A Suggested Approach for Arbitrators in Complex Competition/Antitrust Disputes

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Abstract

This article posits that many complex commercial disputes, including competition-based cases, may have a greater chance of faster, less expensive, and more robust resolution in arbitration instead of the national judiciaries. Towards the end of the last century, the US Supreme Court took a gamble and stated the then relatively unproven method of dispute resolution, arbitration, was acceptable and even desirable in competition cases. Reasons given were arbitration's built-in flexibility, expertise, and expediency. Today, arbitrators in these complex competition cases should take advantage of the tools the process allows and encourages.

Introduction

An increasing number of complex disputes today are resolved by arbitration as there is a strong policy to allow parties the freedom and autonomy to decide by contract how their commercial differences will be ironed out. There are many reasons parties in business transactions prefer arbitration to court litigation, including: normally the process is faster than the national courts; it should be less expensive, as the process, if handled properly as suggested below, can be streamlined and more efficient; the proceedings are confidential; furthermore, as the arbitrators are many times chosen by the parties, the case can be decided by someone with a special expertise in the subject matter; and finally, in international matters, the arbitration should be decided without a bias to one side or the other, i.e., there will not be a "hometown" or "home court" advantage and the award should be readily enforceable due to the New York Convention, requiring signatory states to enforce awards if certain conditions are met.

This article will focus on how arbitration may just very well be the best medium to resolve competition or antitrust disputes. Of course, not all these cases can be decided via arbitration as an arbitrator only derives their authority through the parties' autonomous agreement to the appointment that they decide the dispute through and to a legally binding award. Many competition disputes involve no agreement to arbitrate as these matters are often prosecuted by government enforcement and these cases, of course, have no contract attached to them stating the dispute should be decided by arbitration.[1] But vertical distribution or license agreements and horizontal joint venture agreements many times contain arbitration agreements and competition issues can easily surface therefrom.

Thus, the central thesis of this article: these disputes are best resolved through arbitration to capture the very policy benefits mentioned in the paragraph above. To elucidate this thesis, two points need discussion. First, the author will explain the policy reasons behind the "why and how" the parties can legally agree that competition issues be decided by arbitration (that is, their arbitrability) with the initial focus being on the United States (US) where arbitrability of competition disputes had its genesis; and this will lead to the second point, that once those critical policy reasons which favour arbitrability are understood, there are certain aspects of or tools in arbitration which can and should be employed by arbitrators with confidence, more so than even national judges, to arrive at a fair, just, and efficient resolution. This toolbox is enhanced by the presence of certain popular soft law protocols.

Arbitrability: why arbitration is the better process to resolve competition disputes

Almost four decades ago, the US Supreme Court delivered perhaps its most important arbitration decision to date, and certainly its most groundbreaking at that time in the sense of it being a call to innovation. In *Mitsubishi v Soler*,[2] a case decided at the very dawn of modern international arbitration as we know it today, the US Supreme Court was presented with the issue as to whether international antitrust or competition cases were arbitrable

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[1] Application of antitrust or competition law involving government enforcement (e.g., criminal enforcement, merger enforcement or European Commission (EC) unlawful state aid enforcement) is generally not arbitrable as there would be no arbitration agreement between the governmental competition authorities and the target of enforcement. It should be noted on the European front, there has been discussion of arbitration of behavioural remedies in merger cases through an agreement, but this has not really taken hold. See L.G. Radicati di Brozolo, "Arbitration in E.C. Merger Control: Old Wine in a New Bottle" (2008) 19 Eur. Bus. L. Rev. 7 and G. Blanke, "International Arbitration and ADR in Conditional EU Merger Clearance Decisions" in G. Blanke and P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer, 2011), pp.1605–1724. We have seen (2018) in the US the use of arbitration proposed by the defendants in connection with a government challenge in a merger case (ATT and Time Warner) and the court endorsing arbitration as a proposed remedy to deter anticompetitive conduct by the merged entity. *US v ATT*, *http://www.dcd.uscourts.gov/sites/dcd/files/17-2511opinion.pdf*, p.149, fn.51 affirmed *https://www.cadc.uscourts.gov/internet/opinions.nsf/390E66D6D58F426B852583AD00546ED6/%24file/18-5214.pdf*. More recently (2020) the US Department of Justice and parties to a proposed merger, 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, *https://www.justice.gov/atr/case-document/file/1200821/download*.

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

under the New York Convention and the US's corollary legislation, the Federal Arbitration Act. Up till that time most, if not all, jurisdictions around the globe considered antitrust matters to be strictly for the national courts. Many may not grasp the forward-thinking nature of the *Mitsubishi* decision at that time and the prescience of Justice Blackmun in writing for the majority, as arbitration had little track record in 1985 and the court was somewhat writing on a blank tablet. Yet the Court, in holding these cases arbitrable, was willing to take the chance in some respects to give the discipline the jump start to move where it is today. The Court stated "the *potential* of these tribunals for efficient disposition of legal disagreements arising from commercial relations has *not yet been tested*. If they are to take a central place in the international legal order, national courts will need to 'shake off the old judicial hostility to arbitration'."[3] Thus, the Supreme Court was willing to embrace this "experiment" and require courts to rid the bias against arbitration and essentially get with broad-minded international notions of progress in trade and commerce. The *Mitsubishi* opinion took this bold position on arbitration at that moment in time in 1985 when international arbitration in no way resembled the massive discipline and far-reaching infrastructure it enjoys today.[4]

In response to the argument that competition cases are too complex for arbitration, the Court said that argument actually proves the point, that in light of this complexity, these disputes are the perfect candidates for arbitration as "adaptability and access to expertise are hallmarks of arbitration." And because these cases historically have been so complex in the national courts, "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."[5] Accordingly, since *Mitsubishi* many of the leading arbitral institutions have developed in their procedural rules adaptations to take on complex cases and to the push for expedition despite complexity.[6] There is also an effort by institutions in selecting (or assisting the selection of) arbitrators individuals who are comfortable, if not expert in the subject matter of the dispute, in the antitrust/competition arena for example. Furthermore, 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 to which we will come back below.[7] The Court was clear: it was arbitration's "adaptability" and "access to expertise" that swayed the Court on the over-complexity argument to conclude these cases are arbitrable.[8]

Thus, the US Supreme Court has challenged and stated to the arbitration world that arbitration may be a smart alternative to the national courts, with its built-in flexibility for innovation and informality, to develop a product and process that evolves with conditions for a simplified, less expensive way to streamline the resolution of complex competition disputes. The green light for this creative adaptation came when the Court said the parties really *trade up* in having their complex disputes arbitrated by "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration".[9] The opportunity is there for arbitrators to put in place a new improved, innovative process that consumers will see as "faster, smarter, and cheaper."

