Page 301 - 308 **DOI:** *https://doij.org/10.10000/IJLMH.113154*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

Arbitrability of Anti-Trust Claims: In Light of the Mitsubishi Motors Case

RUKMAN BANKA[1]

ABSTRACT

Arbitration as an alternative dispute resolving mechanism has developed through constant restraints of judicial interventions and courtroom scepticism. The resistance to honor arbitration as an authentic procedure is prominently visible from the contrasting opinions laid down in judgements in deciding the arbitrability of any subject matter of the dispute. The law is vague on this point and the precedents have majorly added obscurity to the issue flowing from the strikingly contrasting rationale used by the Courts of law. In the landmark judgement of U.S. Supreme Court in the matter of Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc. ("Mitsubishi-Motors Case"), the powers and benefits of arbitration were heavily emphasized while discussing the arbitrability of anti-trust claims in International Commercial Agreements and Trade. This decision of 1985 has profound impact and consequences attached to it as it widened the scope of arbitration while analyzing the long continuing parochial lens used by judiciary which has led to the frustration of objects and purpose of arbitration mechanism. This paper aims to navigate around the change brought in the position of arbitrability of anti-trust claims before and after the Supreme Court decision in the case mentioned. The paper also makes a comparison of the outlook followed in other jurisdictions such as UK, India and Singapore. And ultimately, it attempts to analyze the significance and impact of mandatory laws and its consequences on international commercial arbitration.

Keywords: *arbitrability, anti-trust claims, international commercial arbitration, Mitsubishi Motors, public policy, mandatory laws.*

I. INTRODUCTION

Anti-trust laws and regulations aim at curbing any enterprise to gain monopoly power in the market and maintain competition among the companies to prevent market failure. Arbitrability of antitrust claims is a complex issue as it involves the commercial market and public at large raising questions against the merit of an arbitral award or the jurisdiction of arbitration on such matters. The public nature of antitrust disputes coupled with the private and confidential nature of international commercial arbitration creates the conflict between the two. Anti-trust laws

1 Author is a student at O.P. Jindal Global University, India.

 [ISSN 2581-5369]

governing the market in the US, such as the Sherman Act of 1890, Clayton Antitrust Act of 1914, allows private parties to sue for the actions in violation of such laws and seek treble damages for harm caused by anti-competitive conduct. Further, a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award is mandated to honor and recognize an international arbitration agreement. However, this is subject to limitation of setting aside an arbitral award if it is found to be in conflict with the public/domestic laws and policies of the country, a policy often wielded against arbitration. For such reasons, it becomes vital to discuss the arbitrability of anti-trust claims by the virtue of its unique nature to understand the nitty-gritty behind the development of law around it over the years.

II. PRE-MITSUBISHI MOTORS CASE

The hostility of Courts, irrespective of the jurisdiction/country, has been a fundamental reality for the prime hindrance behind the development of resolving disputes through arbitration since its very inception. The enactment of the Federal Arbitration Act, 1925 tried to put an end to such hostility by laying down a core legal framework of principles applicable to the matters of arbitration leaving little to no ground lending arbitrary powers in the Court of Law, making it powerful and progressive legal tool. However, it gave birth to plethora of ground on which an arbitration agreement can be deemed to be invalid or an arbitral award to be set aside, ultimately thwarting any potential attempt made towards its development. The doubts against arbitration were resolved by putting various legislations into place through various decades. Ratifying the New York Convention was a significant step leading to a crucial shift towards the pro-arbitration mandate as it allowed recognition of foreign arbitral awards and arbitration agreements. However, in matters of domestic claims, the Courts often played their upper hand in the matters and continued to show their strong disapproval in involving international commercial arbitration for resolving matters which involve the domestic public. Before the *Mitsubishi Motors Case,* the Courts of United States examined the arbitrability of anti-trust claims in *American Safety Equipment Corp v. J.P. Maguire &Co.*[2] in 1968, which heavily influenced the dissenting opinion of Stevens J. in the *Mitsubishi Motors Case.*

III. POST-MITSUBISHI MOTORS CASE

The arguments used by the United States Court of Appeals for the First Circuit, before the final appeal was made to the Supreme Court, quite represent the stereotypical hesitance faced by the

[2] American Safety Equipment Corp v. J.P. Maguire &Co., 391 F.2d 821 (2d Cir. 1968).

