made to prevent the submission of the dispute to arbitration[38]. The U.S. Supreme Court decided that, despite the understanding established in *American Safety Equipment v. J.P. Maguire & Co.*, arbitrators can resolve disputes involving antitrust matters and it was the intention of the Congress to provide parties with the possibility to settle their controversies by arbitration. In addition, the U.S. Supreme Court held that, in case the arbitral award was against public policy, it could have its recognition denied in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958[39].

Therefore, following *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the U.S. Supreme Court overruled the traditional understanding and confirmed that antitrust matters may be solved by arbitration under certain conditions[40].

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[37] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 620 (1983).

[38] For a detailed description of the controversy addressed in this case, ref. CRISTOFARO, Pedro Paulo Salles; NEY, Rafael de Moura Rangel. Possibilidade de aplicação das normas do direito antitruste pelo juízo arbitral. In: ALMEIDA, Ricardo Ramalho. *Arbitragem Interna e Internacional*. Rio de Janeiro: Forense, 2003. p. 355-356.

[39] "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The [New York Convention] reserves to each signatory country the right to refuse enforcement of an award where the 'recognition of enforcement of the award would be contrary to the (Art. V.2(b), NYC) public policy of that country." (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 620, 1983).

[40] OECD. Directorate for Financial and Enterprise Affairs - Competition Committee. *Arbitration and Competition*. Available at:

**(iii) E.U. case law.**

The European Union has a long-standing tradition of enforcing antitrust rules and, therefore, its precedents must also be taken into account when discussing the arbitrability of antitrust matters[41].

In 1966, the International Chamber of Commerce ("ICC") addressed the issue in case no. 1397. The arbitration award rejected the allegation that a contract granting exclusivity could not be subject to arbitration due to possible violations of Article 85 of the Treaty of Rome. The decision held that, although a contract in violation of the antitrust laws would be beyond the authority of an arbitral tribunal, arbitrators could not refrain from addressing such claim in order to verify that they fall into the criteria of relevant antitrust rules. Thus, while arbitrators could not accept the performance of an obligation against public policy, they also could not refrain from examining the basis of such claim[42].

In the following years, other decisions awarded by ICC would further confirm the arbitrability of antitrust matters under the E.U. treaties. In ICC case no. 2,811, judged in 1979, the arbitral tribunal

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<http://www.oecd.org/competition/abuse/49294392.pdf>. Accessed on: February 28, 2015.

[41] For a detailed analysis of the European Union case law on the arbitrability of antitrust matters, see GAILLARD, Emmanuel, SAVAGE, John. *Fouchard Gaillard Goldman on International Commercial Arbitration*. London: Kluwer Law International, 1999. p. 349.

[42] "[A] dispute relating essentially to the validity or nullity of a contract under Article 85 of the Treaty of Rome would be beyond the jurisdiction of an arbitrator, and no arbitration agreement could substitute a private judge for a public judge to resolve a dispute concerning public policy *in se* and *per se*. However, if in the context of a private Law dispute a defendant claims that the contract on which the other party relies is void on the grounds of public policy and in particular for breach of Article 85 of the Treaty of Rome, the arbitrator has a duty to establish whether the disputed contract satisfies the substantive and legal conditions leading to the application of the said article. [...] The arbitrator can neither accept the performance of an obligation contravening public policy nor, conversely, admit a claim for a stay of proceedings without examining the basis of that claim, nor indeed extend to an entire complex agreement the nullity which may affect a part thereof."

claimed jurisdiction to resolve a dispute involving the application of Article 85 of the Treaty of Rome and an EC regulation establishing block exemption to exclusive dealing agreements. In 1984, the award issued in the ICC case no. 4,604 provided for a decision allowing the resolution by arbitration of a dispute involving an exclusive license containing a non-compete clause. Subsequently, in 1990, the arbitral tribunal decided in ICC case no. 6,106 that a dispute involving a non-compete clause could be resolved by arbitration. Also, in 1993, in the judgment of ICC case no. 7,673, the arbitrators analyzed a claim of abuse of dominant position, in connection with an alleged attempt of a party to exclude its rival from the market[43].