To be expected, since *Mitsubishi*, there has been debate among scholars and in the courts about the significant public policy concerns inside competition law and whether the accommodation of this policy has been wrongly arrogated to private, non-elected arbitrators. The Court stated: "[h]aving permitted the arbitration to go forward, the national courts…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'."[10] This is the language that spawned the so-called "second look" doctrine although the Supreme Court does not use that phrase. But the law has evolved today that most public policy questions are arbitrable in many developed countries if the parties so agree, and the applicable legislative provision does not prohibit.[11]

There is little question today that in many, if not most, developed countries a large part of the competition law forms an integral part of a state's public policy or *ordre*

[3] *Mitsubishi* 473 US at 638 (emphasis supplied).
[4] *Mitsubishi* has been unremarkably construed to cover US domestic as well as international disputes. *ABA Antitrust Law Developments*, 8th edn (2017), p.813. Noting the massive discipline today, see the late Emmanuel Gaillard's quite astonishing (and indeed sometimes humorous) article on the far-reaching tentacles (the "sociology") international arbitration has today, "Sociology of international arbitration" (2015) 31 *LCIA Arbitration International* 1, *https://www.arbitration-icca.org/media/7/70785051257890/emmanuel-gaillard--sociology-of-international-arbitration-042715-ia.pdf*.
[5] *Mitsubishi* 473 US at 633.
[6] See, e.g., AAA's Rules on Procedures for Large, Complex Commercial Cases, "Commercial Arbitration Rules and Mediation Procedures Including Procedures for Large, Complex Commercial Disputes" (2013), *https://adr.org/sites/default/files/CommercialRules_Web.pdf*, p.37.
[7] IBA, "IBA Rules on the Taking of Evidence in International Arbitration", 2010, arts 5 and 6, *https://www.ibanet.org/MediaHandler?id=68336C49-4106-46BF-A1C6-A8F0880444DC*.
[8] *Mitsubishi* 473 US at 633.
[9] *Mitsubishi* 473 US at 628.
[10] *Mitsubishi* 473 US at 638.
[11] Gary Born, *International Commercial Arbitration*, 3d edn (Kluwer, 2021), p.1035. Examples of what public policy matters are typically not arbitrable are criminal, domestic relations, bankruptcy, and governmental sanctions matters.

public by ensuring markets function properly and competitors play on a level playing field; this policy defines its core values to the mandatory rule of law.[12] As just noted, adherence to a state's public policy is at the heart of the New York Convention dealing with enforcement of arbitral awards as the national court at the award-enforcement stage can "look" at the award and determine if it comports with the state's public policy, NY Convention V(2)(b). *Mitsubishi* prompted the late R. Von Mehren to note the Court, for the first time, conferred upon "a private system of dispute resolution…not only the power, but the duty to adjudicate" competition claims (arising under US law) irrespective of the law chosen by the parties to govern the interpretation of the contract.[13] The parties cannot by contract provide for a choice of law and thereby seek to avoid a mandatory policy that applies to them.[14]

Furthermore, in meeting the expectations of the parties, the tribunal should do its level best to issue an enforceable award, a goal which is embodied in some institutional rules, such as art.42 of the International Chamber of Commerce (ICC) Rules or art.32.2 of the London Court of International Arbitration (LCIA) Rules and therefore agreed to by the parties. Thus, the arbitration tribunal must consider the different competition regimes which touch the controversy; i.e. at least, the public policy of the place of arbitration and the jurisdictions where the award will be or could be enforced.[15] In fact, failure to consider a particular country's competition law that clearly has reasonable application to the controversy could very likely lead to an unenforceable award as will be discussed and, if the requisite intent is shown, can possibly draw the arbitrator into an awkward position even to the point of aiding or being "an accomplice [with the parties] to the circumvention of the applicable competition laws".[16]

Regarding the nature of the judicial second look at the enforcement stage, the court should take into consideration the two overriding and overlapping policies; the first being the parties' freedom to contract (party autonomy) and choose confidential arbitration as the way to decide their dispute, carrying with it that the ensuing award be final, save for only certain gross irregularities or breach of public policy, such as what is set forth (in an international arbitration) in the New York Convention; which morphs to the second policy, being proper consideration of the mandatory public policy of a country's competition regime. Scholars have written extensively in this area and there appears to have developed two schools of thought—at both ends of the spectrum—on the proper extent of judicial review of awards in competition disputes impacting a state's public policy (be it the state of the place of the arbitration, the state law agreed by the parties to govern the dispute, or the law of the state where enforcement is sought). These two approaches have been characterised by some commentators a couple decades ago as the maximalist and minimalist positions.[17] The maximalist position would entail a more interventionist court, even to the point of the court reviewing the arbitration award *de novo* as regards the public policy issues.[18] And the minimalist position is, as one would expect, a more deferential approach by the reviewing court to the arbitrator's judgment on public policy issues and is more in line with the traditional review that a court employs when reviewing an arbitrator's findings of fact and conclusions of law. The trend today, at least in the US and many other countries, for judicial review of an arbitration tribunal's award on competition issues is to determine if there is a serious (mis)application of competition policy resulting or potentially resulting in a serious economic injury or distortion to a geographic and product market. And certainly, mere error of law is not enough to cause a reviewing court to intervene via what has been coined "the second look doctrine".[19]

