

Enhancing Antitrust Enforcement through International Arbitration

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Overview of Presentation (1 of 2)

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1. Prevalence of international arbitration in dispute settlement

PwC/Queen Mary College 2008 Survey

- Conducted over a six-month period, this study summarises data from 82 questionnaires and 47 interviews. Major corporations that are users of arbitration services were surveyed.
 - International arbitration remains companies' preferred dispute resolution mechanism for cross-border disputes.
 - certain industries, such as insurance, energy, oil and gas and shipping, use international arbitration as a default resolution mechanism.

Prevalence of international arbitration in dispute settlement (2 of 3)

ICC Statistical Report 2009, page 5

- A record 817 new cases were filed with the ICC Court during 2009, bringing the number of ongoing cases at the end of the year to 1,461, which represents an increase of almost 50% in ten years.

Prevalence of international arbitration in dispute settlement (3 of 3)

ICC Statistical Report 2009, page 14

- Disputes from all sectors of the economy were referred to ICC arbitration in 2009. Construction and engineering disputes continued to represent the lion's share, accounting for some 15% of cases. Energy disputes were the next most frequent, closely followed by disputes from the finance and insurance sector (each representing almost 10% of cases). Other prominent sectors included minerals and metallurgy (8.4% of cases), telecommunications and information technology (7.7% of cases), transport (6% of cases), general trade and distribution (5.6% of cases) and industrial equipment (5.3% of cases).

2. Role of international arbitration in antitrust enforcement

- International arbitration is by definition an exclusive forum
- It excludes all courts of all states except regarding provisional measures where there is generally shared jurisdiction

Example: 2006 UNCITRAL Model Arbitration Law

Article 9. It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

- Where there is arbitration the parties therefore have no recourse to state courts

Role of international arbitration in antitrust enforcement (2 of 6)

- Limited review of arbitration awards
- Convention almost universally observed that only courts of place of arbitration have jurisdiction to hear challenges to the award

2006 UNCITRAL Model Arbitration Law

Art. 1(2). The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Role of international arbitration in antitrust enforcement (3 of 6)

- Generally found that there is no appeal on the law
- Generally found that grounds of appeal are few and narrow
 - Art. 34 of the Model Arbitration Law exhaustively designates 7 of the 8 New York Convention grounds (see below) as bases to set aside the award

Role of international arbitration in antitrust enforcement (4 of 6)

- Exhaustive and limited grounds to refuse enforcement of an arbitration award under the New York Convention on recognition and enforcement of arbitration awards widely accepted around the world (currently 145 parties)
 - Most important regarding antitrust is Art. V(2)(b): “the recognition or the enforcement would be contrary to the public policy of [the enforcement state]”.

Role of international arbitration in antitrust enforcement (5 of 6)

- Modernisation of EU competition law does not mention international arbitration
- In EU and in US, obligations on arbitrators only indirect, through obligations on EU enforcing courts
- For EU, leading case *Eco Swiss v. Benetton*, Case C-126/97, [1999] ECR I-03055, this flows from the fact that that case was on a setting aside action [before the courts of the Netherlands]
- *Mitsubishi v. Soler* 473 U.S. 614 (1985) per Blackmun J. for the Court at 638:
 - « 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 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. »

Role of international arbitration in antitrust enforcement (6 of 6)

Private enforcement of antitrust law is not an absolute
but is merely incidental to private interests

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 at 429:

« It nevertheless is true that the treble damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, *is designed primarily as a remedy.*» (emphasis supplied)

Mitsubishi v. Soler, at 636:

« And, of course, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit, [...] and the private antitrust plaintiff needs no executive or judicial approval before settling one. »

- *Baxter v. Abbott Laboratories*, 315 F.3d 829 (7th Cir.) per Easterbrook J. at *10 quoting the USSC in *Mitsubishi*:

« The arbitral tribunal in this case "took cognizance of the antitrust claims and actually decided them." Ensuring this is as far as our review legitimately goes.