The issue of the arbitrability of antitrust matters under E.U. law was further clarified in a decision issued by the European Court of Justice in 1999[44]. In its decision, the Court held that "[a] national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the EC Treaty (now Article 81 EC) [...]." Therefore, the implication of this ruling is that arbitrators are not only *allowed* to apply the relevant competition laws where its application is so required, but that they *must* apply such laws. Otherwise, if arbitrators refrain from applying the relevant antitrust laws, their decision may be considered contrary to the relevant antitrust provisions of the E.U. treaties.

## V – Arbitrability of antitrust matters in Brazil.

According to the OECD, when addressing the arbitrability of competition law disputes, a distinction should be made between arbitration as "(i) a means for individuals to privately enforce

[43] For a full description of these cases, see GAILLARD, Emmanuel; SAVAGE, John. *Fouchard Gaillard Goldman on International Commercial Arbitration*. London: Kluwer Law International, 1999. p. 350.

[44] *Eco Swiss China Time Ltd. v. Benetton International NV* [1999] ECR I-3055.

competition law and (ii) a tool for competition authorities in their public enforcement of competition law."[45]. In addition, it should be considered whether an arbitrator could apply competition law and, if yes, which competition law should be applied and how such enforcement should be done[46].

First of all, one of these questions can be immediately answered under a Brazilian law perspective. It is very unlikely that arbitration could serve as a tool for CADE in its antitrust public enforcement. As previously explained, anticompetitive practices in Brazil are deemed to generate a duality of damages. They inflict damages upon the collectivity and upon companies and individuals directly affected by the practice. CADE's prosecution aims to punish those who undertake anticompetitive behavior in order to protect the collective rights of free competition and free enterprise. Such rights are inalienable and may not be subject to arbitration. Therefore, it is very unlikely that CADE would be allowed to resolve any dispute involving antitrust matters under its authority by arbitration.

Notwithstanding, it seems reasonable to conclude that arbitration can be used by companies and individuals as a means to privately enforce the Antitrust Law. Considering that the Antitrust Law allows those injured by anticompetitive practices to seek indemnification in the courts, there is no reason to believe that they also could not seek indemnification by arbitration.

As for the questions of whether an arbitrator could apply competition law and which competition law should be applied and how should such enforcement be done, the answers seem clear under the Brazilian law. Similar to the decision taken by the European Court of Justice in *Eco Swiss China Time Ltd. v. Benetton International*

[45] OECD. Directorate for Financial and Enterprise Affairs - Competition Committee. *Arbitration and Competition*. Available at: <http://www.oecd.org/competition/abuse/49294392.pdf>. Accessed on: February 28, 2015.

[46] Ibid.

*NV*[47], the arbitrators shall apply the Antitrust Law if the circumstances require them to do so. Accordingly, the Antitrust Law is applicable to any practice or act that may generate anticompetitive effects[48] in Brazil[49]. Consequently, whenever an anticompetitive practice may generate effects in Brazil, the applicable law must be the Antitrust Law, at least to the extent of such effects. If, for example, the arbitrator decides to apply a foreign antitrust statute to address effects generated in Brazil by an anticompetitive practice, it is reasonable to assert that his award will likely not be enforceable in Brazil (public policy argument).

Finally, the question remains of how the enforcement of the Antitrust Law should be done. According to the Antitrust Law, those injured by anticompetitive practices may seek indemnification for the damages inflicted upon them. The analysis of whether a certain practice is anticompetitive must certainly be made based on the Antitrust Law. Upon the decision by the arbitrator that the practice is, in fact, anticompetitive, an obligation to indemnify the injured party will arise[50]. As a general rule, the calculation of such indemnification by Brazilian courts is made in accordance with Law no. 10,406/2002 (Brazilian Civil Code)[51]. However, it seems reasonable to assert that such calculation may be made in accordance with the applicable law chosen by the parties.