"Second look" originated or became pronounced at a time in the 80's once the *Mitsubishi* decision was rendered, when there was less confidence in the process of international and even domestic arbitration (recall the court stated that arbitration of complex disputes had not

[12] "Common examples of mandatory laws include norms involving the regulation of competitive markets (antitrust or competition laws), securities regulation, currency controls, environmental laws, and embargos." Brower, "Arbitration and Antitrust: Navigating the Contours of Mandatory Law" (2011) 59 Buffalo L. Rev. 1127, 1130.
[13] Robert B. Von Mehren, "The Eco-Swiss Case and International Arbitration", (2003) 19 *LCIA Arbitration International* 465, 466.
[14] The Court in *Mitsubishi* did mention this scenario because of the particular facts in that case involving the choice of law clause stating Swiss law would apply, the concern being through a choice of law provision in the arbitration contract (i.e., the choice of the parties), the tribunal would only apply that law and not apply another country's competition law even though the dispute clearly impacts the competitive marketplace in that other country. The *Mitsubishi* Court spoke directly to this fact pattern in a much-cited footnote 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, we would have little hesitation in condemning the agreement as against public policy," 473 US at 637, fn.19. This unusual, but real, fact scenario correctly places the principal of party autonomy, so central to effective arbitration and behind the policy underpinnings of *Mitsubishi*, subservient to the principles of mandatory law as the former policy would have been misused to subvert the latter policy.
[15] Prof. Radicati di Brozolo has written on "which competition law," including the mention of the "auto-attachment" of mandatory rules on a tribunal's choice of which competition regime to consider: "Arbitration and Competition Law: The Position of the Courts and Arbitrators" (2011) 27 *LCIA Arbitration International* 1, 19–20; also, of note, Prof. 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, "Mandatory Rules of Law in International Arbitration" (1986) 2 J. Int. Arb. 274, 284–86; see also the extensive discussion in Prof. Brower's article referenced in fn.12,above. The Internal Rules of the ICC Court state that ICC awards will be scrutinised by the court "to the extent practicable, the requirements of mandatory law at the place of the arbitration", ICC Rules, Appendix II, art.7. For background on antitrust arbitration under the ICC Rules, see G. Blanke, "Antitrust Arbitration under the ICC Rules" in *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer, 2011), pp.1763–1898. This Handbook is a thorough compendium on the general subject of this article.
[16] See Radicati di Brozolo, "Arbitration and Competition Law: The Position of the Courts and Arbitrators" at 20; V.V. Veeder and P. Stanley, Ch.3 in *EU and US Antitrust Arbitration: A Handbook for Practitioners*, p.103.
[17] See, e.g., Radicati di Brozolo, "Arbitration and Competition Law: The Position of the Courts and Arbitrators" at 4–5; Chs 1, 22 and 39 by A. Mourre, L. Radicati di Brozolo, and R.C. Levin in *EU and US Antitrust Arbitration: A Handbook for Practitioners*, all very much state the law is correctly trending to the minimalist standard of review of awards. For an alternative view, see G. Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last?" in D. Bray and H. Bray (eds), *Post-Hearing Issues in International Arbitration* (Juris Publishing, 2013), pp.169–227.
[18] See Born, *International Commercial Arbitration*, p.3618.
[19] Born, *International Commercial Arbitration*, p.3622. See also, Radicati di Brozolo, "Arbitration and Competition Law: The Position of the Courts and Arbitrators" at 5.

been "tested"). The majority was emboldened, enterprising, and optimistic to the "experiment" when stating that "national courts will need to 'shake off the old judicial hostility to arbitration'."[20] Furthermore, judicial recognition of the deference required in the review of competition awards in fact began with Justice Blackmun, for the majority in *Mitsubishi*, who was quite clear in observing the parameters of the "second look" that is contained in the New York Convention. The Court noted 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."[21] After *Mitsubishi*, one of the most respected US appellate judges, Frank Easterbrook on the US Court of Appeals for the 7th Circuit, stressed for his court in *Baxter Int'l v Abbott Laboratories*,[22] the very minimal review of the national courts if the arbitration process is going to work at all or be given a chance to work, as implied strongly by *Mitsubishi*. "Legal errors are not among the grounds that the [New York] 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."[23]

The issue of the amount of judicial deference to an arbitral tribunal judgment on the public policy question, however, still is a much-debated topic;[24] no credible authority states the review should be a mere rubber stamp. In the US, having the benefit of almost four decades of hindsight since *Mitsubishi*, if the second look means "study" with the key international law policy of party autonomy in mind versus true *de novo* second look, the US courts are trending to former, as there really is likely no intensive "second look." The pro-arbitration progressive position of courts like *Abbott Laboratories* still requires the reviewing court to balance the two policies noted by *Mitsubishi*—party autonomy in choosing how their disputes will be resolved and the mandatory policy in favour of robust competition law, where perhaps the public policy would support an open forum of the dispute decided by an elected or appointed official. But as noted above, this balancing process and review, in the US, are not extensive or, as Judge Easterbrook noted, you might as well not arbitrate your antitrust disputes. The second look is not meant to be a long look. An example might be for a court to determine if there was a serious violation of competition law that was overlooked and not considered such that there is an infringement of public policy; or if the award is part of an enforcement of a price fixing agreement or allocation cartel or enforcing or otherwise sanctioning a scheme to evade competition law. A mere disagreement on the law that was duly considered by the tribunal, or the amount of damages or type of relief would seem rarely to affect competition policy.[25] In the US at least, there is a clear weight of authority favouring a respectful and non-interventionist judicial approach in dealing with the review of competition or antitrust awards.

