New York Law Journal

Arbitration, 24 Years After 'Mitsubishi'

James J. Calder and David S. Stoner

05-11-2009

Twenty-four years ago, the U.S. Supreme Court ruled, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, that an international antitrust dispute was subject to arbitration under the Federal Arbitration Act (FAA).[1] The case overturned established law that antitrust claims were so complex and important they could only be properly handled by the courts.

In the nearly 25 years since *Mitsubishi*, arbitration has been extended to purely domestic antitrust disputes and a modest number of such cases have now gone to arbitration.[2]

This article focuses on some of the key questions that arise when a party seeks to arbitrate an antitrust case.

Compelling Arbitration

The FAA requires courts to stay judicial proceedings and compel arbitration where the parties have a written agreement that provides for the arbitration of the dispute underlying their litigation.[3] There is a strong federal policy favoring arbitration, and federal courts generally resolve all doubts concerning the arbitrability of a claim in favor of arbitration.[4]

Under the FAA, when a lawsuit is brought regarding any issue within the scope of an arbitration agreement, the court is required to "stay

the trial of the action until such arbitration has been had in accordance with the terms of the agreement."[5] Thus, a court is generally bound to send claims to arbitration where those claims are within the scope of the parties' arbitration agreement.

Prior to *Mitsubishi*, courts generally refused to apply the FAA to antitrust cases on public policy grounds. As explained by the Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.*,[6] and amplified by the Supreme Court in *Mitsubishi*, the great reach and complexity of antitrust law, and its "fundamental importance to American democratic capitalism," rendered antitrust claims inappropriate subjects of arbitration.[7]

In *Mitsubishi*, an international dispute between a Japanese automobile manufacturer and an auto dealer located in Puerto Rico, the Court confronted and rejected the policy of *American Safety*, at least with respect to cross-border disputes. The Court reasoned that "adaptability and access to expertise are hallmarks of arbitration" and that the complexity of antitrust claims was insufficient to bar the arbitration of such claims, at least in the international context.[8]

The Court concluded that the policy considerations behind the *American Safety* doctrine had to give way where "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" were present.[9] On the basis of that analysis, the Court held that the dispute had to be arbitrated, and that the auto dealer located in Puerto Rico had to arbitrate his U.S. antitrust claim in Japan in accordance with the rules and regulations of the Japanese Commercial Arbitration Association.[10]

In reaching its decision, the *Mitsubishi* Court was clearly driven by its concern that arbitration was an important tool of international

commerce and that to protect this method of dispute resolution, "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."[11] The Court also expressly reserved the issue of whether domestic antitrust claims could be arbitrated.[12] However, nothing in the Court's analysis and rejection of the bases for the *American Safety* doctrine suggested that its analysis did not also apply to domestic disputes.

The Court in fact extended its rejection of *American Safety* to purely domestic disputes in subsequent complex cases that did not involve antitrust claims. Thus, in *Shearson/American Express v. McMahon*,[13] the Court relied on *Mitsubishi* when it held that RICO claims could be arbitrated. The Court acknowledged that while "the holding in *Mitsubishi* was limited to the international context, much of its reasoning is equally applicable here."[14] The Court then reviewed the reasons for its rejection of *American Safety* in *Mitsubishi* and concluded that the reasoning there applied with equal force to domestic RICO claims.[15]

Following the Court's lead in *McMahon*, antitrust disputes that are subject to valid arbitration agreements, both international and domestic, are arbitrable. That is now settled law.[16]

Current Issues

As the case law has developed since *Mitsubishi*, a number of interesting and important questions have emerged concerning the scope of antitrust claim arbitrability. These questions include whether:

(1) horizontal price-fixing claims can be arbitrated on the basis of an arbitration clause contained in a customer's purchase agreement with one of the alleged price-fixers;

(2) class action claims can be arbitrated; and

(3) class action waivers contained in arbitration clauses can be enforced so as to preclude class relief for parties to such arbitration agreements.

