

On Arbitrating Antitrust/Competition Disputes (I)

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Richard Levin (Richard Levin Arbitration)

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This note will first reflect back thirty three years on the genesis of arbitration and competition matters and the Mitsubishi case, and then, in Part 2 below, I will touch on some practical issues that frequently will arise in a competition case today and how Mitsubishi is still influencing with vigor. As the reader will see, that organic decision continues to be of great significance in the handling of complex arbitrations, especially those dealing with antitrust or competition issues.

In Mitsubishi Motors v Soler, 473 US 614 (1985), the US led the worldwide migration to the arbitrability of competition disputes. Up till that time, most, in not all, jurisdictions around the globe considered these matters strictly for the courts. The Supreme Court in Mitsubishi began by noting the “healthy regard for the federal policy favoring arbitration” as well as, in respect to international matters, the growth of American business and trade will not be encouraged if “we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.” 473 US at 629. In holding antitrust claims arbitrable (claims “encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction”), the Court (per Justice Blackmun) observed with remarkable prescience in 1985 “[t]he controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested.” 473 US at 638. Thus, the Supreme Court was willing to embrace this “experiment” and courts will have to “shake off” any hostilities to arbitration and essentially get with international notions of progress in trade and commerce.

In the commercial area, although there is always room to improve, we have certainly seen since 1985 a robust development for increased efficient disposition of these claims in arbitration, including antitrust/competition claims as will be discussed. Also, at the time of Mitsubishi, antitrust/competition advocates were concerned about ceding private enforcement authority to arbitrators, while the arbitration bar, by virtue of language in the opinion allowing courts to have a “second look,” was unsure just what the case would mean to the very cornerstone of arbitration, party autonomy in deciding how they want their disputes resolved. More on that below as well.

Since that seminal case, cases around the world have followed suit if not extended Mitsubishi, most

notably Eco Swiss China Time v Benetton Int'l [fn] Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.) [fn] in the EU. Furthermore, Mitsubishi has been unremarkably construed to cover US domestic as well as international disputes. [fn] ABA Antitrust Law Developments (8th ed. 2017), p. 813 [fn] Now, in looking back more than thirty years later, Mitsubishi, in addition to its landmark ruling on arbitrability, strikes me on fresh reread as making certain corollary points which are of significant importance to the arbitration and competition law practitioner today.

The first observation on reflection is the discussion regarding the concern that antitrust cases are too complex to be left in the hands of arbitrators. The cases “require sophisticated legal and economic analysis, and thus are alleged to be ‘ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity.’” 473 US at 632. The Court’s dismissal of this concern was powerful. Precisely because these cases can be so complex is reason to favor arbitrability as “it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.” 473 US at 633. Thus, we see today many arbitral institutions have adapted to complex cases in their rules and the push for expedition in spite of complexity, as well as arbitrator selection of individuals who are comfortable if not expert in the competition arena for example. Antitrust cases many times are economic theory driven and most institutional rules as well as soft law rules such as the IBA Rules on Taking of Evidence in International Arbitration (“IBA Rules”) allow for creative and liberal use of expert testimony in the proceeding. This was recognized by the Court as well as the reference to a kind of “anyway” the cases in arbitration will most likely be vertical issues (subject to an arbitration agreement) and not horizontal price fixing cartel cases, the “monstrous proceedings that have given antitrust litigation an image of intractability.” 473 US at 633. [fn] Horizontal price fixing cases have since been held to be arbitrable disputes. See, e.g. JLM v Stolt-Nielsen, 387 F. 3d 163 (2d Cir 2004). [fn] It was arbitration’s “adaptability” and “access to expertise” that swayed the Court on the over-complexity argument.

The second point that strikes me on a Mitsubishi reread are the concerns raised by the Soler party against arbitration that the private treble damage procedure is too important to the business fabric to be thus relegated and, furthermore, the arbitration process cannot be counted on enforce competition policy with arbitrators, many times foreign and many times chosen from the business community.” Just as just as ‘issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community – particularly those from a foreign community that has had no experience with or exposure to our law and values.’” 473 US at 632. The Court had no problem dismissing these concerns, noting what has been true today, through the party and institutional appointment process, the tribunals have for the most part remained impartial and competent, and have had no special obstacles interpreting foreign law if needed, just as a judicial body would do under Fed R Civ P 44.1.

As to the importance of the private treble damage remedy, [fn] Of course government enforcement (eg criminal enforcement and merger enforcement) would not be arbitrable. On the European front, there has been discussion of arbitration of behavioral remedies in merger cases, but this has not really taken hold. See L.G. Radicati, Arbitration in E.C. Merger Control: Old Wine in a New Bottle, *European Journal of Business Law* 2007. We have seen recently in the US the use of arbitration

proposed by parties seeking government approval in a merger case (ATT and Time Warner). US v ATT et al. (at pages 41, 149 fn. 51).^[fn] the Court as well found no impediment in allowing a litigant to vindicate its full competition grievance through the arbitration process. The private right of action statute.^[fn] Section 4 of the Clayton Act, 15 USC sec 15.^[fn] will remain just as viable in arbitration as in judicial litigation and thus as “the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies,” 473 US at 636. “The importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court.” 473 US at 635.