Outside the US, cases have followed *Mitsubishi* in recognising the arbitrability for complex competition disputes; most notably arbitrability was first recognised by *Eco Swiss*[26] in the European Union (EU). This has been the rule in many major economies,[27] the important exceptions being India, where arbitrability may not be clear,[28] and China where it appears competition matters are not arbitrable.[29] The "second look" approach has also been carried through as well as outside the US in the competition space. The European Court of Justice (ECJ) noted in *Eco Swiss* that the national courts in the EU should grant annulment of any arbitration award where "its domestic rules of procedure require it…for failure to observe national rules of public policy,"[30] and competition law (in *Eco Swiss*) is considered by the Member States in the EU to form part of their public policy, just as in the US. This reference to national court review has expectedly received much attention, weighing the two policies of party autonomy and mandatory law, and that arbitration and choice of law cannot be used to subvert that country's mandatory law. In the US, private judicial enforcement of the antitrust laws is more prevalent than, for example, in England or the EU,[31] where competition enforcement is more pronounced in the European Commission or the national enforcement authorities. Seemingly, then if US courts can still defer to arbitrators in competition disputes (to displace judicial action), there is logical reason to expect the judiciaries in the Member States or England should be just as hospitable to arbitration awards involving competition policy.[32] While *Eco Swiss* stated that national courts should grant annulment in case of a breach of public policy of which competition law is a fundamental part, the ECJ did note "[i]t is in the interest of efficient arbitration proceedings

[20] *Mitsubishi* 473 US at 638.
[21] *Mitsubishi* 473 US at 638.
[22] *Baxter Int'l v Abbott Laboratories* 315 F 3d 829 (7th Cir. 2003).
[23] *Abbott Laboratories* 315 F 3d at 832.
[24] A thorough discussion on this is in Born, *International Commercial Arbitration*, pp.3618–24.
[25] See also Born, *International Commercial Arbitration*, pp.3611–12 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 an arbitral tribunal's substantive decisions or procedural rulings."
[26] *Eco Swiss China Time Ltd v Benetton International NV* (C-126/97) EU:C:1999:269; [2000] 5 C.M.L.R. 816.
[27] In England, *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch); [2017] 5 C.M.L.R. 5 is an example.
[28] *Union of India v Competition Commission of India*, A.I.R. 2012 Del 66 (India)..
[29] Judgment of 21 August 2019, *Shell China Co Ltd v Huili Hohlot Co Ltd*, Zhi Min Zhong No 47 (Chinese S. Ct).
[30] *Eco Swiss* (C-126/97) [2000] 5 C.M.L.R. 816 at [37].
[31] As noted by the *Mitsubishi* court, "The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators," 473 US at 635.
[32] See Radicati di Brozolo, Ch.22 in *EU and US Antitrust Arbitration: A Handbook for Practitioners*, p.763.

that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances."[33] This latter point was confirmed in *Thales v Euromissile*,[34] in the Paris Court of Appeal in 2004, where the court refused to consider a competition law infringement that was not even raised during the arbitration. The court of appeal noted there was no violation of French public policy since the purported infringement was not "obvious, actual and concrete" (*flagrante, effective et concrete*), as only that degree of violation would be considered by the reviewing court. The court followed *Eco Swiss* and French procedural rules and refused to intervene to set aside the award.

Until more recent times, this minimalist (pro-arbitration) approach to the second look doctrine appeared to be a trend in the EU. However, today the position of the courts favouring party autonomy and not to intervene in competition law arbitration awards is perhaps facing some pushback and is less clear, at least in Germany and maybe France and elsewhere.[35] In Germany, recently the *Bundesgerichtshof* (BGH) (the Federal Court of Justice Cartel Panel) issued an important anonymised ruling holding that arbitration awards dealing with German competition law are subject to full factual and legal review *de novo* by German courts.[36] In Germany (and in the EU), as just noted above, it is settled that competition law is part of its public policy and the question has been whether review would be a hard in-depth look (the maximalist approach) or one, like the US and United Kingdom (UK), a minimalist approach just to determine whether the competition issues were addressed. Evidently, German courts held back in the 1960s that the plenary full court review of competition issues in arbitration awards was appropriate and the recent decision by BGH has unambiguously affirmed that maximalist approach.[37]

Activist judicial review of arbitration awards which deal with *ordre public* in France is drawing some attention at least in the past couple years, as France is a well-known and historic seat of arbitration. So far, court review has been in the corruption/bribery space. In a series of cases, the most recent being at the time of this writing the *Sorelec* decision,[38] the French Cassation Court has affirmed the judiciary's activist approach in reviewing arbitral awards for alleged illegality or breaches of French international public policy, as noted in this case, in public corruption. Notably in *Sorelec*, the court allowed *de novo* review of the arbitration award on the corruption issue even when it was not raised in the arbitration and allowed circumstantial evidence to justify the set-aside of the award. *Sorelec* followed *Beloken*,[39] in the Court of Cassation, which found that awards can be set aside where there are "serious, precise and consistent" indications—also known as red flags—of corruption.[40] Whether the *Sorelec* decision and the trend in French cases will continue and spill over in other areas of French public policy cases, such as competition matters, has not explicitly come up yet. (Indeed, *Thales* itself has called out its own red flags as mentioned above). But the trend, if it continues, could not only call into question the landmark *Thales* ruling, as well as the *Cytec* case,[41] which followed and confirmed *Thales*, regarding the policy of respecting party autonomy, but also possibly affect France as an ideal choice of an arbitration seat.[42]

How can arbitrators take advantage of the flexibility the process offers in competition disputes?

