A Coda to a Suggested Approach for Arbitrators in Complex Competition/Antitrust Disputes

Richard C. Levin*

Arbitration; Competition; Private enforcement

Abstract

This short sequel to the previous article in this journal in 2023 expands on two topics which the author received as comments to the original piece. One relates to expert testimony and creative approaches an arbitration tribunal can use, and the other topic discusses very recent developments that have taken place relating to judicial review of arbitration awards in the competition space.

Introduction

This "coda" follows the article "A Suggested Approach for Arbitrators in Complex Competition/Antitrust Disputes", which was recently published in this journal, the *Global Competition Litigation Review* in 2023 (referenced as the "Earlier Article").[1] Since the date of publication, the author has received several helpful observations on the underlying thesis that complex competition disputes may be resolved more efficiently in arbitration as opposed to the national courts. This thesis is plausible because the judiciaries, beginning with the US Supreme Court in the *Mitsubishi* case[2] specifically noted that competition disputes are perfect candidates for arbitration (hence arbitrable) *because* of their complexity and *because* arbitration has by definition built-in flexibility to streamline disputes. The feedback has mostly focused on the areas of expert testimony and the very recent developments in Europe related to the so-called "second look" doctrine; that is, the extent of appropriate judicial review of arbitration awards in competition cases. Hence, this brief follow-on comment is needed.

Experts

Expert evidence, testimony, reports, charts, documents authored by persons expert in industry or economics, is part and parcel of complex competition cases. The *Mitsubishi* court noted the importance of "access to expertise" as being a "hallmark" of arbitration; the court referred both to the parties' choice of arbitrator expertise as well as expert opinion testimony, stating "arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal".[3] And as flexibility is the procedural key to arbitration and party autonomy the guiding principle, this would mean there is simply no tight perimeter on how the parties and tribunal may agree to the use and presentation of expert evidence as there would be in the national courts.

Depending on the location of the hearing and background of the parties, the arbitration may fall under either common or civil law aegis and expert testimony, recognised as critical in complex disputes by both regimes, are presented with significant differences; common law tradition goes in line with a more counsel driven advocacy approach where each side will present competing expert evidence; while with the civil law approach, the expert is appointed by the tribunal. Indeed, many international tribunals allow for both party and tribunal-appointed experts. The civil law approach leads to an inevitable criticism that the expert actually decides the case, and the common law approach is criticised as being too dependent on lawyer advocacy in cross examination.

The Earlier Article discussed innovative thinking in the presentation of expert testimony, such as witness conferencing[4] and that it would be a waste of the flexible benefits arbitration brings to simply present expert testimony in traditional ways such as direct/cross/redirect/recross.[5] One excellent innovation, a cousin to witness conferencing, was presented by a paper in 2010 by Klaus Sachs, a respected arbitration practitioner in Germany and has been given the name "Sachs Protocol". The protocol cleverly melds the civil/common law systems and cultures in that it envisions both sides providing proposed experts to the tribunal and the tribunal then selecting one expert from each list. The selected team of experts becomes the tribunal's expert as in the civil system, yet what ideally follows would be an open witness conference session of the expert team subject to examination by counsel as well as the tribunal, a process seen under the common law umbrella.

The expert team would prepare a joint report "from scratch" relying upon the submissions and documents, using their own expertise, and not in communication with the party which nominated them. The team would remain

* Richard Levin Arbitration LLC.

[1] Richard C. Levin, "A Suggested Approach for Arbitrators in Complex Competition/Antitrust Disputes" (2023) 16 G.C.L.R. 99.

[2] *Mitsubishi v Soler* 473 US 614 (1985).

[3] *Mitsubishi* 473 US 614 (1985) at 633.

[4] Levin, "A Suggested Approach for Arbitrators in Complex Competition/Antitrust Disputes" (2023) 16 G.C.L.R. 99, 106.