In considering these questions, it is important to note that they are all fact driven. The first two turn on the scope of the specific arbitration clause at issue. The third turns, at least in some circuits, on the ability of a litigant to pursue his statutory rights individually in an arbitral forum.

Arbitration of Horizontal Price-Fixing Claims. An important issue for both antitrust plaintiffs and defendants is whether horizontal price-fixing claims can be forced into arbitration. In the typical price-fixing case, purchasers of a service or product assert that their vendors agreed to charge inflated prices to their respective customers. Where the vendor and the purchaser have a contract that contains a "broad arbitration clause" that covers "any and all" differences or disputes "arising out of" the contract, can the vendor force the purchaser's horizontal antitrust claim into arbitration? At least in the Second Circuit, the answer is a qualified "yes."[17]

In *JLM Indus. Inc. v. Stolt-Nielsen SA*, plaintiffs, who chartered ocean tankers for the transport of liquid chemicals, brought a class action alleging price-fixing by the tanker owners.[18] The transactions at issue were governed by 80 identical, industry standard, charter shipping contracts between the plaintiffs and each of the defendants.[19] Each contract contained a broad arbitration clause that covered "any and all differences and disputes of whatsoever nature arising" from the contracts.[20] On the basis of these arbitration clauses, the defendants sought to compel arbitration of the price-fixing claims and the Second Circuit agreed.

The court of appeals examined the standard arbitration clause in the contracts between the parties and concluded that the clause was a "broad" one which covered matters "collateral" to the contract itself.[21] The court then examined the actual price-fixing allegations asserted and held that, since they affected the actual price terms contained in the charter agreements, the claims arose out of the underlying contract and were covered by the arbitration clause.[22] Accordingly, the court concluded that the claims were arbitrable.

At least one other district court within the Second Circuit has reached a similar result.[23] Thus, depending on the facts of the case and the nature of the arbitration agreement, it may be possible to arbitrate horizontal price-fixing claims.

Arbitration of Class Claims. There is also significant case law development concerning the arbitrability of class claims.

Prior to 2003, courts generally held that a court could not compel class arbitration when the contract was silent on the matter.[24] In *Green Tree Financial Corp. v. Bazzle*, however, a case brought under South Carolina's consumer protection law, the U.S. Supreme Court explicitly acknowledged that class claims could be arbitrated even though the arbitration agreement did not explicitly provide for class treatment.[25]

The case was not an antitrust case and was arbitrated under South Carolina's state arbitration statute rather than the FAA.[26] It came to the Supreme Court on appeal from a decision of South Carolina's Supreme Court holding that the arbitration clause at issue permitted class treatment under South Carolina law.[27]

The Supreme Court held that the FAA, and not state arbitration law, governed and that the arbitrator, rather than the court, needed to decide if the arbitration clause permitted class arbitration.[28] Accordingly, the Court reversed the decision of the South Carolina

court and remanded to permit the arbitrator to decide the question. What is significant about the case from the standpoint of antitrust practitioners is the Court's recognition that class arbitration was an acceptable procedure at all under the FAA, even if not explicitly provided for in the parties' arbitration agreement.[29]

Subsequent to *Bazzle*, the Second Circuit held that the class-wide arbitration of the price fixing claims in *JLM* were arbitrable with little discussion of the class issue.[30] Similarly, in *In re Currency Conversion Fee Antitrust Litigation*, Judge William Pauley in the Southern District of New York compelled class-wide arbitration of antitrust claims brought by credit card holders against credit card networks and their member banks.[31] Thus, in at least some situations, arbitration of class-wide antitrust claims may be had.

Finally, in response to *Bazzle*, arbitration groups, such as the American Arbitration Association (AAA), created new rules to govern class arbitration.[32] In addition, parties began to draft contracts that explicitly addressed the issue of class arbitration. The prevalence of class arbitration grew exponentially. As of April 2009, the AAA listed more than 260 class arbitrations on its Web site.[33]

The Enforceability of Class Arbitration Waivers. Perhaps the latest issue to emerge in antitrust arbitration is the enforceability of explicit class action waivers.

