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Working Party No. 3 on Co-operation and Enforcement

HEARING ON ARBITRATION AND COMPETITION

-- United States --

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1. This note discusses the arbitrability of private federal antitrust claims in the United States and the approach of the Antitrust Division of the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (collectively, “the U.S. antitrust agencies”) towards use of arbitration and mediation in their antitrust enforcement.

1. Arbitrability of private federal antitrust claims

1.1 Introduction

2. The general rule, first articulated by the Supreme Court in 1985 in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, is that U.S. courts enforce agreements to arbitrate private federal antitrust claims. A leading treatise on U.S. antitrust law describes arbitration as a “significant way to improve the administration of antitrust litigation,” with “considerable promise for simplifying certain types of antitrust disputes, particularly those between sellers and customers, or between manufacturers and their dealers, or between franchisors and their franchisees.”¹

1.2 Non-arbitrability of private antitrust claims: the pre-Mitsubishi era

3. Prior to the Supreme Court’s 1985 *Mitsubishi* decision,² U.S. courts routinely held that federal antitrust claims were not subject to arbitration. This was the case despite the federal policy of favoring arbitration in private legal claims, first set out 85 years ago in the Federal Arbitration Act of 1925 (FAA).³ One case in particular, *American Safety Equipment Corp. v. J.P. Maguire & Co.*,⁴ distilled the argument against arbitrability to the fact that claims under the antitrust laws are not merely private matters. The decision held that “[a]ntitrust violations can affect hundreds of thousands – perhaps millions – of people and inflict staggering economic damage. ... We do not believe that Congress intended such claims to be resolved elsewhere than in the courts.” Additional reasons advanced by courts in favor of nonarbitrability included that: “private suits aid enforcement; contracts generating antitrust disputes are often contracts of adhesion;” antitrust litigation required sophistication rather than the speed and simplicity of arbitrations; and antitrust was too important to be left to private parties.⁵

1.3 Mitsubishi and arbitrability of private antitrust claims

4. The seminal *Mitsubishi* case involved an agreement between Mitsubishi, a Japanese car manufacturer, and a Puerto Rican car dealer for the supply of cars. The agreement stated it was “made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein,” and provided for arbitration in Japan of certain contract disputes arising under the agreement. Mitsubishi sued the dealer in U.S. district court in Puerto Rico, seeking an order compelling arbitration in Japan of alleged breaches of the agreement (*e.g.*, non-payment for vehicles and storage penalties). The dealer counterclaimed, alleging violations of, *inter alia*, the Sherman Act that included allocation of territories that unreasonably restricted the areas in which the dealer could sell. Mitsubishi then asked the court to compel arbitration of the antitrust counterclaims. The district court

¹ 2 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 311e1, at 214-15 (3d ed. 2007). For an overview of antitrust/arbitration issues in the United States, see *The Road Less Traveled: Arbitrating Antitrust Claims*, 19 *Antitrust* (Fall 2004) 5-36.

² 473 U.S. 614 (1985).

³ 9 U.S.C. §1 et seq.

⁴ 391 F.2d 821, 826-27 (2nd Cir. 1968)

⁵ Areeda & Hovenkamp, *supra* note 1, at 215.

ordered the parties to arbitrate the federal antitrust claim, but the court of appeals reversed this order, holding that the antitrust counterclaims were not arbitrable.⁶

5. The Supreme Court disagreed with the court of appeals and held that the claims were, in fact, arbitrable. The Court first described the broad federal statutory policy favoring arbitration agreements, and determined that an exception to the FAA was not justified. The Court expressed skepticism regarding each of the reasons cited in ¶2 above for not arbitrating antitrust claims. With respect to the argument that private antitrust suits are not merely a private matter but are part of a broader national policy to ensure “American democratic capitalism,” the Court noted that “[n]otwithstanding its important incidental policing function, the treble-damages cause of action ... seeks primarily to enable an injured competitor to gain compensation.”⁷ The Court did not agree that an arbitration clause is likely to be the result of unfair bargaining power, and noted that even if it were, the affected party could “attack directly the validity of the agreement to arbitrate.”⁸ The Court also rejected the argument about complexity of antitrust disputes.⁹ Finally, the Court rejected “the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes,” noting that the parties could choose “competent, conscientious, and impartial arbitrators.”¹⁰

6. *Mitsubishi’s* holding on the arbitrability of antitrust claims was restricted to international claims. Specifically, the Supreme Court explained that “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes [,] require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”¹¹ The Court noted that where, as in *Mitsubishi*, the parties agree to have an arbitral body decide certain claims, such as “those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.”¹² In such cases, “so long as the prospective litigant may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”¹³

⁶ The United States government filed an amicus brief in *Mitsubishi*, urging the Court to affirm the court of appeals’ decision that the antitrust claim was not subject to arbitration. The government argued that “the special public enforcement role Congress has assigned to private antitrust claims requires that such claims be regarded as nonarbitrable in both the domestic and international contexts.” *Mitsubishi*, Brief for the United States as Amicus Curiae, 1985 WL 669814, at 6. As explained herein, this position was rejected by the Court.

