International Arbitration Of Antitrust Claims

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Introduction

International arbitration is a commonly preferred method of resolving international commercial disputes for parties seeking an alternative forum to potentially costly and unfamiliar domestic court litigation. Until fairly recently, however, antitrust claims could not, as a matter of law in the United States and elsewhere, be resolved through either domestic or international commercial arbitration proceedings. This is no longer the case. Importantly then, counsel for parties to international contracts should consider whether it is in their best interest to resolve their actual or potential antitrust disputes through international arbitration. In making this decision, consideration should be given to the nature of the potential claims and the advantages and disadvantages of private dispute resolution. This article summarizes the key issues to consider when making that decision.

Arbitrability Of Antitrust Claims

Until 1985, agreements to arbitrate antitrust claims were not enforceable in the United States as a matter of law based on public policy grounds.[1] The old rule, known as the American Safety doctrine, prohibited enforcement of contractual arbitration clauses covering antitrust disputes, even if the parties had specifically agreed to arbitrate "antitrust disputes."[2] One exception to this rule was that courts would often enforce an agreement to submit an antitrust dispute to arbitration if the agreement to arbitrate was reached after the dispute had arisen.

More recently, U.S. courts have moved toward the support of full arbitrability of all claims, whether they be statutory or common law-based, including antitrust claims. In 1985, the U.S. Supreme Court in *Mitsubishi* held that an agreement to submit antitrust disputes to international arbitration was enforceable out of "[c]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes."[3] In *Mitsubishi*, the dispute involved territorial restrictions in an automobile distribution agreement. The distributor attempted to sell outside its territory and refused to arbitrate as specified in the distribution agreement. Mitsubishi then sued to force arbitration. The distributor asserted antitrust counterclaims and alleged that the counterclaims were not arbitrable under the American Safety doctrine. The Court chose to enforce the arbitration agreement. Now, following *Mitsubishi,* it is well settled under U.S. law that antitrust claims can be resolved through international arbitration as well as domestic arbitration.

Unlike in the United States where the U.S. Supreme Court has directly addressed the issue of arbitrability of antitrust claims, the issue is less clear in the European Union.[4] Arbitrability is usually a matter of the law of the place of arbitration so the question of arbitrability is essentially a question of domestic arbitration law.[5] Whether antitrust claims are arbitrable is not fully settled in many European countries, however. Moreover, domestic competition law itself is not particularly well developed in many EU countries.

EU competition law, on the other hand, is relatively well developed. Still, there is not any leading case law from the European Court of Justice in Luxembourg on the issue of arbitrability of antitrust claims. The 1993 Notice on Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty was issued to improve the enforcement of competition laws throughout the community.[6] The Note did not directly address whether the competition laws could be enforced through arbitral proceedings, however.

Nevertheless, many leading commentators believe that it is generally accepted in the case law of many Member States, and implicit in their laws on arbitration, that arbitrators have the competence to apply EC competition law if it is relevant to the issue before them.[7] In Switzerland, for example, the Swiss Federal Tribunal annulled an arbitral award between an Italian party and a Belgian party where the arbitral tribunal had declined jurisdiction. The Court stated that "[N]either Article 85 of the Treaty [of Rome] nor Regulation 17 on its application forbid a national court or an arbitral tribunal to examine the validity of that contract."[8] Similar decisions have been reached in cases before the Supreme Court of the Netherlands and in France where case law concludes or assumes that competition law issues are arbitrable.[9]

The Decision To Arbitrate

Assuming a claim is arbitrable, whether a specific claim should be submitted to international arbitration for resolution is an important initial consideration.[10] One of the first things counsel will want to consider is the nature of the potential claims. Baker and Stabile categorize private antitrust disputes into four categories based on the nature of the claim and the potential parties.[11] These categories are a useful general framework to help guide the analysis. The four categories are as follows:

- Contractual disputes between partners of either a horizontal or vertical nature. Claims include disputes on pricing, exclusivity, territory or termination.
- Disputes between buyers and sellers that arise on a transaction-by-transaction basis. Claims include price discrimination, tie-ins, resale or use restrictions, refusals to deal or other monopoly abuses.
- Disputes involving a "conspiracy" with strangers that arise when one party to a business relationship has conspired with third parties to inhibit competition and damage the first party. Claims include price-fixing, market division, and boycotts.
- Disputes between competitors involving claims by one competitor that it has been or is likely to be injured by the acts of one or more competitors through predatory pricing, refusal to deal, monopolistic abuse, price discrimination, exclusive dealings, unfair competition and anti-competitive takeovers, among others.