[5] Richard C. Levin, "A Suggested Approach for Arbitrators in Complex Competition/Antitrust Disputes" (2023) 16 G.C.L.R. 99. (G Blanke and P Landolt eds.in *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer, 2011), referring to Veeder and Stanley's reference to arbitration bringing "procedural and evidential flexibility" in the presentation of expert evidence.

independent and impartial vis à vis the parties, owe their duty to the tribunal, and compensated from the common fund or joint deposits.

While this Protocol seems brilliantly to bridge the civil/common law divide in process and culture, the devil comes down to the details. In the abstract, the Protocol could very well restrict or barrier out information or assumptions needed for the expert team to achieve a robust opinion, as that information many times comes from ex parte communication with the party. This likely could be remedied in the "terms of reference" which is contemplated to be developed by the tribunal with the expert team and the parties at the outset of the expert team's appointment.[6] While the bespoke terms should generally cover issues on which the opinions will be given, documents needed, and ministerial matters such as compensation, they should also contemplate a preparation session(s) at which the expert team could question the parties on points of refinement and assumptions to be made for their prospective joint report.[7] The essential point is there is no true limit on counsel and arbitrators' creativity on how to present expert testimony or reports in complex matters in arbitration; the process is meant to be flexible to get to the heart of the matter quicker.[8]

"Second Look" developments

In the Earlier Article, the author noted that in both leading cases recognising arbitrability of competition disputes worldwide (*Mitsubishi* in the United States (US) and *Eco-Swiss*[9] in the European Union (EU)), there was concern that public policy issues embodied in competition law would be "wrongfully arrogated to non-elected arbitrators" and the national courts should retain some review function following the arbitration. Hence what is known as the Second Look Doctrine was recognised although not used in those cases. The Earlier Article discusses the nature of the second look by national courts—is it a "maximum" (or even *de novo*) review as to whether there is an infringement of public policy or simply a minimum type of review just to see if the tribunal actually dealt with the competition law issues substantively enough to satisfy applicable public policy, and not so much whether the reviewing court disagreed with the tribunal in its competition law judgement.

In the US and noted in *Mitsubishi* itself, the tendency is for a minimalist "second look" review; the Earlier Article quoted Judge Easterbrook in a 2003 decision which is still the prevailing view in the US: "[l]egal errors are not among the grounds that the [New York] Convention gives for refusing to enforce international awards" 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."[10] This minimalist approach seems to be in line with a pro arbitration policy of party autonomy, allowing parties the freedom to decide how their disputes would be resolved, and the state having minimal intervention to check if its public policy was addressed and satisfied. Outside the US, notably in the EU, the Earlier Article noted while there is strong reference in past cases to deference to arbitration rulings in competition matters, notably in *Eco-Swiss* and France in *Thales*,[11] an emerging trend is picking up steam that arbitrated competition matters must stay under the state's control and the national court's full review.

The Earlier Article referred to the German Federal Court of Justice decision of 27 September 2022, KZB 75/21, which held full judicial control of arbitral competition awards is necessary to protect German public policy as reflected in its country's laws dealing with the public's economic life. Furthermore, in a footnote, the Earlier Article referenced the Opinion of AG Wathelet in *Genentech Inc v Hoechst GmbH*[12] (at [61] stating "the responsibility for reviewing…European public policy [in EU competition matters] lies with the courts…not with arbitrators").[13] Indeed, language in *Eco-Swiss* lends support to both maximalists and minimalists camps as referenced in the Earlier Article, but some new developments in France and the Court of Justice of the European Union (CJEU) have established strong judicial swing that national courts should undertake a complete review of arbitral awards in the competition space. The author notes these developments are previously discussed in case notes in the 2024 G.C.L.R. in issues 1 and 3 by the editor Gordon Blanke.[14]