In order to avoid the risk of class actions, some parties now include in their standard arbitration clauses explicit waivers of the right to proceed on a class basis in arbitration. The class action waiver, combined with the parties' agreement to resolve any disputes in arbitration, effectively forces a plaintiff to resolve any dispute on an individual basis. For plaintiffs with small claims, this may make it uneconomic to seek recovery for their alleged injuries.

The circuit courts have split outside of the antitrust context on whether such class arbitration waivers are enforceable. The Third, Fourth, Seventh and Eleventh circuits have all held, in cases under the Truth in Lending Act (TILA), that explicit class arbitration waivers are valid.[34] On the other hand, the Ninth Circuit and some district courts have struck down class arbitration waivers as being unconscionable under state law.[35]

In the antitrust context, at least two circuits have examined the issue as a matter of federal substantive arbitration law.[36] Both the First and Second circuits have found class arbitration waivers unenforceable where the facts of the specific case demonstrate that the waivers would effectively grant the defendant de facto immunity from the antitrust claims because the individual plaintiffs' claims are too small to be pursued individually.

In *In re American Express Merchants' Litig.*, the Second Circuit held that class action waivers must be examined on a case-by-case basis to determine if the waiver precludes the plaintiffs from properly vindicating their statutory rights.[37] If so, the circuit may decline to enforce the waiver.

In the *American Express* case, merchants who accepted the American Express card sought to pursue antitrust claims on behalf of a class challenging the legality of the American Express "honor all cards" policy. The policy required merchants to accept both American Express charge cards and credit cards; the plaintiffs claimed this constituted an illegal tying agreement. The parties' agreement contained a broad arbitration clause that precluded the parties from participating in class resolution of their claims. Individual arbitration was thus the only available remedy.[38]

In analyzing whether the class action waiver should be enforced, the court noted at the outset that although the "right" to litigate as a class

is a procedural right only, the U.S. Supreme Court "has repeatedly recognized the utility of the class action as a vehicle for vindicating statutory rights."[39] In particular, the Second Circuit relied on the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin*[40] that, when a plaintiff is faced with a complex antitrust action to recover a small amount of damages, "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all."[41]

The court then turned to the facts and found that, given the size of the average plaintiff's claim and the costs of pursuing claims individually, the plaintiffs would not be able to pursue individual arbitrations economically. The court therefore concluded that the class arbitration waiver would effectively grant the defendant "de facto immunity from antitrust liability by removing plaintiffs' only reasonably feasible means of recovery."[42]

Consequently, the court found as a matter of substantive federal arbitration law that the class arbitration waiver was unenforceable.[43] It then remanded the case to the district court to give American Express the opportunity to withdraw its motion to compel arbitration.[44] In reaching its conclusion, however, the circuit emphasized that it was not holding all class action waivers per se unenforceable, and that its decision was based on the facts of the case before it.[45] The court left open the possibility that, on different facts, a class action waiver could be upheld.[46]

The Court of Appeals for the First Circuit reached a similar conclusion in *Kristian v. Comcast Corp.*[47] There, the court noted that, under *Mitsubishi*, arbitration was an acceptable alternative to litigation, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[48] It then inquired, on the basis of the facts before it, whether the class arbitration waiver precluded the plaintiffs from obtaining a recovery because their individual claims were too small to pursue separately.[49] The court found this to be the

case on the facts before it, severed the class action ban from the arbitration agreement and ordered the arbitration to go forward under the arbitration clause as modified.[50]

In reaching this conclusion, the court examined, and distinguished, the TILA cases noted above where other circuits had upheld class arbitration waivers. In particular, the court held that TILA claims were far different and far simpler than antitrust claims, and that a class action waiver in the TILA context might not deprive a plaintiff of his statutory rights, whereas in the antitrust case before the court, it would.[51]

Thus, the First Circuit, like the Second in *American Express*, examined the economics of the specific claims before it to determine whether a class action ban would effectively deprive the plaintiffs of their ability to assert their antitrust claims. Finding on the facts that the class action waiver had such an effect, it held the waiver to be unenforceable.[52]

Conclusion

Twenty-four years after *Mitsubishi*, arbitration continues to develop as a potentially useful device for resolving antitrust disputes. The evolution of the law in this area is well worth watching.