All this being said, as mentioned at the outset, the underlying thesis of this article is that competition disputes are best resolved out of state courts with their more rigid procedural rules and into flexible arbitration, respecting the parties' free autonomy to decide how their competition matters are resolved and allowing arbitrators (ideally chosen by the parties for their expertise) to design streamlined methods more efficient and less costly to get to a robust resolution. The author's preferred position is that any public policy checks are best accomplished by the "second look" doctrine on a minimalist basis where a court can see non-intrusively if the competition issues were addressed appropriately.[43] As just noted with some state courts' allowance of incursions in arbitration awards via public policy concerns, whether arbitration continues to flourish as a brilliant private mechanism to resolve competition and other differences may be under some question. Gary Born sent a warning in a 2016 speech that

[33] *Eco Swiss* (C-126/97) [2000] 5 C.M.L.R. 816 at [35].
[34] Cour d'appel de Paris, 1re Chambre, s.C, 18 Novembre 2004 (n.2002/19606, *SA Thalès Air Défense c/ GIE Euromissile et EADS*).
[35] In affirming the second look doctrine, the ECJ, in *Eco Swiss* noted that the courts of Member States must review arbitral awards for compliance with European competition law, even if the parties had not raised the issue in the arbitral proceedings. *Eco Swiss* (C-126/97) [2000] 5 C.M.L.R. 816 at [7], [30]. See the Opinion of AG Wathelet in *Genentech Inc v Hoechst GmbH* (C-567/14) EU:C:2016:177 (at [61] stating "the responsibility for reviewing…European public policy lies with the courts…not with arbitrators"). Born's Treatise has a "compare" cite of this Opinion to the weight of scholarly writing: Born, *International Commercial Arbitration*, p.4050, fn.1794.
[36] Docket No.KZB 75/21, 27 September 2022.
[37] The decision is well analysed by a note from Wilkie Farr & Gallagher at *https://www.willkie.com/-/media/files/publications/2022/germancourtswillfullyscrutinizearbitralawardsoncom.pdf*. The note makes the point that the BGH would consider German arbitration awards on European competition law (as well as German competition law) would receive the same full review by the courts in Germany.
[38] *Sorelec*, Cour de Cassation, 7 September 2022, No.20-22.118.
[39] *Beloken*, Cour de Cassation, 23 March 2022, No.17-17.981.
[40] A very recent important case in the Versailles Court of Appeals, however, upheld an ICC award in the face of similar allegations of bribery: *Alstom v ABL Ltd*, Cour d'Appel de Versailles (1er Ch, 14 March 2023).
[41] *Cytec*, Cour de Cassation, 4 June 2008, No.06-15.320.
[42] Running in parallel outside of commercial arbitration, courts in the EU have overturned awards in arbitrations under investment treaties as violations of EU mandatory law, finding the treaties' dispute resolution clause allowing arbitration for these claims to be contrary to EU law: *Slovak v Achmea BV* (C-284/16) EU:C:2018:158; [2018] 2 C.M.L.R. 40.
[43] Gary Born, in his through treatise, has discussed in depth the views on both sides and concludes that the weight of authority is that courts and commentators follow "the same restrictive view of public policy in annulment actions, reasoning that only extreme (mis)applications of public policies or mandatory laws should permit an award to be set aside". Born, *International Commercial Arbitration*, p.3622.

the "winter is coming" and an army of the undead is forming to tear down "everything that has so harmoniously been created" in the belief that "the state and state-selected decision makers are the only real way to properly resolve disputes".[44] To be slightly contrary, we will assume that summer is still here for a while longer (at least in the competition space) and arbitration without too much court meddling will continue. Accordingly, then, how can arbitrators in competition disputes take advantage of the flexibility, informality, and efficiency of this dispute resolution mechanism to make it a preferred way to resolve complex competition matters?

Unquestionably and unremarkably, an arbitrator has a very heavy responsibility in all disputes and compounding this importance, when the mandatory public policy of competition law is delegated by contract to an arbitration tribunal, this involves nothing less than that private tribunal deciding issues of the very fabric of the proper working of economic markets. The matter can easily take on a "national interest" at least regarding the US economy, as *Mitsubishi* notes,[45] and there is no reason to think these disputes are less important in most other countries. Thus, the remainder of this article will touch on a few issues the author believes the arbitration tribunal has in its toolbox, arguably to the advantage over state courts in deciding complex competition matters. It has been critically important to have reviewed the policy underpinnings of *Mitsubishi*, as it can cast a long and wide net. The case's rationale on the nature of competition arbitration will not only help embolden arbitrators to be creative, but also direct those creative practitioners to take the issues the disputes present and bring them to "efficient disposition" as predicted by the Supreme Court. The focus first will be on discovery or information exchange in these types of cases.

The Supreme Court noted in *Mitsubishi*, that "vertical restraints…most frequently give birth to antitrust claims covered by an arbitration agreement" and that these "will not often occasion the monstrous proceedings that have given antitrust litigation an image of intractability". But even then, the court noted that "adaptability and access to expertise are hallmarks of arbitration".[46] As the years have passed since that seminal case, horizontal restraint allegations are now properly presented in arbitration[47] and many intellectual property (IP) cases will involve licenses on a horizontal level and contain arbitration clauses, such as in *Abbott Laboratories*, discussed above. To be sure, these cases are based in contract and are not disputes like nationwide grand jury price fixing or market allocation investigations or dawn raids seen in the EU that involve truckloads of hard drives, paper, and information of all sorts. Nor are they merger investigations with the government, involving massive second requests for information. These "monstrous proceedings" which are not based on any contractual relation would not be seen in arbitration.[48] Furthermore, there is no question historically that most competition matters are fact, economic, and often documented grounded, and information exchange can be important if not critical for all parties. That said, there has been a shift at least in the US and likely elsewhere about massive discovery in competition cases, especially for cases which facially do not show promise or logic; at one time, summary/dispositive motions were explicitly disfavoured in antitrust matters because "the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot".[49] Then in the 1980s and up to the present day,[50] the courts have become chary of simply green lighting expensive and drawn out antitrust claims with no plausible basis. Remarkably in parallel, with the groundswell of arbitration, *Mitsubishi* came down and courts began asking "why not" bring simplicity, informality, and expedition to these same disputes?

