On Arbitrating Antitrust/Competition Disputes (II)

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Richard Levin (Richard Levin Arbitration)

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Now that we know the "second look" is not so much a look but a glance, what does this mean for arbitrators in these cases, frequently highly complex disputes infused with economics? In brief, it places a very heavy burden to get it right. The mandatory public policy of competition law which would by contract be delegated to an arbitration tribunal involves the very fabric of "democratic capitalism" and is of "national interest" to at least the US economy, as Mitsubishi notes, 473 US at 635-36 and there is no reason to think the disputes are less important in most other countries. The importance is heavy, the policy is real, even such that arbitrators, in the view of some scholars, have the duty to raise and apply the relevant competition regimes on their own motion.[fn] See Radicati, op. cit.fn.7, at p.21[/fn] Thus, I will touch on a few issues I have experienced, noting that Mitsubishi has had a long and wide effect, and its fundamental policy of the nature of arbitration may help practitioners evolve the issues the cases present to lead to "efficient disposition" as predicted by Mitsubishi; the focus will only be on discovery, experts, and summary disposition in complex competition disputes, but you could obviously expand this list.

The Supreme Court noted in Mitsubishi, as referenced above, that "vertical restraints which most frequently give birth to antitrust claims covered by an arbitration agreement will not often occasion the monstrous proceedings that have

given antitrust litigation an image of intractability. In any event, adaptability and access to expertise are hallmarks of arbitration." 473 US at 633. And of course, we have seen horizontal restraint allegations in arbitration[fn] E.g., Stolt-Nielsen, op cit. fn.3.[/fn] and many IP cases will involve licenses on a horizontal level and contain arbitration clauses, such as Abbott Laboratories, discussed above. In any case, these are not disputes like nationwide grand jury price fixing or market allocation investigations or dawn raids seen in the EU that involve truckloads of hard drives, paper, etc. Nor are they merger investigations, involving Second Requests. These "monstrous proceedings" are not seen in arbitration. Thus in my experience in arbitrations, in both vertical and horizontal issues, I have latched on the "adaptability" point of Justice Blackmun and have so far been able to successfully conclude disputes with tailored discovery; my guidepost has been the IBA Rules referenced in Part 1. For the sake of expedition and to keep the expense reasonable, depositions are not generally allowed, unless that witness is critical to the case and/or cannot appear live. And while tailored document exchange is the preferred method of information exchange, I would very much agree with two leading practitioners "because arbitral procedures are flexible, it is always possible for a tribunal, if persuaded that it is necessary, to make searching orders for the production of documentary evidence, short of "fishing" exercises."[fn] Veeder and Stanley, in EU and US Antitrust Arbitration: A handbook for Practitioners, op cit. fn. 8, ch. 3 at p.105.[/fn] All this said, this is arbitration, not court litigation, and broad discovery is not necessarily a given.[fn] Judge Easterbrook noted in a recent domestic US case on the Seventh Circuit "nothing in the Federal Arbitration Act requires an arbitrator to allow any discovery. Avoiding the expense of discovery under the Federal Rules of Civil Procedure and their state-law equivalents is among the principal reasons why people agree to arbitrate. That Hyatt's attorneys' fees in the arbitration exceeded $1 million shows that plenty of discovery occurred; an argument that the arbitrator had to allow more rings hollow." Hyatt Franchising v Shen Zhen[/fn]

In any case, discovery of some dimension is usual, especially in a complex arbitration, like a competition based arbitration. Many institutions have adopted rules to deal with the complexities of competition cases, an example being the AAA's Procedures for Large, Complex Commercial Disputes as well as the soft law guidance of the IBA Rules. Furthermore, the privilege issues that can come up in

international disputes can be daunting and I have previously written on my position and the importance of keeping a level playing field between the different parties who may face different privilege national laws and protocols.

Justice Blackmun also notes the importance of "access to expertise" as being a "hallmark" of arbitration; the Court refers both to arbitrator expertise as well as expert opinion testimony, "arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." 473 US at 633. Antitrust and competition disputes are expert driven as the jurisprudence in major antitrust regimes throughout the world has trended to be grounded in solid economics.[fn] In the United States, see US v ATT, et al, op cit. fn. 4; Ohio v American Express, 585 US ___; 138 S. Ct. 2274 (2018).[/fn] The IBA Rules again have detailed and well thought out procedures in Articles 5 and 6 of the Rules.