⁷ *Mitsubishi* at 635.

⁸ *Id.* at 632.

⁹ *Id.* at 633. In particular, the Court emphasized that: (1) courts accepted “an undertaking to arbitrate antitrust claims entered into after the dispute arises,” demonstrating that such claims are not inherently insusceptible to resolution by arbitration; (2) “the 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;” and, (3) “adaptability and access to expertise are hallmarks of arbitration.”

¹⁰ *Id.* at 634.

¹¹ *Id.* at 629.

¹² *Id.* at 636-37.

¹³ *Id.* at 637.

7. The Court noted that Mitsubishi had already conceded that the arbitrators would apply U.S. antitrust law to the antitrust counterclaims at hand, and that “in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, [it] would have little hesitation in condemning the agreement as against public policy.”¹⁴ Lower-level U.S. courts would, according to the Supreme Court, ensure at the award enforcement stage that “the legitimate interest in the enforcement of the antitrust laws ha[d] been addressed.” Although substantive review at that stage is “minimal,” “it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.”¹⁵

1.4 *Arbitration and private antitrust claims since Mitsubishi*

8. In the wake of *Mitsubishi*, U.S. courts extended the arbitrability of private antitrust claims to purely domestic cases.¹⁶ Although arbitrability of private antitrust claims is now firmly established in the U.S., issues continue to arise at the margins over the scope of enforceable arbitration agreements. As one treatise explains:

*To conclude that antitrust disputes are subject to arbitration agreements is not to say that every arbitration clause in a contract is sufficient to force an antitrust plaintiff to arbitrate. The arbitration clause must cover antitrust disputes; the relationship between the parties to the antitrust dispute must be such that the plaintiff can properly be bound by the contractual term; and the arbitration clause must not have terms in it that the court regards as unfair or inappropriate, particularly with regard to available remedies. These questions of arbitrability are generally questions of law. Nevertheless, the overall tendency of the courts has been to interpret the clauses so as to favor compulsory arbitration, even of antitrust disputes.*¹⁷

9. In *Simula, Inc. v. Autoliv, Inc.*, for example, the court required arbitration of an antitrust claim pursuant to a contract clause broadly requiring arbitration of “all disputes arising in connection with this Agreement,” because resolution of the antitrust claims required interpretation of the contract. In addition, the court noted that although the arbitrator might apply non-U.S. law, with relief that might differ from what a U.S. court could provide, the plaintiffs would receive adequate protection because the standard was whether “plaintiffs would be deprived of any reasonable recourse.”¹⁸

10. The arbitrability of claims concerning horizontal agreements was at issue in *Coors Brewing Co. v. Molson Breweries*.¹⁹ The United States Court of Appeals for the Tenth Circuit held that the arbitration clause in question covered only disputes arising out of the contract and not allegations that the defendant entered anticompetitive agreements with a third party not privy to the contract. According to a leading treatise, “*Coors* serves to limit *Mitsubishi* mainly to ‘vertical’ antitrust disputes, which typically involve only the parties to a contract, such as a manufacturer and a distributor, dealer, franchisee, retailer, or

¹⁴ *Id.*

¹⁵ *Id.* at 638. Subsequent to *Mitsubishi*, U.S. courts reviewing arbitral awards in private competition-related cases have engaged in minimal substantive review. *Baxter Intern., Inc. v. Abbott Laboratories*, 315 F.3d 829, 832 (7th Cir. 2003).

¹⁶ See generally cases assembled in 2 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 311e, at 214-24 (3d ed. 2007), and ABA Section of Antitrust Law, 1 *Antitrust Law Developments* 999-1002 (6th ed. 2007).

¹⁷ Areeda & Hovenkamp, *supra* n.1, at 217-18.

¹⁸ *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 723 (9th Cir. 1999).