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[47] See supra note 42.

[48] See supra note 27.

[49] See article 2 of the Antitrust Law: "Art. 2. This Law applies, without prejudice to the conventions and treaties of which Brazil is a signatory, to practices performed, in full or in part, on the national territory, or that produce or may produce effects thereon."

[50] It is important to mention that, according to the Antitrust Law, those who adopt an anticompetitive practice are liable for all losses and damages regardless of culpability (which means that they will be strictly liable). See article 36 of the Antitrust Law.

[51] The calculation of indemnification for damages under the Brazilian law is made in accordance with articles 944 to 954 of the Brazilian Civil Code.

## VI. Should antitrust matters be resolved by arbitration?

It is reasonably clear that antitrust matters can be resolved by arbitration under Brazilian law. But should they? What are the potential advantages of using arbitration to resolve disputes involving antitrust matters?

The fact that a strong private antitrust enforcement discourages companies and individuals to adopt anticompetitive behavior is almost intuitive[52]. In a report on antitrust and behavioral economics, the OECD asserted that "executives behave as rational, profit-maximizers, in conducting a cost-benefit analysis to see if the expected gains from participating in the cartel are worth the costs, which include the magnitude of likely punishment discounted by the probability of cartel prosecution."[53]. Therefore, when deciding whether or not to join a cartel or to exclude a rival from the market, an executive (or other applicable decision-maker individual) will likely take into account the probability of being prosecuted and punished. It is also true that, currently, private antitrust enforcement is almost non-existent in Brazil[54].

Therefore, the use of arbitration by parties injured by anticompetitive practices as a tool to recover their damages and seek indemnification may be a valuable means to enhance and strengthen the enforcement of the Antitrust Law in Brazil. Accordingly, the incentives for adopting anticompetitive behavior may be significantly reduced if the injured party is provided with an efficient dispute

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[52] In fact, some scholars believe that antitrust private enforcement is even more effective in deterring anticompetitive behavior than criminal prosecution. See LANDE, Robert H., DAVIS, Joshua P. *The extraordinary deterrence of private antitrust enforcement: A reply to Werden, Hammond, and Barnett.* San Francisco, 2012. Avaliable at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2127762>. Accessed on: May 31, 2013.

[53] OECD. Directorate for Financial and Enterprise Affairs - Competition Committee. *Arbitration and Competition*. Available at: <http://www.oecd.org/competition/abuse/49294392.pdf>. Accessed on: February 28, 2015.

[54] See supra note 29.

resolution mechanism to seek indemnification. Thus, under a law-and-economics perspective, the use of arbitration to resolve disputes involving antitrust matters may enhance antitrust private enforcement and be beneficial.

## VII. Conclusion.

The protection of free competition and free enterprise in Brazil is a matter of public policy and is deemed a means to achieve a broader goal set forth by the Brazilian Constitution. In this sense, the enforcement of the antitrust laws is essential to ensure the effective application of the set of ideologies, principles and ideas that form the so-called "economic order".

Under such context, the Antitrust Law in Brazil certainly involves inalienable rights that cannot be subject to arbitration and must be protected by CADE. However, antitrust matters also involve patrimonial rights that can be freely negotiated to the extent that the Antitrust Law provides those injured by anticompetitive practices with the right to seek indemnification in courts. Such rights may be subject to arbitration and, therefore, it seems reasonable to assert that private antitrust enforcement may be made effective by arbitration if the parties mutually agree to do so. Several precedents of U.S. and E.U. case law also indicate that antitrust matters may be resolved by arbitration.

In addition to the arguments in favor of the arbitrability of antitrust matters, a law-and-economics approach also indicates that resolving disputes involving competition issues by arbitration may be beneficial to society. In this sense, the use of arbitration may strengthen antitrust private enforcement and reduce incentives for the adoption of anticompetitive behavior.