For reasons discussed in greater detail herein, the claims generally encompassed by the first two categories are perhaps best suited to be resolved through international arbitration, while those in the last two categories are less likely candidates for resolution through arbitration.

Discovery. The necessity and availability of discovery is of paramount importance when considering the suitability of submitting a claim to arbitration. The first two categories of disputes are generally viewed as best suited for arbitration in part because they require more limited discovery. These cases generally involve joint ventures, licensee/licensor relationships, and distribution and marketing relationships between business partners in ongoing relationships. These claims usually involve relatively narrow factual issues and require less discovery. Moreover, much (if not most) of the proof needed to resolve these claims is in the hands of the parties themselves, so there is little need to seek extensive discovery from third parties.

This is not true for the third category of claims involving conspiracy. This situation exists, for example, in price-fixing agreements between a seller and its competitors. These types of claims require much greater third-party discovery to which arbitration is not generally particularly well suited.

The difficulty of obtaining third-party discovery can be amplified when participating in an international arbitration. Procedural rules of leading arbitration institutions – such as Article 20(1) of the International Chamber of Commerce (ICC) Rules of Arbitration, which provides that the Arbitral Tribunal shall establish the facts of the case "by all appropriate means" – allow for the possibility of discovery in the arbitral proceeding.[12] Provisions such as these generally refer to making application to the courts and laws of the country in which the arbitration is pending to enforce such requests.[13]

As a result, the law of the forum may be the principal source of discovery rights against third parties (as well as the law of the jurisdiction where the third party is located). Host country laws can vary widely, but many statutes are similar in many respects to the Federal Arbitration Act, including the difficulty in obtaining evidence from third parties that are outside the jurisdiction of the host country's courts. In selecting a forum it is therefore important to consider the likely necessity of referring to domestic courts for legal processes in aid of obtaining evidence, and the likely location of necessary parties and documents.

Finally, the fourth category is usually not well suited for arbitration because the parties are not in privity of contract, so an arbitration clause usually does not exist.

The Arbitrators. The ability to select arbitrators is often viewed as an advantage of international arbitration. Arbitrators may be selected for their relevant industry expertise, familiarity with international commercial business relationships and/or relevant market expertise. An arbitrator also may be selected to meet a specific need such as special training in such fields as econometrics. Often, trained arbitrators are in the best position to interpret complex and technical antitrust evidence and issues. Resolution through arbitration also avoids the runaway jury problem where plaintiffs may be awarded treble damages. A company may not feel as subject to an improper "strike suit," as they are known in the securities context, and may be more willing to resolve the issue on the merits.

Efficiency and Flexibility. Arbitration proceedings can be (and usually are) more efficient, informal and expeditious than domestic courts, which can be drawn-out, motion intensive, expensive and often invasive. The parties to international arbitration have the flexibility to choose the time frame within which hearings must be conducted, the location of the hearings, specific rules as to motions and discovery, and other relevant timelines. Parties can avoid a forum that they are not familiar or comfortable with. This flexibility is often preferable to the extended proceedings and drawn-out motion practice associated with U.S. federal courts, for example.

As discussed above, although discovery can be limited in international arbitration, arbitrations also may enjoy the unique advantage of avoiding any applicable foreign "blocking" and "clawback" statutes that generally do not apply to international commercial arbitration proceedings and awards concerning antitrust claims.[14]

Confidentiality. Confidentiality is also a decided advantage of international arbitration. Proceedings that are confidential have the benefit of allowing parties to resolve their disputes in a private setting and not in an open public forum. Often this can be an important consideration, especially in disputes involving parties in ongoing relationships who may want to keep confidential the terms of, or even the actual existence of, their relationship from competitors or other market inhabitants.