¹⁹ 51 F.3d 1511 (10th Cir.), on remand, 889 F.Supp. 1394 (D. Colo. 1995).

customer. Once the dealer or equivalent firm challenges an antitrust restraint involving others – such as price-fixing or territorial division between the manufacturer and other sellers, then *Coors* apparently permits [a private antitrust] action against the plaintiff's own contracting opposite,²⁰ despite the arbitration clause. In contrast, in *JLM Indus., Inc. v. Stolt-Nielsen SA, Ltd.*,²¹ the court construed an arbitration agreement to include antitrust claims alleging a price-fixing conspiracy where the plaintiffs were seeking joint and several liability against their contracting counterpart, even though other conspirators were involved. The court rejected the proposition that horizontal price-fixing claims were not arbitrable, as well as an argument that the choice-of-law provision permitting application of UK law, said to be more hostile to the plaintiffs' claims, made the case nonarbitrable.²²

11. *Kristian v. Comcast Corp.* involved a different set of issues. In that case, the United States Court of Appeals for the First Circuit ordered arbitration of consumers' antitrust claims arising from cable television service agreements.²³ The court held that provisions of the agreements that might have denied statutory rights to treble damages, attorneys' fees and costs, and class arbitration, would have voided the arbitration requirement. A savings clause, however, provided that limits on remedies would not apply if applicable law prohibited such limits, and the court thus ordered arbitration on a class or consolidated basis, authorizing the arbitrator to grant treble damages and allowing the plaintiffs to recover attorneys' fees and costs.²⁴

12. Finally, a 2010 Supreme Court decision, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* interpreted the FAA in a private class action price-fixing case that followed a Department of Justice criminal investigation.²⁵ The parties had stipulated that they had not agreed to class arbitration in the standard contract between them. The Court held that "differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."²⁶ The Court thus reversed a Court of Appeals decision supporting the arbitrators' conclusion that the arbitration clause in the contract at issue allowed for class arbitration.²⁷

13. In summary, in the U.S., there is a federal statutory policy favoring arbitration of private legal disputes. Consistent with that policy, the law in the U.S. is that both domestic and international private

²⁰ Areeda & Hovenkamp, supra n.1, at 221-22.

²¹ 387 F.3d 163 (2d Cir. 2004).

²² *Id.* at 182.

²³ 446 F.3d 25 (1st Cir. 2006).

²⁴ The question of whether an arbitration agreement can bar class or consolidated actions also arose in *American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009), summarily remanded, 103 S.Ct. 2401 (May 3, 2010) (for reconsideration in light of *Stolt-Nielsen*), and in *Cotton Yarn Antitrust Litigation*, 505 F.3d 274 (4th Cir. 2006).

²⁵ 130 S.Ct. 1758 (2010).

²⁶ *Id.* at 1776.

²⁷ The Supreme Court continues to review issues concerning arbitrability under the FAA. In *AT&T Mobility LLC v. Concepcion*, Sup. Ct. 09-893, for example, the Court is currently considering in a private class action fraud case whether a state law definition of "unconscionability" with respect to a waiver of class actions in a proceeding under state law is preempted by the FAA. The Court of Appeals ruled that the waiver in the arbitration clause in the agreement between a telephone company and a customer was unconscionable and thus unenforceable under California law, and that the FAA did not preempt the state law. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

antitrust claims are arbitrable pursuant to the Federal Arbitration Act. The courts continue to explore issues surrounding the application of this general rule.

2. The antitrust agencies' use of arbitration and mediation in antitrust matters

2.1 Introduction

14. This section discusses the use of alternative dispute resolution (ADR) by the U.S. antitrust agencies. It describes federal statutory provisions authorizing the use of arbitration and other ADR proceedings. It then describes each agency's experience with ADR, including (1) court-ordered mediation in settling antitrust matters, and (2) the use of arbitration in the implementation of remedial provisions in the U.S. antitrust agencies' merger consent decrees.

15. The Administrative Dispute Resolution Act (ADRA)²⁸ broadly authorizes federal government agencies, including the DOJ and FTC, to use arbitration or other ADR proceedings with the consent of the parties. The statute also requires agencies to "consider not using" ADR in various circumstances.²⁹ According to the ADRA, an agency must consider whether an ADR proceeding is appropriate if a definitive or authoritative resolution of the matter is required for precedential value. Among other limitations, ADRA requires agencies to consider not using ADR in a matter that involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, if the ADR proceeding likely would not serve to develop a recommended policy for the agency. Of course, arbitration and other ADR proceedings serve to settle individual cases, but by nature tend not to develop enforcement policies or their underlying rationales. Finally, the ADRA cautions against using arbitration or ADR if a full public record of the proceeding is important. Detailed case records help distinguish one situation from another and explain inconsistent outcomes. These detailed case records also provide guidance to the legal and business community as to what the agency considers during its enforcement proceedings. Arbitration and ADR proceedings, however, are typically less formal than litigation and their records are typically less complete.