Today competition arbitrations, involving both vertical and horizontal issues, can and do latch on to the very "adaptability" or flexibility point stressed by Justice Blackmun and are capable to be successfully resolved with creative and tailored information exchange; this writer has found the leading guidepost for discovery in complex arbitrations to be the "soft law" protocol contained International Bar Association (IBA) Rules referenced above, soft law in that the rules will not replace mandatory state arbitration law applicable and should be construed in conformity with the parties' agreement as well as any institutional rules that apply.[51] Most institutional arbitration rules do not cover the fine points of document production,[52] other than providing for the fact of information exchange, so tribunals should determine at an early case management conference—on the basis of the parties' nationalities and expectations, the nature of the case and the parties' arguments—whether document production should be ordered and its extent. Article 2 of the IBA Rules specifies such a case management "consultation".

In these complex arbitrations, the IBA Rules strike the right balance between the parties' necessity to obtain information in a competition dispute and the principles of expedition and reasonable cost. The information exchange contemplated by the IBA Rules is more in the nature of focused rifle shot document requests as opposed to scatter shot blanket requests seen in some countries, including US court discovery. The Rules provide for a

[44] Born's speech, "Is Winter Coming?", can be found at *https://www.youtube.com/watch?v=0-2wtbaFn88*.
[45] *Mitsubishi* 473 US at 635–6.
[46] *Mitsubishi 473 US at 633*.
[47] e.g., *JLM v Stolt-Nielsen* 387 F. 3d 163 (2d Cir 2004).
[48] See fn.1 above, where arbitration has been utilised in the US both as part of a contested merger settlement and as part of the dispute itself (to decide the proper relevant market).
[49] *Poller v CBS* 368 US 464, 473 (1962).
[50] *Matsushita Electric v Zenith Radio*, 475 US 574 (1986); *Bell v Twombley* 550 US 544 (2007).
[51] See "IBA Rules on the Taking of Evidence in International Arbitration", 2010, arts 5 and 6.
[52] Some institutional rules are themselves quite thorough. See, e.g., Rule 24 of the ICDR Rules on International Dispute Resolution Procedures.

Request for Production (if the arbitration tribunal and parties agree to the use of the Rules), which is much more tailored than what is seen in court procedures, such as the Federal Rules of Civil Procedure in the US. Moreover, the tribunal and parties can be flexible and work up their own method of information exchange, keeping in mind the arbitral goals of expedition and remaining economical.[53] As to disputes over document production, one of the handiest tools is the well-known "Redfern Schedule",[54] which the parties and tribunal can put in place, a simple, albeit clever device to explain in one document in chart format the specific reasons for requesting or objecting to the production of each document request. The tribunal can easily put a perimeter around document dispute issues and decide them quickly via this tool.

For the sake of expedition and to maintain reasonable expense, other forms of information exchange (e.g., admissions or interrogatories) commonly seen in the US and some countries should not be allowed in these arbitrations. Generally, this type of discovery is beyond the parties' expectations when signing an arbitration clause, and if the parties intend for some reason to have this broad discovery, they should stipulate in the very clause itself. Depositions are not generally allowed even in these complex disputes unless that witness is critical to the case and/or cannot appear live.[55] And while tailored document exchange is the preferred method of information exchange, this author would very much agree with two eminent barristers that "because arbitral procedures are flexible, it is always possible for a tribunal, if persuaded that it is necessary, to make searching orders for the production of documentary evidence, short of 'fishing exercises.'"[56] All this said, this is arbitration, not court litigation, and broad discovery is not necessarily a given.[57] The practice of allowing US type judicial discovery should be out of the question and the soft law protocols like the IBA Rules provide arbitrators the best practice guidepost and the support needed to frame the case. Arbitrators should take heed and streamline the complex case; as of today, too many arbitrators are reticent to take the step to try to simplify complex disputes.

Taking all considerations in mind, this writer has found that discovery (information exchange) of some dimension is usual and necessary in a complex arbitration, like a competition-based arbitration; generally, the best principle to start from is one of proportionality, that is the more complex the case, the more discovery is likely needed and vice versa. As noted above, many institutions have adopted rules to deal with the complexities in arbitrations, such as competition cases, an example being the American Arbitration Association's (AAA) Procedures for Large, Complex Commercial Disputes, and, as well, the soft law guidance of the IBA Rules. Furthermore, the privilege issues in the exchange of documents that come up in international disputes can be daunting and this writer has previously written on this issue and the importance of keeping a level playing field between the different parties who may face different privilege national laws and protocols.[58]

The *Mitsubishi* court also noted the importance of "access to expertise" as being a "hallmark" of arbitration; the Court refers 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."[59] Antitrust, competition, and IP disputes are very much expert driven as the jurisprudence in these regimes in major countries throughout the world has trended to be grounded in solid economics.[60] Economic issues in competition disputes requiring expertise are too many to enumerate, but here is a short start of obvious ones: the definitions of relevant markets, the impact of the behaviour in question on the defined market, whether a particular price is supra competitive, barriers to entry, "power" buyers which can defeat a price increase, pro-competitive aspects of any alleged collaboration or licensing arrangement benefitting consumers (true integrations), "two-sided" markets, whether transformative developments of a business were achieved without predatory behaviour, whether there is a "free-riding" effect which the alleged business practice or structure was aimed to correct, and questions as to whether there are fair nondiscriminatory licensing practices. These all are commonly seen in competition disputes and are based on fundamental economics and heavily dependent on expert opinion.