Available Remedies. The damages available in international arbitral proceedings are more limited than those available in domestic courts. An arbitral tribunal may be willing to award treble damages, for example, as are available in U.S. antitrust litigation. However, even if such an award is issued, it may not be capable of enforcement in domestic courts. In many jurisdictions outside of the United States, treble damages are viewed as penal in nature and not properly awardable by arbitrators. The New York Convention, Article V, provides that an award which is being enforced in a domestic court must be considered to be in accordance with the law of the country where the arbitration took place. Enforcement can be denied if treble damages is not in accordance with the law of the country, if the underlying antitrust claim is not capable of being submitted to arbitration in the country of enforcement, or if enforcement is generally considered contrary to the public policy of the country where it is sought.[15]

The leading arbitration rules, such as the ICC Rules of Arbitration and the UNCITRAL rules, and the rules of many countries such as the United States do allow for interim relief. Interim relief is usually only granted in extraordinary circumstances upon a showing that, for example, irrevocable harm will occur in the absence of such measures. As a general rule, mere monetary harm that can be compensated through the award of cash is not sufficient to warrant interim relief.

Finality and Enforcement. Arbitration awards are often viewed as having greater finality than a domestic court judgment, which may be subject to lengthy appeals. International arbitration awards also are more likely than a domestic court ruling to be recognized and enforceable across multiple jurisdictions. Some 120 countries are now signatories to the New York Convention on the Enforcement of Arbitral Awards. The list includes the United States and most European countries. Other conventions, such as the Inter-American Treaty, also may be valuable tools to assist in enforcement of an arbitral award.

Conclusion

International arbitration offers significant advantages for parties seeking an alternative to costly and timely domestic court litigation for antitrust claims. This is particularly true for claims between partners in a joint venture or other ongoing commercial relationship. It is not as true, *ceteris paribus*, for those antitrust claims involving allegations of conspiracy and those that will otherwise need significant third-party discovery to effectively resolve the dispute. It is important, therefore, at the outset of negotiating and drafting an arbitration clause calling for international arbitration that full consideration be given to the nature of potential future antitrust claims, the various advantages and disadvantages of arbitration, and the potential need for enforcement proceedings in domestic courts, and to weigh all these factors to make certain that international arbitration is appropriate for one's needs. In many cases it will be both a desirable and available means of international dispute resolution.

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[1] Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., *473 U.S. 614, 655 (1985) (Stevens, J., dissenting).*

[2] *The rule obtained its name from the holding in* American Safety Equip. Corp. v. J.P. Maguire & Co., *391 F.2d 821 (2nd Cir. 1968).*

[3] Mitsubishi, *473 U.S. at 629.*

[4] See *J.H. Dalhuisen*, The Arbitrability of Competition Issues, *11 Arbitration International No. 2 at 151 (1995).*

[5] See generally *Alan Redfern & Martin Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (3rd ed. 1999) at Chapter 2.*

[6] *93/C 39/05, OJ NoC 39/6 (February 13, 1993).*

[7] See, e.g., *Slot, P.J., The Enforcement of EC Competition Law in Arbitral Proceeding, 1 L.I.E.I. 101, 102-104 (1996) (including a brief survey of national legal systems).*

[8] *Judgment of the Swiss Tribunal Federal, April 28, 1992, (1993)* ICCA Yearbook *143; also reported in the Yearbook of Commercial Arbitration Vol. XVIII, 1993, pp. 143-149.*

[9] See *Slot, 1 L.I.W.I. at 103.*

[10] *For a good discussion of the advantages and disadvantages of domestic U.S. arbitration see Thomas J. Brewer,* The Arbitrability of Antitrust Disputes: Freedom to Contract for an Alternate Forum, *66 Antitrust Law Journal 99 (1997).*

[11] See *Donald I. Baker & Mark R. Stabile,* Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel, *48 Bus. Law. 395, 398.*

[12] *ICC Rules of Arbitration, Article 20(1) at 27 (2nd ed. 2001).*

[13] *In the case where a party to the arbitration proceeding has control over the third party from whom discovery is sought, the Tribunal may make a negative inference against the controlling evidence if that evidence is not made available.*

[14] See *Baker & Stabile, at 416-417.*

[15] See *New York Convention on the Enforcement of Arbitral Awards Article V.1(e), V.2(a) and V.2(b).*

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