16. Although the DOJ and FTC are thus statutorily authorized to use arbitration or mediation in some circumstances, they have not directly used arbitration to resolve differences between them and the subjects of their antitrust enforcement proceedings. In some instances, however, courts have ordered the U.S. antitrust agencies and the parties to an enforcement action to attempt to resolve their differences through mediation. In addition, the U.S. antitrust agencies have, in several instances, included provisions in consent decrees or administrative enforcement orders requiring mediation or arbitration of potential commercial disputes that may arise between decree or order respondents and third parties in implementing the remedies.

2.2 DOJ experience

2.2.1 Court-ordered mediation

17. DOJ's best-known experience with court-ordered mediation in antitrust enforcement proceedings was in *U.S. v. Microsoft Corp.* In November 1999, the trial court, after entering its Findings of Fact but prior to its final judgment, ordered the parties (the United States, the 19 state government plaintiffs, and Microsoft) to engage in settlement negotiations, with Chief Judge Richard Posner of the U.S. Court of

²⁸ Codified at 5 U.S.C. §§ 571, et seq.

²⁹ 5 U.S.C. § 572(b).

Appeals for the Seventh Circuit as mediator.³⁰ In April 2000, Chief Judge Posner announced that although DOJ, the plaintiff states, and Microsoft had considered “almost twenty successive drafts of a possible consent decree” in a period of a little more than four months, the parties had not been able to reach agreement.³¹ The court subsequently entered judgment against Microsoft. That judgment was appealed and the court of appeals affirmed the judgment in part, reversed it in part, and remanded the case to the district court for further proceedings.³² On remand, the trial judge again ordered the parties into a period of intensive settlement and mediation discussions to attempt to reach an agreed resolution.³³ After the mediation, in November 2001, the DOJ, nine of the state plaintiffs, and Microsoft agreed on a Proposed Final Judgment, which was the basis for the Final Judgment eventually entered by the district court.³⁴

2.2.2 *Arbitration in consent decrees*

18. DOJ has included arbitration provisions related to the parties’ remedial obligations in half a dozen proposed antitrust consent decrees, and the courts have approved these provisions. These provisions have not involved the resolution of liability issues between DOJ and defendants, but rather commercial relationships between defendants and third parties with respect to the implementation of an agreed merger remedy.³⁵ These arbitration provisions have typically involved a remedial divestiture to a particular buyer or issues arising under supply agreements concerning quantities of critical inputs to be sold or their fair market value. Some such provisions protect the divesting party in situations where there may be a single suitable buyer, such that the market forces that operate in a typical price negotiation are absent, while in other instances such provisions ensure that the buyer receives the benefit of its bargain. These arbitration clauses generally have provided that in the event that the seller and acquirer cannot agree on the fair market price of divested assets or other assets sold pursuant to supply agreements, either person can elect to settle the issue through binding arbitration. The seller in that case would be required to enter a “reasonable arbitration agreement” acceptable to DOJ, and follow certain rules laid out in the consent decree.³⁶

³⁰ Order by Judge Thomas P. Jackson referring cases for voluntary mediation to Judge Richard A. Posner, Chief Judge of the U.S. Court of Appeals for the 7th Circuit (November 19, 1999), *U.S. v. Microsoft Corp.* (D.D.C., 1:98cv1232).

³¹ Statement by Judge Richard Posner, Termination of mediation efforts in Microsoft case (April 1, 2000), available at <http://www.techlawjournal.com/courts/dojvmsft2/20000401pos.htm>.

³² *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

³³ Order of Judge Colleen Kollar-Kotelly requiring the parties to engage in intensive settlement discussions commencing on September 27, 2001, and concluding on November 2, 2001 (September 28, 2001); Order of Judge Colleen Kollar-Kotelly appointing Eric D. Green of Boston University School of Law to serve as facilitator/mediator (October 12, 2001), *U.S. v. Microsoft* (D.D.C., 1:98cv1232).

³⁴ Neither of the Microsoft mediations occurred pursuant to the ADRA.

³⁵ See, e.g., *U.S. v. Cargill, Inc. and Continental Grain Co.*, final judgment dated June 30, 2000, available at <http://www.justice.gov/atr/cases/f6600/6628.htm>; *U.S. v. Morton Plant Health System, Inc. and Trustees of Mease Hospital, Inc.*, final judgment dated June 17, 1994, available at <http://www.justice.gov/atr/cases/f5000/5057.htm>; *U.S. v. Dow Chemical Co. and Ethyl Corp.*, final judgment dated August 12, 1987, available at <http://www.justice.gov/atr/cases/f3700/3722.htm>.