James J. Calder *is a partner in the New York office of Katten Muchin Rosenman, and* **David S. Stoner** *is an associate in that office.*

Endnotes:

1. 473 U.S. 614 (1985).

2. See, e.g., *JLM Indus. Inc. v. Stolt-Nielsen SA*, 387 F. 3d 163, 179 n.8 (2d. Cir. 2004); *American Cent. E. Texas Gas Co. v. Union Pac.*

Res., 93 Fed.Appx. 1 (5th Cir. 2004).

3. 9 U.S.C. §1 et seq.

4. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

5. 9 U.S.C. §3.

6. 391 F.2d 821 (2d Cir. 1968).

7. *American Safety*, 391 F.2d at 826; *Mitsubishi*, 473 U.S. at 634-35.

8. Id. at 633.

9. Id. at 629.

10. Id. at 639-40.

11. Id. at 639.

12. Id. at 624.

13. 482 U.S. 220, 239-41 (1987).

14. Id. at 239 (internal citation omitted).

15. Id. at 239-41.

16. See, e.g., *JLM*, supra note 2; *Union Pac. Res.*, supra note 2; *Simula Inc. v. Autoliv Inc.*, 175 F.3d 716 (9th Cir. 1999); *Nghiem v. NEC Elec. Inc.*, 25 F.3d 1437 (9th Cir. 1994); *Bellevue Drug Co. v. Advance PCS*, 333 F.Supp.2d 318 (E.D.Pa. 2004).

17. *JLM Indus. Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004).

18. Id. at 167.

19. Id. at 167.

20. Id. at 171-72.

21. Id.

22. Id. at 175.

23. See *In re Currency Conversion Fee*, 361 F.Supp.2d 237, 258 (S.D.N.Y. 2005).

24. See, e.g., *Champ v. Siegel Trading Co. Inc.*, 55 F.3d 269 (7th Cir. 1995).

25. 539 U.S. 444, 453 (2003) (plurality decision).

26. Id. at 449.

27. Id. at 450.

28. Id. at 453.

29. See *In re American Express Merchants' Litig.*, 554 F.3d 300, 313 (2d Cir. 2009).

30. *JLM*, 387 F.3d at 181.

31. 361 F.Supp.2d 237, 267 (S.D.N.Y. 2005).

32. See Supplementary Rules for Class Arbitration, www.adr.org (last

visited April 26, 2009).

33. American Arbitration Association, www.adr.org (last visited April 26, 2009).

34. See *Livingston v. Associates Fin.*, 339 F.3d 553, 559 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 819 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000).

35. See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir. 2003); *Luna v. Household Fin. Corp. III*, 236 F.Supp.2d 1166, 1178 (W.D.Wash. 2002); *Lozada v. Dale Baker Oldsmobile Inc.*, 91 F.Supp.2d 1087, 1105 (W.D.Mich. 2000); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278-79 (W.Va. 2002); *Powertel Inc. v. Bexley*, 743 So.2d 570 (Fla.Dist.Ct.App.1999).

36. *American Express*, 554 F.3d at 312.

37. Id.

38. Id. at 306-07.

39. Id. at 312.

40. 417 U.S. 156 (1974).

41. *American Express*, 554 F.3d at 312.

42. Id. at 320.

43. Id.

44. Id. at 321.

45. Id.

46. Id.

47. 446 F.3d 25 (1st Cir. 2006).

48. Id. at 54 (quoting *Mitsubishi*, 473 U.S. at 637).

49. Id. at 55.

50. Id. at 64.

51. Id. at 58-59.

52. Id. at 64.