[53] The very important soft law protocol solely for civil law arbitrations, the Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration) have been published in 2018, *http://praguerules.com/*. These rules offer the civil law alternative approach to information exchange in which the tribunal is more proactive and "inquisitorial". Again, like the IBA Rules, the parties and tribunal can adopt all, part, or none of these Rules. Document discovery is, expectedly, even more circumscribed under the Prague Rules. The parties must submit all documents on which they rely as early as possible, and while there are provisions allowing limited document exchange involving specific documents, including documents specifically needed and requests from the tribunal, the "parties are encouraged to avoid any form of document production", art.4.2.

[54] This is named after the distinguished practitioner in the UK Alan Redfern, who first devised this concept.

[55] See IBA Rules art.4.9.

[56] Veeder and Stanley, Ch.3 in *EU and US Antitrust Arbitration: A Handbook for Practitioners*, p.105.

[57] Judge Easterbrook noted in a domestic US case in the 7th Circuit "nothing in the Federal Arbitration Act requires an arbitrator to allow any discovery. Avoiding the expense of discovery under the Federal Rules of Civil Procedure and their state-law equivalents is among the principal reasons why people agree to arbitrate. That Hyatt's attorneys' fees in the arbitration exceeded $1million shows that plenty of discovery occurred; an argument that the arbitrator had to allow more rings hollow," *Hyatt Franchising v Shen Zhen*, *https://caselaw.findlaw.com/us-7th-circuit/1880980.html*.

[58] Levin, "Privilege and International Arbitration" (*Kluwer Arbitration Blog*, 14 August 2012), *http://kluwerarbitrationblog.com/2017/08/14/privilege-international-arbitration/?print=pdf*. See also r.25 of the ICDR Rules on International Dispute Resolution Procedures.

[59] *Mitsubishi* 473 US at 633. An excellent history on expert testimony in international disputes can be found at M. Swinehart, "Reliability of Expert Evidence in International Disputes" (2017) 38 Mich J Int'l Law 287.

[60] In the US, see *US v ATT*, *http://www.dcd.uscourts.gov/sites/dcd/files/17-2511opinion.pdf*; *Ohio v American Express* 138 S. Ct 2274 (2018). See generally *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Ch.9.

The architecture in international arbitration for the presentation of expert testimony and the discovery or exchange in advance of that presentation will vary depending on the composition of the tribunal, the nationalities of the parties, the law governing the dispute, the seat of arbitration and other factors. Generally, in common law countries, US counsel, British counsel, and Canadian counsel, all have their own separate and very different backgrounds, approaches, and methods with expert testimony including laws both regulating the presentation of the testimony and discovery in advance of expert testimony at the hearing. Civil law disputes are dramatically different than the common law approach, as the expert's allegiance is more to the process and the tribunal with no visible "advocacy" on behalf of one side or the other.[61] For most international commercial arbitrations, the better view is contained in the IBA Rules, which has aimed to infuse both common and civil law approaches to expert presentations with detailed and well thought out procedures in arts 5 (party-appointed) and 6 (tribunal-appointed) of the Rules. The Rules adhere to the synthesis of common/civil law in international arbitration, and require, in the case of party-appointed experts, a statement of independence by the experts from the parties or their counsel; tribunal appointed experts (almost by definition) must be independent (IBA Rules art.6.1 and Prague Rules art.6).[62] Accordingly, the proper role of any expert in an international arbitration, party or tribunal appointed, will be to provide independent professional judgment on opinions in which they genuinely believe.[63]

In the author's experience with competition/economic experts in courts, the agencies in the US and the EU, and in arbitration, the very "adaptability" which the *Mitsubishi* Court noted to be the "hallmark" of arbitration allows arbitration to be a better avenue for a more robust resolution of expert opinion in a complex dispute, such as a competition matter, than even the courts provide. This proposition is actually quite remarkable in the sense that arbitration presents a way for the parties and the arbitral stakeholders in complex competition cases to get to the truth in a faster, and less expensive way than the courts. Arbitrators, usually from a case management conference, need only utilise the flexibility of the process to streamline the critical economic evidence in a way that will be easier to employ than if the case were in court. The traditional respected method, in the courts and in many arbitrations, in common law expert witness procedure is both expensive and time consuming. An adversarial method in many juridical systems of cross examination alone by advocates just may not be the best way of testing such economic opinions. As noted over a decade ago by Messrs Veeder and Stanley, "[t]he way in which expert evidence is presented and tested may 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".[64] Accordingly, while the author is not certain of the benefits of the use of solely tribunal-appointed experts, and the procedures contemplated by art.6 of the IBA Rules and art.6 of the Prague Rules, the author completely agrees that rigorous cross examination by counsel alone of party appointed economic experts is nothing short of wasting the very tools of flexibility that arbitration offers in a competition dispute.

Accordingly, a very clever and beneficial tool for the arbitrator to utilise in complex cases would be a form of witness conferencing with experts; the author has found this to be the most powerful method to arrive at a comfortable, solid resolution. A form of this procedure has been employed for decades.[65] The process of party appointed expert witnesses engaging with one another in some fashion to encourage cooperation in the hopes of narrowing the scope of disagreement is no longer unusual in international arbitration, especially outside the US.

Witness conferencing is a process for taking evidence where two or more witnesses give evidence concurrently, essentially together at the same time. It departs from the traditional common law sequential pattern of testimony, and the procedure is neither difficult nor controversial. The Chartered Institute of Arbitrators (CIArb) has, in fact, developed its own "Guidelines for Witness Conferencing in International Arbitration" ("Guidelines").[66] In the Preamble, the Guidelines succinctly state 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

[61] See generally *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Chs 8 and 9; Born, *International Commercial Arbitration*, p.2449.
[62] The London-based Chartered Institute of Arbitrator's Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration of 2016 notes not only does the expert owes their duty to the tribunal to assist in deciding issues, but also the expert's opinion "shall be impartial, objective", Annex I, art.4.1. Furthermore, the Protocol states there is no privilege of confidentiality, absent good cause, attaching to the instructions of the expert, Annex 1, art.5.1, *https://www.ciarb.org/media/4200/guideline-7-party-appointed-and-tribunal-appointed-expert-witnesses-in-international-arbitration-2015.pdf*.
[63] See Born, *International Commercial Arbitration*, p.2452 ("the better view is that experts are required, including when they are party-appointed and compensated entirely by the appointing party, to provide their genuinely held and sincere professional opinion, and not assume the role of advocate for a party.").
[64] Messrs Veeder and Stanley refer to this as "procedural and evidential flexibility," in *EU and US Antitrust Arbitration: A Handbook for Practitioners*, p.106.
[65] The late Martin Hunter wrote on this in 2007: "Expert Conferencing and New Methods" (2007) 3 *Transnational Dispute Management* 1.
[66] CiaRB, "Guidelines for Witness Conferencing in International Arbitration" (2019), *https://www.ciarb.org/media/4595/guideline-13-witness-conferencing-april-2019pdf.pdf*.

