Kluwer Arbitration Blog

Conferencing Economic Experts: Streamlining the Process in Arbitration of Competition Disputes

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The intersection of competition law and arbitration has been around for thirty-five (35) years. Competition disputes are likely to be seen more frequently in arbitration today, given its flexibility, speed and cost savings potential. Notably, the recent and extraordinary US government antitrust suit in the Novelis merger highlighted just that point, as the parties agreed to arbitrate a central issue in the case—the relevant market in which the merger will be judged to be anticompetitive or not. After prevailing on the issue, Assistant Attorney General Delrahim noted**:** "This first-of-its-kind arbitration has allowed us to resolve the dispositive issue in this case efficiently, saving taxpayer and private resources, while providing critical time-certainty".

Still, up to now, most competition arbitrations are private disputes, obviously with an arbitration agreement such as a license or joint venture agreement. These disputes, like antitrust cases in the national courts, many times hinge on economic testimony of expert witnesses. I consider that these disputes can actually be more efficiently resolved in arbitration, where the tribunal has flexible devices at its disposal such as witness conferencing of competing expert economists. I focus in this post on expert witness conferencing and explain that complex competition case can many times be simplified, decided quicker and with less expense in arbitration because of that device.

Witness conferencing: background and policy developments

Witness conferencing is a process for taking evidence where two or more witnesses give evidence concurrently, essentially together at the same time. The procedure is especially useful in the taking of expert testimony, which many times is basic and critical in antitrust/competition or IP related cases as those matters frequently will be grounded in economics (or engineering).

In its landmark case on arbitration, *Mitsubishi v Soler*, the US Supreme Court stated that "access to expertise are hallmarks of arbitration," and "it is often a judgment that streamlined proceedings and expeditious results will best serve [the parties'] needs…; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [the parties] mutually to forgo access to judicial remedies." 473 US 614, 634 (1985). The policy of *Mitsubishi* is to encourage creativity and flexibility to resolve ("streamline") complex disputes by arbitration and this would include the area of expert testimony. Expert witness conferencing carries out this policy cleverly and effectively allows the arbitrator and parties to create a bespoke process to test

competing expert theories, the essence in many complex arbitrations, such as competition related disputes.

Witness conferencing, of course, departs from the traditional sequential pattern of testimony, usually the party with the burden of proof going first, with direct testimony, then the witness is cross examined, and then the opposing party answering with direct and then cross examination. Expert economic testimony in complex arbitrations, such as seen in many competition/antitrust disputes, is simply fundamental and critical to shed light on and prove or disprove the difficult issues such as those relating to relevant market, the nature of entry barriers, competitive pricing, two sided markets, efficiencies, true integrations, fair licensing practices etc. What *Mitsubishi* teaches is that the arbitrator and parties' tool kit to best offer, take and understand this difficult evidence has no tight perimeter; the arbitrator and parties can be creative to devise efficient procedures and methods to streamline and simplify this testimony, unlike the counterpart procedure in the national judiciaries which are normally bound by strict rule of procedure.

Witness conferencing might just be a most handy instrument for the parties and arbitrator to get to the "truth" faster and cheaper when it comes to complex expert economic testimony. Other procedures, such as hot tubbing of experts, or "teaching sessions" by experts are also in their tool kit and are worthy to consider at the right time for the right case, and indeed the two procedures just mentioned in some respects overlap with witness conferencing. All the procedures of course must be with everyone's agreement and are best developed at the time of an appropriate case management conference and embodied in a procedural order.

The Chartered Institute of Arbitrators ("CIArb") has, in fact, developed its own Guidelines for Witness Conferencing in International Arbitration. While the Guidelines have been discussed in detail in a previous blog post, it is worth pointing out certain aspects that bear on their use in competition disputes involving economists.

In the Preamble, the Guidelines have succinctly stated the advantages to this method of taking evidence:

> "First, a conference can be a more effective means of receiving evidence than consecutive examination of witnesses by parties' counsel. The side-by-side presentation of evidence can make it easier to compare witnesses' different views on an issue, and for the witnesses to challenge each other's views with direct responses or rebuttals. Second, the quality of evidence may be improved. For example, expert witnesses may be less willing to make technically incorrect assertions in front of a peer who can supply an immediate rebuttal. Third, the process can promote efficiency at an evidentiary hearing, as the tribunal can hear evidence from all the witnesses on the issues at once, rather than at different stages of a hearing as the parties present their cases."

The Guidelines, in fact, note that the national courts in the UK, Australia, and Singapore have used witness conferencing in some form, so it is not purely seen in arbitration alone, although that seems to be where it is a more robust tool, given arbitration's informality and flexibility. And in keeping with that flexibility of arbitration, the Guidelines' express objective is to take advantage of the "diversity of approaches that can be adopted without seeking to restrict the ability and imagination

of tribunals and parties to shape a conference most suited to any given dispute." They, in fact, comprise a practical "Checklist" of points to consider if a witness conference is the best procedure to use, "Standard Directions" of matters for consideration in a procedural order for a witness conference, and "Specific Directions" which are procedural frameworks for witness conferences led by either (a) the tribunal; (b) the witnesses; or (c) counsel.