³⁶ For example, the arbitration provision in the consent decree in *United States v. Imetal, et al.*, Final Judgment dated May 25, 2000, available at <http://www.justice.gov/atr/cases/f223200/223278.htm>, provides as follows:

1. Any controversy to be settled by arbitration shall be submitted to the American Arbitration Association;
2. The arbitrator appointed shall be one acceptable to the United States in its sole discretion;

2.3 *FTC experience*

2.3.1 *Court-ordered mediation*

19. In the civil penalty litigation in *U.S. v. Boston Scientific Corporation* (“BSC”),³⁷ brought by DOJ in 2000 at the request of the FTC for violation of the FTC’s final divestiture order, the district court strongly urged the parties to attempt to resolve their dispute through mediation. FTC and DOJ attorneys met with BSC’s counsel and the mediator, but ultimately were unable to reach a settlement. Thereupon, following a trial, the court found that BSC had violated the FTC’s order, and imposed a \$7.04 million civil penalty. Mediation in *BSC* came about not because the FTC or DOJ thought the matter was a particularly good candidate for ADR, but because the court urged the parties to try to resolve their differences through mediation, and because the dispute was over the civil penalty amount, rather than over any other relief.

2.3.2 *Arbitration and mediation in FTC orders*

20. In its administrative enforcement orders, the FTC has not included provisions allowing ADR regarding possible violations of the *orders* themselves, for the reasons discussed earlier in ¶15. Moreover, the FTC has not regularly included provisions *requiring* arbitration of disputes between order respondents and third parties, because it prefers to let the parties determine for themselves how they want to resolve disputes. However, some FTC orders have required the party under order to engage in arbitration to settle commercial disputes³⁸ with third parties, usually where the latter requests it (that is, if the acquirer wishes to use arbitration to resolve a dispute arising in implementing the order, the ordered party may not decline). For example, in *In re Evanston Northwestern Healthcare and ENH Medical*,³⁹ the FTC Order mandated that, at the option of the person paying for hospital services, any disputes as to prices or terms would be resolved by mediation or, where the dispute cannot be solved by mediation, by a single arbitrator mutually agreed upon. In *In re America Online, Inc. and Time Warner, Inc.*⁴⁰ the FTC ordered that, at the option of third parties not affiliated with the merging parties, disputes in connection with compliance with any of the rates, terms, and conditions in the agreement ordered between the parties shall be submitted to binding arbitration; provided, *inter alia*, that the arbitrator shall have no authority to resolve issues concerning Respondents’ compliance with the FTC’s Order. In other words, the arbitrator’s authority did not extend over the FTC’s enforcement of its own final order in that matter. Finally, in *In re Exxon Corporation and*

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3. The United States shall provide its assistance to the arbitrator and may submit evidence;
 4. Rules and procedures shall be adopted to ensure that the controversy shall be completed within four months from the appointment of the arbitrator and any award made pursuant to any arbitration shall be final and binding on the parties to the arbitration.

See Competitive Impact Statement in *Imetal*, (May 24, 1999), available at <http://www.justice.gov/atr/cases/f2400/2483.pdf>, at 15-16.

³⁷ DOJ’s Complaint is available at <http://www.ftc.gov/os/2000/10/bsccmp.htm>. The court’s judgment is available at <http://www.ftc.gov/os/2003/03/bostonscientificord.pdf>.

³⁸ The contracts entered into under FTC orders typically provide the price terms and, accordingly, potential contract disputes would likely be over non-price issues such as volumes, delivery, etc.

³⁹ *In re Evanston Northwestern Healthcare and ENH Medical*, F.T.C. No. 9315 (April 24, 2008) (Final Order), ¶II.D, available at <http://www.ftc.gov/os/adjpro/d9315/080424finalorder.pdf>.

⁴⁰ *In re America Online, Inc. and Time Warner, Inc.*, F.T.C. No. C-3989 (April 17, 2001) (Decision and Order) ¶II.C.4, available at <http://www.ftc.gov/os/2001/04/aoltwdo.pdf>.

Mobil Corporation, the FTC ordered binding arbitration mechanisms to the extent the parties fail to agree on various commercial terms.⁴¹

⁴¹ In re Exxon Corporation and Mobil Corporation, F.T.C. No. C-3907 (November 30, 1999) (Agreement Containing Consent Orders) ¶¶ XIV.B.5, XV.A, and XV.C.2, *available at* <http://www.ftc.gov/os/1999/11/exxonmobilagr.pdf>.