Courts in referring a matter for arbitration and has been argued against by Justice Blackmun in his delivery of the opinion of the Court. The Court first scrutinized the intention of Congress in enacting the Sherman Act, 1890 and Clayton Antitrust Act, 1914 which permits any third party to initiate proceeding against the party in default of such statutes through anti-competitive actions leading to concentration of the free market. This suggests that the intent was to promote free economic activity essential to the public interest, the responsibility of safeguarding which has been delegated upon both, the government and the public.

Second, it was stated that the contracts out of which antitrust claims arise are often 'contracts of adhesion', that is, there is power asymmetry between the parties to the contract causing undue influence of one over the other and hence, the forum selection in such cases cannot be entirely valid. Third, examining and solving disputes of antitrust claims require legal expertise in the field which arbitrators are assumed to lack as their primary focus lies in understanding the intentions of the party and coming to a common consensus. That is, the application and interpretation of law in solving disputes does not lie within the area of their expertise and training. And lastly, arbitrators of foreign origin, even if chosen from the business community, possess no proper knowledge of laws in the United States, that is, domestic laws. The Court held a decision against arbitrability of antitrust claims premised on these reasoning and held that public interest is so inherent to the antitrust disputes that it renders private arbitration inappropriate in hearing the matter.

This case expanded mostly on the argument of 'inappropriate nature of arbitration' in such matters. The US Supreme Court looks into all the principle stated above which are used as grounds against arbitration in this case. The majority decided that international commercial arbitration agreement must be enforced in order to 'honor foreign arbitral awards' as well as 'promote international comity, commerce and trade' especially so because the dispute is not wholly domestic. The Court examined the doctrines laid down in the case of *American Safety* one-by-one. First, while discussing the 'contracts of adhesion', the Court found that it is obvious that a recalcitrant party would attack at the validity of an arbitration agreement to avoid undergoing the process by proving fraudulent measures adopted, presence of undue influence or any such reason, which can result in an unfair trial. However, no such grounds were used to prove the invalidity of the arbitration agreement and argument was rather raised by the Court of Appeals out of the blue to prove that the agreement of forum selection was held invalid on the of the asymmetric power structure in an antitrust dispute. Second, to the argument that the complexity of antitrust claims lies outside of the purview of arbitrators, the Court replied that a potential complexity of the dispute shouldn't become a ground for warding off arbitration as

"adaptability and access to expertise are hallmarks of arbitration"[3] and complexity, again, is a subjective threshold to associate arbitrability of matters with. In fact, the Court in *American Safety* do not fully subscribe to this idea as they held in favor of arbitration for arbitration agreement decided post dispute. The conflict between the opinion and final judgement of the case used by them as precedent on the matter makes their reasoning tainted.

Third, the Court also rejected the claim of inadequate competency of arbitrators panel consisting of experts from foreign community with no knowledge or exposure to US antitrust laws. It was argued that such panel is decided with the consent and assistance of the parties and such people appointed are experts from the legal and business community. Along with this, the Courts will also have the opportunity to review the proper application of antitrust laws by such foreign arbitrators during the award enforcement stage. The remedy of treble-damages provided to the injured party for the violation of antitrust law under Sherman Act does not require prior judicial approval and is completely up to the individual parties who wish to seek the remedy. Considering the possibility of uncertainty in the international transactions, the parties can mutually agree beforehand the mechanism to be followed and the remedies to be granted. Mere doubt or assumption that the arbitration will not confer adequate remedies and follow proper mechanism cannot be a ground to ward it off. The Supreme Court came to these decisions and rationale by relying on *Alberto Culver Co. v. Scherk*[4] and *The Bremen v. Zapata Off-Shore Co.*[5] From this case the Court also drew a very important pro-arbitration rationale stating "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 require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context".

However, the Court also mentioned that such rationale, if put to use in all kinds of matters, will lead to out-of-proportion results and hence, in matters where the parties decide to go for arbitration **after** the dispute arises, the Court must not bar them to resort to litigation. The element of '**intent**' is the key here, as was followed in the case of *Power Replacements, Inc. v. Air Preheater Co.*[6], where the parties came to a settlement only with the intent to solve anti-trust disputes in the future by arbitration. The Court held that many a times, the parties do not apprehend the gravity of the kind of dispute that may arise in the future and only enter into an arbitration agreement with the intent of averting minor disagreements and disputes arising out

[3] *supra,* note 2 at 633.
[4] Alberto Culver Co. v. Scherk, 417 U.S. 506 (1974).
[5] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).
[6] Power Replacements, Inc. v. Air Preheater Co 426, F.2d 980 (9th Cir. 1970).

of the contract and not matters such as antitrust claims which involves illegal harnessing of power and attracts heavy penalty. For reasons such as these, it becomes important to assess the intention of the parties to decide upon the scope of arbitration clauses.