Witness conferencing: the practical perspective

In practice, as arbitrator in competition related arbitrations, I have used witness conferencing in connection with the provision of expert economic testimony. Expert testimony is perhaps, as the CIArb Guidelines refer, the most paradigmatic use of the witness conference procedure to test that opinion testimony, e.g. Guidelines, p. 26. This is so for many reasons, including that witnesses providing expert opinions may or should be more objective and have less of a hostile bias to the counterpart on the other side; thus, the procedure (via shoulder to shoulder comparison) is more likely to develop smoothly with fewer histrionics. Indeed, in some instances the opposing expert witnesses come together on certain points when giving testimony concurrently ("yes, I happen to agree") and most of the times, their differences will be pronounced and not obfuscated by the close in time "side by side" comparison. To my mind, the more complex the issue to be resolved, the greater the benefit from the witness conference and the contemporaneous comparison of testimony.[1)]

And, in fact, there is no reason why the party appointed experts might not in advance of the witness conference hold a "meet and confer" between themselves and attempt on their own to reach agreement on certain issues in their expert reports and then subsequently record the areas of disagreement. This form of "hot tubbing" with a written joint report is recognized by the IBA Rules on Taking Evidence in International Arbitration and would work nicely in conjunction with a follow-on witness conference. (See the "Schedule" contemplated by Guidelines to serve as an agenda for the witness conference, pp. 46-7).

The format I have followed has always involved a mixture of counsel examination as well as tribunal questioning, usually counsel's examination first and then the arbitrator's, and to be worked out if counsel can then pose further questions after. Also, I found the process works easier, indeed simpler, to take up each economic issue seriatim. Given the complexity of the economic issues, one seeks the easiest process to clarify and simplify the resolution of the disputed testimony.

Taking only one example in the vast area of competition law, in many competition disputes in arbitration in the major legal regimes, including the US and EU, a central issue can be whether the challenged agreement in question likely harms competition by increasing the ability or incentive of one party to that agreement to profitably raise price for a significant period of time above or reduce output, quality, service, or innovation below what likely would prevail in the absence of that agreement. That is, whether the conduct in question would confer market or monopoly power on that one party in a relevant market (in both product and geography). Thus, the definition of a relevant market becomes a focal issue in the arbitration, which is an issue likely best spoken by an economic expert. Once you have that definition, then you can compute the challenged party's share of that market to test whether there is market or monopoly power.

The proof of a relevant product market in a competition dispute can involve several key and

complex touchstones: including defining the outer perimeter of the product market through (a) analysis of whether customers will switch in response to a small but significant and nontransitory increase in price ["SSNIP"] by a hypothetical monopolist, or (b) a related "critical loss analysis," or (c) cross elasticities of supply (or demand), or (d) reasonable interchangeability of use, or (e) such practical indicia such as unique production facilities and distinct customers. Many other economic issues can bear on the issue such as supply side substitution and whether there are barriers to entry, where if low or insignificant, entry of a new firm into that product market could defeat or make unprofitable a hypothetical increase in price.

These difficult issues, as well as market share calculations through such methods as the Herfindahl-Hirschman Index (HHI) are most frequently provided by economists in competition disputes. A good method of testing the competing and complex economic testimony is to have the experts meet and indicate the areas of agreement and then for the points of disagreement, set the matter down for witness conferencing taking each point of disagreement one at a time with each expert, using the Guidelines' "Standard Directions" as a starting point for the procedural order governing the conference.

Final remarks

What is most remarkable is that this innovative process of simplifying one of the more complex areas of litigation is not seen, or even allowed in most national courts, other than those mentioned above. It is not a stretch to say arbitration may be a more robust forum to decide private (non-governmental) competition matters, especially those with some complexity.[2)]

Arbitration has employed the innovation and flexibility encouraged by cases like *Mitsubishi* with such procedures like witness conferencing which enable the parties to find a resolution faster, easier, and with less expense than the national courts. Our late colleague Johnny Veeder called this "procedural and evidential flexibility" and stated in 2010 "[T]he way in which expert evidence is presented and tested [in competition disputes] may very well need to be modified; it is certainly not self-evident that anything resembling full-scale 'cross-examination' of the experts by counsel is likely to be productive."[3)]

References

?1 A somewhat similar analogue is used on occasion by the US antitrust agencies (and in the EU and perhaps elsewhere) in an investigated transaction or merger when the enforcement agencies and the parties agree to discuss the matter; many times this meeting leads to the competing economists talking through their positions and can be a successful process to avoid a contested matter or at least identify the precise issues in dispute.

?2 R Levin, On Arbitration of Competition/Antitrust Disputes, 73 Dispute Resolution Journal 39, 56 (2018). As noted above, recently, the US Department of Justice and a party, in a remarkable development, agreed to submit a single issue to arbitration (the definition of the relevant product market) to resolve an alleged anticompetitive merger dispute.

?3 VV Veeder and P Stanley, in G Blanke and P Landolt (eds), *EU and US Antitrust Arbitration, A Handbook for Practitioners*, Kluwer, 2010, p. 106.

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