Likely the part of Mitsubishi that has engendered the most discussion from scholars and counsel has been the important reference in that opinion to the role of the national courts. The Court stated: [h]aving 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 or enforcement of the award would be contrary to the public policy of that country.” 473 US at 638. This is the language that spawned the so-called “second look” doctrine although the Supreme Court does not use that phrase. As well, the ECJ affirmed in Eco Swiss that the national courts in the EU should grant annulment of any award where “its domestic rules of procedure require it ... for failure to observe national rules of public policy.

Having the benefit of thirty three years of hindsight, if the look means a stare vs a glance, we should probably quietly turn the lights out on the “second look” doctrine as there really is no proper “second look,” the Supreme Court did not mean for there to be a proper “second look,” and we do nothing to further the laudable goals of competition policy or arbitration policy to keep that doctrine breathing. The doctrine could have very well originated at a time in the 80’s when there was perhaps less confidence in the process of international and even domestic arbitration (recall it had not been “tested”), and you can see this in the strong Mitsubishi dissent of Justice Stevens, an eminent jurist to be sure, joined by Justices Brennan and Marshall. 473 US at 665. But I do not think the majority was reticent to the “experiment” when stating that “national courts will need to “shake off the old judicial hostility to arbitration.” 473 US at 638.

There is no issue that in most countries competition law forms an integral part of a state’s public policy, its *ordre publique* that defines its core values to the rule of law. As adherence to a state’s public policy is at the heart of the New York Convention dealing with enforcement of arbitral awards, the national court at the award-enforcement stage has the opportunity to “look” at the award and determine if it comports with the state’s public policy. NY Convention V (2) (b). Furthermore, in meeting the expectations of the parties, the Tribunal should do its best to issue an enforceable award, which goal is embodied in some institutional rules, such as Article 41 of the ICC Rules. Thus, the Tribunal must consider the different competition regimes which touch the controversy; ie in jurisdictions where the award will be enforced and its public policy.^[fn] Professor Radicati has written well on “which competition law.” *Arbitration and Competition Law: The Position of the Courts and Arbitrators*, 27 *LCIA Arbitration International* 1 at page 19 (2011); Professor Mayer stated in 1986 that even though arbitrators “are neither guardians of the public order nor invested by the State with the mission of applying its mandatory rules,” they should “pay heed” to the “future” of the award and thus apply all mandatory rules of law to develop an award that can be enforced. Pierre Mayer,

It comes down to what kind of “look” does the enforcement court engage? I don’t have the space allotment to discuss this in detail, only to say Professor Radicati has well laid out the “maximalist” and “minimalist” approaches of scholars and the national courts in the article cited in footnote 7.[fn] The reader is also referred to the thorough compendium on this general subject put together by G Blanke and P Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer, 2010. The chapters by A Mourre, L Radicati, as well as this writer, all very much state the law has adopted and should adopt the minimalist standard of review of awards. See Chapters 1, 22, and 39.[/fn] Moreover, Justice Blackmun for the Court was quite clear in stating that this “look” is “minimal”: “[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.” 473 US at 638.

Following that, one of the most respected appellate judges Frank Easterbrook on the US Court of Appeals for the 7th Circuit noted in Baxter Int’l v Abbott Laboratories, 315 F 3d 829 (7th Cir.2003), the very minimal review of the national courts if the arbitration process is going to work or be given a chance to work, as implied strongly by Mitsubishi. “Legal errors are not among the grounds that the Convention gives for refusing to enforce international awards” Judge Easterbrook noted and “Mitsubishi did not contemplate that, once arbitration was over, the federal courts would throw the result in the waste basket and litigate the antitrust issues anew. That would just be another way of saying that antitrust matters are not arbitrable.” 315 F 3d at 832. And to the same effect are cases across the Atlantic, perhaps the most notable being Thales v Euromissile[fn] Cour d’appel de Paris, 1^{re} Chambre, section C, 18 Novembre 2004 (n° 2002/19606, SA Thalès Air Défense c/ GIE Euromissile et EADS[/fn] in the Paris Court of Appeal in 2004, where the court refused to consider a competition law infringement allegedly that “creve les yeux,” but was not even examined for better or for worse by the “yeux” of the arbitrators. The court followed Eco Swiss and French procedural rules and refused to set aside the award.[fn] See also Gary Born, *International Commercial Arbitration* (2d ed.2014, Kluwer) at p.3322 where he notes that “[p]ublic policy has generally been invoked only in cases of clear violations of fundamental, mandatory legal rules, not in cases of judicial disagreement with a tribunal’s substantive decisions or procedural rulings.”[/fn]