[6] The best discussion of the Protocol is by Sachs himself, *https://www.arbitration-icca.org/icca-rio-2010-video-session-4-klaus-michael-sachs*.
[7] Cf. Kantor, "A Code of Conduct for Party-Appointed Experts in International Arbitration" (2013) 26 *Arbitration International* 323, 338.
[8] An excellent general discussion on how the flexibility of arbitration can be used to streamline expert testimony and reduce time and expense in complex disputes is by the well-known construction arbitrator Doug Jones in "Methods for Presenting Expert Evidence", 2021, available at *https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/1st-edition/article/methods-presenting-expert-evidence*.
[9] *Eco Swiss China Time Ltd v Benetton International NV* (C-126/97) EU:C:1999:269; [2000] 5 C.M.L.R. 816.
[10] *Baxter International v Abbott Laboratories* 315 F 3d 829, 832 (7th Cir. 2003).
[11] Richard C. Levin, "A Suggested Approach for Arbitrators in Complex Competition/Antitrust Disputes" (2023) 16 G.C.L.R. 99, 103. Switzerland, not part of the EU, seems to have a more deferential approach to arbitral awards at least as to what is and is not Swiss public policy. See, e.g. *Bundesgericht* 4P. 278/2005 (2006). Please note discussion of the ISU case below.
[12] Opinion of AG Wathelet, *Genentech Inc v Hoechst GmbH* (C-567/14) EU:C:2016:177.
[13] Opinion of AG Wathelet, *Genentech Inc v Hoechst GmbH* (C-567/14) EU:C:2016:177.
[14] Gordon Blanke, "Arbitration/ADR: ISU arbitration rules found in violation of EU competition law (Case Comment)" (2024) 17 G.C.L.R. R1; Gordon Blanke, "Paris Court of Appeal adopts stricter standard of supervisory court review in competition arbitration (Case Comment)" (2024) 17 G.C.L.R. R19.

In France, the case of *GBO v CAI* was decided by the Paris Court of Appeal on 23 January 2024.[15] While the court upheld the arbitration award as not in violation of French public policy, what is significant is that the court continued its maximalist approach to award review for public policy compliance which was done in the corruption area in the *Sorelec* and *Beloken* cases,[16] and this time in the competition space.

The *GBO* case is a vertical exclusive distribution case brought by the supplier for unpaid invoices. The arbitral tribunal held for the supplier enforcing the debt owed by the distributor. The debtor distributor then brought an action in the French courts to annul the award, asserting that recognition of the award would violate international public policy since the exclusive distribution contract is illegal under EU competition law as conferring a monopoly on the supplier CAI. Even though the competition allegations were not asserted before the arbitral tribunal, the Paris Court of Appeal undertook to analyse the contract with a maximalist approach as to whether the enforcement of the award would violate public policy in a substantial or "serious" fashion. Note the test has evolved from *Thales* (the violation of public policy must be "flagrant, effective and concrete"[17] to warrant court intervention) to whether there is a "serious" infringement of public policy as set forth in *Beloken* ("violation caractérisée").[18] This maximum review follows the recent case in Germany, mentioned above and in the Earlier Article.

The Paris court had no problem in its analysis concluding the agreement did not violate competition law and was, therefore, not a serious infringement of public policy. The court noted the agreement may be procompetitive without resale price maintenance[19] or customer restrictions (as the EU indeed has adopted a Block Vertical Exemption, recognising the pro-competitive impact of certain vertical distribution arrangements).[20] The court noted that the appellant had not put forth any serious economic analysis of the contract on inter-brand competition. If anything, the opinion would seem to counsel not to wait to assert competition arguments as an afterthought, but rather assert the allegations in the arbitration with proper expert testimony as support for more credibility. Furthermore, the arbitration award would pack some presumptive force, such that only a "serious" breach of public policy can merit overturning the award.

Finally, on 21 December 2023, the CJEU issued a landmark decision in *International Skating Union v EC*.[21] The ISU is the principal organiser of figure and speed skating competitions throughout the world and the only association recognised by the International Olympic Committee. The union adopted "eligibility rules" essentially regulating activity *ex ante* for organisations and athletes wishing to have a competition or participate in skating competitions, with sanctions for violations of the rules. For example, the eligibility rules stipulate that skaters may only participate in events authorised by the ISU and a breach of the rules could lead to a lifetime ban on the athlete for all ISU skating competitions. The rules also state that any challenge of ISU decisions must be made before the Court of Arbitration for Sport (CAS), which per CAS rules, the arbitrations are seated in Lausanne, Switzerland and, as such, all appeals are made pursuant to Swiss law the Federal Act on Private International Law.[22] Thus the appeal would be one which considers if the CAS award is consistent with Swiss law and its public policy, not EU law, Switzerland not being a member of the EU. The CJEU found the ISU eligibility rules to be violative of EU competition law. As to the CAS arbitration requirement, since there is no "effective" review on competition public policy issues by an EU court, the CJEU upheld the Commission finding that the Swiss law arbitration requirement essentially reinforces the underlying violation of the eligibility rules. by evading EU public policy review.