3. Weaknesses of international arbitration in antitrust enforcement

- Arbitrators are independent of states – unlike judges, not “agents of states”:
- *Mitsubishi v. Soler*, at 636:
 - « To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. »

Weaknesses of international arbitration in antitrust enforcement (2 of 4)

- Arbitration values resolutely anti-state intervention:

Concern expressed by the plaintiff in *Mitsubishi v. Soler*, but rejected by the USSC at 634:

« [...] we also reject 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. »

Weaknesses of international arbitration in antitrust enforcement (3 of 4)

- Arbitration often represents a diluted system of fact finding and legal ascertainment
 - *Mitsubishi v. Soler*, at 628:
 - « By 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*. » (emphasis supplied)
 - Unlike judges, arbitrators have no “imperium”, i.e., coercive powers
 - No contempt of court for not obeying evidence-gathering orders of arbitrators

Weaknesses of international arbitration in antitrust enforcement (4 of 4)

- Arbitration is personal to the parties to the arbitration clause and non-parties cannot generally be joined
 - Often the whole antitrust matrix cannot be dealt with, i.e., joint and several actions against co-conspirators, class action suits

4. Strengths of international arbitration in antitrust enforcement

- *Mitsubishi v. Soler*, at 634:
- « International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly. »
- Potent international enforceability under the New York Convention presently not available for court judgments
 - Hague Convention of 30 June 2005 on Choice of Court Agreements – only ratified by Mexico but signed by US and EU. Not yet in force.

5. Policy enhancement of antitrust enforcement through arbitration

- Antitrust systems need to be clear about what they expect of international arbitration in enforcing antitrust
 - US law appears only to require that antitrust be applied by arbitrators if a party invokes it
 - EU law could not be more uncertain
- Is antitrust to be applied as mandatory laws?
- Is all of antitrust to be applied as mandatory laws or just parts (i.e. regarding hard-core violations)?

Policy enhancement of antitrust enforcement through arbitration (2 of 6)

- Need to match requirements upon arbitration with legal consequences
 - Revision of dominant thinking that public policy violations are a narrower category than violations of mandatory norms
 - Setting aside and enforcement courts are generally unconcerned with an arbitral tribunal's failure to apply foreign antitrust law
 - Consider creation of declaratory jurisdiction for courts to declare that an award is contrary to their antitrust law

Policy enhancement of antitrust enforcement through arbitration (3 of 6)

- Incentives upon private actors to invoke antitrust in international arbitration
- Effective whistleblower/leniency policies to erode solidarity between cartelists

Policy enhancement of antitrust enforcement through arbitration (4 of 6)

- Simplified procedures whereby arbitrators and parties can obtain assistance of courts
 - Recognise public policy/enforcement of rights exception to confidentiality of arbitration
- Expanded assistance from courts, in particular in coercing non-parties to give evidence in arbitration
- Preparedness of antitrust agencies to cooperate in international arbitration

Policy enhancement of antitrust enforcement through arbitration (5 of 6)

- Facilitation of antitrust claims
- Be clear it applies to arbitral tribunals and not just before courts
 - e.g., Section 31(2) of the UK Competition Appeal Tribunal Rules extending time limitation only applies to this court
- Specific legal bases of antitrust claims (removing fault requirements)
- Burden of proof
- Time limitation
- Presumptions in follow-on cases
- Super-compensatory damages
 - Recognition that super-compensatory damages are not contrary to public policy

Policy enhancement of antitrust enforcement through arbitration (6 of 6)

Education about the goals of antitrust law
and their vital importance

6. Party enhancement of antitrust enforcement through arbitration

- Choice of place of arbitration
- Choice of arbitrators
- Choice of counsel
- Avoid accelerated procedures
- Vigorous use of courts' (28 USC 1782 discovery for example) and antitrust agencies' assistance

Conclusions

- International arbitration is often the only means open to parties privately to enforce their antitrust rights
- A number of features of international arbitration condition the attenuated application of antitrust law but a few enhance it
- Antitrust systems need to examine ways to increase incentives for parties to invoke antitrust rights in arbitration
- Parties themselves can favour the effective enforcement of antitrust in arbitration