Another important ground for non-arbitrability is lack of judicial review to ensure proper interpretation of antitrust laws due to the confidential nature of arbitration proceedings. The Courts discussed whether antitrust laws allow arbitration as a method for solving such disputes without failing the idea of economic freedom as the laws allows space for public involvement and international commercial arbitration is a private process. This was discussed in another case of *Wilko v. Swan*[7], where the Supreme Court added to the layer of restrictions by stating that besides the grounds laid down in the statutes for setting aside an arbitral award if it can also be set aside if it shows 'manifest disregard for law'. These remarks again imply towards the assumed incapability of an arbitrating panel and its independent existence, thus allowing the progress of arbitration only under aegis of judiciary.

The notable decision of this case is celebrated for its liberal and generous interpretation of arbitration clauses complimenting the federal antitrust laws. It sets a precedent for future interpretations to cover within its ambit a wide scope of disputes unless there is express and explicit exclusion of matters under statutory laws from arbitrating and not otherwise, as the case was before the *Mitsubishi Motors Case*. Hence, the conflicting opinions of setting aside arbitration procedures for resolving antitrust disputes was finally settled in favor of arbitration. But once the issue of arbitrability of anti-trust claim was resolved through the judgement, the alternative weapons of 'public policy' and 'mandatory laws' were used to defeat private arbitration in matters of anti-trust claims.

IV. IMPACT OF MANDATORY LAWS ON INTERNATIONAL COMMERCIAL ARBITRATION

The most important question, which continue to be argued upon, of whether international commercial arbitration requires mandatory laws or not was provoked post-Mitsubishi judgement, which was held to be an 'under-enforcement' of mandatory laws. Mandatory rules are laws that purport to apply irrespective of a contract's proper law, or the procedural law selected by the parties.[8] The mandatory laws are decided by the parties to the conflict. This party autonomy does not come without its limitations and impact on International Commercial

[7] Wilko v. Swan, 346 U.S. 427 (1953).
[8] Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 Arbitration International 274, 275 (1986).

Arbitration where it plays a controversial role by complicating and mixing the intent of the parties and interest of the states and public policies. The necessity to adhere to this balance leads to the success of this mechanism, which when failed, can lead to setting aside of the arbitral award. The threshold, with time, has not only become more complicated, vague and arbitrary, it also has also set the bar of challenging any arbitral award that most of them are likely to succeed if they don't show a consistent outcome. This, instead of minimizing judicial intervention, leads to maximum interference in the procedure. The reason for the complexity of this issue is that mandatory rules leave arbitrators tangled up in arbitration's identity crisis.[9] This crisis is not confined to party autonomy and mandatory rules but also comes from the doubts and bitterness of judiciary towards arbitration. While deciding upon a matter, the interest of state and parties are often in conflict with the mandatory rules and until the priority is identified of individual interests involved in an arbitration procedure, the tension will remain attached to it. The probable way of resolving this issue is by giving wider discretionary powers to arbitrators in order to determine a definitive method of deciding the application of mandatory rules.

V. COMPARISON WITH OTHER COMMON LAW JURISIDICTIONS

(A) Europe:

The extension of the rationale applied in *Mitsubishi Motors Case* was seen in the case of *Eco Swiss China Time Ltd. v. Benetton Int'l NV*[10], where the European Court of Justice ("**ECJ**") indirectly delved upon the arbitrability of matters which came within the ambit of EU Competition. In brief, a licensing agreement concluded by the Dutch company Benetton (the licensor) with the Hong Kong company Eco Swiss and the American company Bulova Watch Company Inc., granted Eco Swiss the right to produce watches and clocks bearing the words 'Benetton by Bulova', which could then be sold by Eco Swiss and Bulova.[11] This agreement singed by the three parties also contained the arbitration clause which laid down that any dispute arising out of this agreement would be resolved by means of arbitration. The difference between the *Mitsubishi Motors Case* and *Eco Swiss* is that in the case of latter, the matter was taken to arbitral tribunal, and it was only after the award was granted, wherein Benetton was to compensate Eco Swiss and Bulova for damages caused, that Benetton took the dispute to Dutch Court to get the arbitral award annulled on the grounds of violation of public policy laid