I have found after years of dealing with competition/economic experts in court, in the agencies in the US and the EC, and in arbitration, that the very "adaptability" which the Supreme Court considers also to be the "hallmark" of arbitration, allows for a better avenue to truth than the courts provide and, therefore, we hope, justice. Messrs. Veeder and Stanley refer to this as "procedural and evidential flexibility."[fn] See Veeder and Stanley, op cit. fn. 8, ch.3 at p. 106.[/fn] The time honored method in many juridical systems of cross examination alone by advocates just may not be the best way of testing economic opinions regarding a definition of a relevant market, has there been more competition over time, has new entry occurred or can it occur in spite of not having occurred, and has there been a prices increase and why not, the list goes on. As noted by the above esteemed barristers, "[i]t is certainly not self-evident that anything resembling full-scale 'cross-examination' of the experts by counsel is likely to be productive."[fn] Id.[/fn]

While I am not certain of the benefits of tribunal-appointed experts, as contemplated by Article 6 of the IBA Rules, I completely agree that simple or rigorous cross examination of party appointed economic experts alone is wasting the very tools of flexibility that arbitration offers. Therefore I have used and have

found very beneficial to the tribunals of which I have been a part, a form of witness conferencing with experts as the most robust method to arrive a comfortable resolution, and with any luck, wisdom and truth. I have used this with experts after their testimony and cross examination to pin point them down on point A, then asking the opposing expert her views on that point, then moving to Point B. I have also had simultaneous back and forths as well, just that the tribunal needs tightly to control this process, some with counsel participating, some after the witness' testimony, with the tribunal only questioning. I have used this most recently with opposing experts on foreign competition legal regimes. Of course, "hot tubbing," an in vogue procedure, also puts to use the flexibility of arbitration and this is contemplated by the IBA Rules as well in Article 5.4. These procedures and other creative ways at approaching economic expert testimony, of course, should be established in advance at an appropriate case management conference.

In the US, dispositive motions (summary judgment motion practice) play a critical part in the development of the antitrust law, mainly as a result of several Supreme Court antitrust decisions, including one a year after Mitsubishi, Matsushita Elec v Zenith Radio, 475 US 574. (1986) (a plaintiff at the dispositive motion stage "must show that the inference of illegal conspiracy is plausible if there is a competing explanation) and, more recently, Bell v Twombley, 550 US 544 (2007), (a plaintiff at the pleading stage must allege facts showing allegations of illegal conspiracy are plausible not merely conceivable). And today in arbitration practice, dispositive motion practice has become an important topic in light of the concern for expedition and expense and many institutional rules have begun to adopt these procedures.[fn] See, e.g., Article 39 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; Rule 29 of the SIAC (Singapore) Rules; Rule 33 of the AAA Commercial Rules.[/fn]

In Mitsubishi, Justice Blackmun noted that "[b]y agreeing to arbitrate a statutory claim, a party … trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 473 US at 628. There is no sound reason why the new interest in this summary process in arbitration and the judicial trend in the Supreme Court in competition cases cannot meld together such that more institutions can come on board, especially in these

complex disputes. For one, Justice Souter noted in Twombley, that a policy behind the decision is to avoid the potentially enormous discovery expense absent a solid plausible claim for violation. 550 US at 558-60. Moreover, dispositive motion practice plays a much more benign or intrusive role in arbitration as the same fact finder, the tribunal, will resolve the case—with or without a plenary evidentiary hearing; in the US at least, a summary judgment takes the decision process away from the jury.

We see a convergence of policies when considering dispositive motions in complex arbitrations, such as competition cases. At one time arbitration, antitrust, dispositive motions, needed discovery, complex disputes were words not used in the same paragraph. These cases have traditionally been heavy document oriented and involved massive discovery, and for many years dispositive motions were discouraged because "the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v CBS, 368 US 464, 473 (1962). Then in 80s, the courts became chary of simply green lighting expensive antitrust claims with no plausible basis and at the same time, with the groundswell of arbitration, Mitsubishi asked "why not" bring simplicity, informality, and expedition to these same disputes? As the penumbra of Mitsubishi has developed, scholars and institutions have advanced the idea of achieving the policy of Mitsubishi through devices as dispositive motions. To be sure, the case must be a correct one for a dispositive motion, and the tribunal must keep in mind Article V (I) (B) of the New York Convention ensuring procedural fairness (a right to be heard) in the arbitration.[fn] Gary Born's treatise is particularly helpful on this score. Op cit. fn. 10 at pp. 3492-541.[/fn] A dispositive motion, when used properly, can potentially reduce the time and expense in a case, which is consistent with the goals of arbitration.[fn] This writer first wrote an article on dispositive motion in competition arbitrations about a decade ago (pre-Twombley), 24 J. Int. Arb. 2 (Kluwer 2007), Certain Procedural Issues in Arbitrating Competition Cases, (dispositive motion discussion at pp. 201-209), (with Kurkela, Liebscher, and Sommer).[/fn]

Mitsubishi was a landmark decision in the area of arbitration, and especially complex arbitration. One can hope that our judges, arbitral institutions, scholars,

and policy makers continue to push the envelope and walk through the door that it has opened.