The ruling on the eligibility rules is relatively unremarkable: an association with market power regulating and managing competition amongst its members and third parties. The arbitration ruling stands out, as the CJEU held that regarding economic activity in the EU, rules, regulations and agreements allowing for arbitration of competition disputes must provide for "effective" EU judicial review of this critical public policy concern embodied in arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). While rules of an association like the ISU may provide for arbitration of disputes, when the matter impacts EU territory or its citizens, further review of that arbitration must be conducted by an EU judicial tribunal "effectively," which plausibly denotes a maximum review. Furthermore, effective review means the ability to refer legal issues to the CJEU pursuant to art.267 of the TFEU allowing the court to give preliminary rulings on such issues. Swiss courts are unable to refer matters to the CJEU and cannot act as a guarantor that EU public policy will be respected.

Likely this ruling will provide some shake-up in sports law regarding EU participants, perhaps at least in the seat location of CAS arbitrations or adopting a new arbitral

[15] *GBO v CAI* (Dept 5-Chamber 16) 22/16431 23 January 2024.
[16] Levin, "A Suggested Approach for Arbitrators in Complex Competition/Antitrust Disputes" (2023) 16 G.C.L.R. 99, 103. Global Arbitration Review (GAR) reported on 12 June 2024, of a case *Webcor v Gabon*, at the Paris Court of Appeal which had overturned an arbitration award for corruption issues purportedly not put before the arbitral tribunal. GAR's report states that the reporting judge and advocate general at the Court of Cassation had hoped to take this case to "overturn" *Sorelec*, but the *Webcor* case settled. *Gabon Settles "wedding gift" Case Ahead of Cassation Ruling—Global Arbitration Review*.
[17] Levin, "A Suggested Approach for Arbitrators in Complex Competition/Antitrust Disputes" (2023) 16 G.C.L.R. 99, 103.
[18] *https://jusmundi.com/en/document/publication/en-belokon-v-kyrgyzstan-judgment-of-the-french-court-of-cassation-23-march-2022*.
[19] Unlike the US, in the EU, resale price maintenance may be illegal per se. See Block Vertical Exemption Regulation, cited in fn.20, art.4.
[20] Commission Regulation 2022/720 of 10 May 2022 on the application of art.101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.
[21] *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0124*.
[22] *https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en*.

institution inside the EU. The *ISU* case is also notable as coming a few years after the historic decision affecting investment arbitration, *Achmea*[23] in which the CJEU held in 2018 that an arbitration clause contained in a bilateral investment treaty is violative of the autonomy of EU law, in essence that public policy issues were being "wrongfully arrogated" to non-elected arbitrators, who themselves are unable to request a preliminary ruling from the CJEU on EU law. Finally, it is important to note the consistency of the *ISU* decision with the pronouncement of the leading and very first "bell cow" decision regarding competition/arbitration, the *Mitsubishi* case. The US court noted in a famous footnote a hypothetical attempt to circumvent a judicial public policy review as mentioned in the Earlier Article. The *Mitsubishi* court stated that if a choice of forum and choice law provision in a contract work in tandem to operate as a "prospective waiver" of a party's competition remedy, the court would invalidate the scheme as a violation of public policy.[24]

[23] *Slovakia v Achmea BV* (C-284/16) EU:C:2018:158; [2018] 4 W.L.R. 87.
[24] *Mitsubishi* 473 US at 614 (1985) 637, fn.19.