[9] Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 Melbourne J. INT'L L., 39 (2005).
[10] Eco Swiss China Time Ltd. v. Benetton Int'l NV, [1999] ECR I-3055.
[11] Vera Korzun, *Arbitrating Antitrust Claims: From Suspicion to Trust,* 48 N.Y.U..J. INT'L 22.

down in the EU Competition Laws. The rationale laid down by ECJ in this case was similar to *Mitsubishi Motors Case*, however, in *Eco Swiss* the Court laid down a clear judgement that if there is an arbitration agreement between the parties which valid and enforceable, such dispute **must** go for arbitration where the EU Competition Laws can be validly applied. More explicitly, national court decisions in France, Switzerland, Germany, Italy, Sweden, Spain and England have repeatedly held that EU and Member State Competition claims may validly and enforceably be the subject of an international arbitration agreement.[12] There has a strong emphasis on following arbitration as a dispute mechanism for EU Competition claims but the award rendered thereof will be subject to judicial review.

Despite the progressive nature of the judgements in the EU member states in favor of arbitration, there are a few risks associated in the areas where the law is not clear. It becomes comparatively easier for the arbitrators to apply the substantive EU Competitive laws in case of a dispute between EU member states where such laws have domestic application. However, the situation is unclear when the dispute before the arbitrator is governed by a law of a non-member state, or when it comes to the question of whether the arbitrator is required to apply EC competition law ex officio. Hence, it implies that the arbitrators cannot neglect the application of mandatory laws of the country where the award will be enforced as well the laws of the country where the seat of arbitration is and must also maintain a balance in the application of the two. The line between the supervisory role of the Courts and reviewing powers of the Court has been blurred with time so much so that intervention and setting aside procedure has become a common next step after the arbitral award has been granted.

(B) India:

India has seen growth in the use of arbitration as a procedural mechanism only in the recent years and even though the development is slow-paced, India is taking long-strides towards it in order to minimize judicial intervention and promote speedy disposal of disputes. Discussing arbitrability of anti-trust claims is important because if an arbitral tribunal adjudicates upon a matter which do not fall within the ambit of disputes which are arbitrable, such award can be set aside under section 34 & 48 of the Arbitration & Conciliation Act,1996 and held null and void. There have been numerous discussions and case laws dealing with the issue of arbitrability of any dispute, but the answer remains unclear and there is no accepted and fixed parlance to adjudicate a dispute of arbitrability and had led to conflicting and opposing opinions across the country. The arbitrability of anti-trust claims have not examined by the Courts in

[12] Gary Born, *International Commercial Arbitration*, 3rd edn, Kluwer Law International, 16 (2021).

 [ISSN 2581-5369]

India and the only case which slightly touched upon the matter is *Union of India v. Commission of India*[13] where the Railway Board of India challenged the jurisdiction of Competition Commission of India when there was an arbitration agreement between the parties. The public policy/public interest argument is used overwhelmingly to avoid arbitration in India. In this case, the Delhi Court denied arbitration of an anti-trust claim on the grounds that a dispute maintainable before the Competition Commission of India cannot be referred for arbitration on the sole reason that there exists an arbitration clause between the parties as these are restricted to clauses of the contract and cannot conduct the investigation inherently necessary for anti-trust claims.

VI. CONCLUSION

One cannot neglect the incongruous nature and object of competition law and arbitration. Competition law is a community law and arbitration follow private enforcement. This conflict is likely to raise questions on the arbitrability of antitrust claims always with equal number of concurring and dissenting opinions. Despite all kinds of restrictive interpretation of law and rules, the scope and application of International Commercial Arbitration is increasing as it now can also include antitrust claims which can be privately enforced even though there is an underlying public concern attached to it. With minimal judicial intervention, arbitration will gain trust of the public and that will give it the autonomy to function separately as an extrajudicial dispute resolution mechanism without any judicial surveillance.

*****

[13] Union of India v. Commission of India, A.I.R. 2012 Del 66 (India).

 [ISSN 2581-5369]