> 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."[67]

Expert testimony is perhaps, as the Guidelines refer, the most paradigmatic use of the witness conference procedure to test that opinion testimony, e.g., Guidelines, p.26. The author has also used this with opposing experts on foreign competition legal regimes, for questions remaining after the written memoranda have been submitted on foreign law. The process works well after some structured cross examination of the expert(s) by counsel, then the tribunal has its turn to pinpoint the expert down on point A, then ask the opposing expert their views on that point, then move to Point B.

Economic experts are, in fact, the paradigmatic use for conferencing 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 since the testimony is close in time and a "side by side" comparison. To this writer's mind, the more complex the issue to be resolved, the greater the benefit from the witness conference and the contemporaneous comparison of testimony.[68]

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 a more commonly used "hot tubbing" with a written joint report is recognised by the IBA Rules[69] and would work nicely in conjunction with a follow-on witness conference.[70]

What *Mitsubishi* teaches is that the arbitrator and parties' tool kit to best offer, take and understand this difficult evidence has no tight boundary; the arbitrator and parties can be creative to devise efficient methods to streamline and simplify the case, the evidence, and the testimony, unlike the counterpart method in the national judiciaries which are normally bound by strict rules of evidence and procedure. Witness conferencing is one such method and 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"[71] by experts are also in their tool kit and are worthy to consider in the right time for the right case, as the two procedures just mentioned in some respects overlap with witness conferencing. And the list should not stop there. As noted, in the US, dispositive motions (summary judgment motion practice) play a critical part in the development of the antitrust law since the 1980s.[72] And today in arbitration practice, dispositive motion practice has become an important topic considering the concern for expedition and expense and many institutional rules have begun to adopt these procedures.[73] The flexible arbitral process can utilise the dispositive motion practice more creatively in complex disputes than is seen in national courts. With the use of bifurcation,[74] perhaps a decision tree approach can be established at an early case management conference and some critical issues at the bottom of the tree can resolved separately with minimum information exchange and submissions on that separate basic "root" issues.[75] Furthermore, why not use the technology developed during the pandemic to allow creative remote conferences and hearings to bring a new model or prototype for the resolution of complex competition or even IP disputes in arbitration with the attendant cost savings and environmental benefits? All the procedures of course should be to everyone's agreement and are best developed at the time of an appropriate case management conference and embodied in a procedural order.

Conclusion

To conclude, the *Mitsubishi* Court was very emphatic that it was the flexibility of arbitration that was a key important factor in deciding the arbitrability issue for the court. Users of arbitration should embrace that very flexibility and put it to creative use in a complex

[67] In keeping with the flexibility of arbitration, the Guidelines' express stated 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", Guidelines, 13. 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: (a) the tribunal; (b) the witnesses; or (c) counsel.

[68] A somewhat similar analogue is used on occasion by the US and EU antitrust agencies (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 simultaneously talking through their positions with the agencies and can be a successful process to avoid a contested matter or at least identify the precise issues in dispute.

[69] IBA rules art.5.4.

[70] See the "Schedule" contemplated by Guidelines to serve as an agenda for the witness conference, pp.46–7. The efficiencies of simultaneous expert testimony is indeed making some inroads in the courts in the US, although full development will likely be restricted by procedural rules. See *https://calawyers.org/antitrust-unfair-competition-law/googles-play-store-antitrust/*.

[71] The flexibility of arbitration as applied to experts is also not restricted to the transcribed proceedings. See the creative suggestion of a "teaching session," a procedure not available in a traditional judicial procedure. Berger et al, "A Teaching Session for the Efficient Management of Technical Evidence in International Arbitration", *http://arbitrationblog.kluwerarbitration.com/2019/01/18/a-teaching-session-for-the-efficient-management-of-technical-evidence-in-international-arbitration/*.

[72] See *Matsushita Elec v Zenith Radio* 475 US 574 (1986); *Bell v Twombley* 550 US 544 (2007).

[73] See, e.g., art.39 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; Rule 29 of the SIAC (Singapore) Rules; Rule 33 of the AAA Commercial Rules; art.23 of the ICDR Rules; ICC Note to Parties of 1 January 2021, paras 109–114; LCIA Rules art.22.1 (viii).

[74] Bifurcation is recognised in many institutional rules, e.g., art.22.4 of the ICDR Rules.

[75] David Rivkin has first written and spoken on the use of the decision tree concept to better streamline arbitration disputes, "Debevoise Partner David W. Rivkin Discusses Enhanced Use of Technology to Improve Arbitration and Unveils Town Elder Arbitration Rules", 2021, *https://www.debevoise.com/news/2021/11/debevoise-partner-david-w-rivkin-discusses*; the decision tree concept would square with the flexibility in most institutional rules. See, e.g., LCIA Rules art.22.1 (vii).

arbitration, such as in areas of discovery, experts, and dispositive motions. Thus, 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. Arbitration can employ the innovation and flexibility encouraged by cases like *Mitsubishi* with the potential of such flexibility to find a resolution faster, easier, and with less expense than the national courts.