

## ON ARBITRATION OF COMPETITION/ANTITRUST DISPUTES: A TRIBUTE TO *MITSUBISHI*

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This article will first reflect back more than three decades on the genesis of arbitration and competition matters and the seminal *Mitsubishi* case, and then how that case was so remarkably forward thinking. The article will then touch at the conclusion on some practical issues that frequently arise in a competition case today and how *Mitsubishi* is still influencing with vigor. As will be apparent, that organic decision continues to be of great significance in the handling of complex arbitrations, including and especially those dealing with antitrust or competition issues. And as also will become apparent, the policy and rationale behind that extraordinary case indeed has relevance in today's struggle between a global and a more national view to international trade.

In *Mitsubishi Motors v. Soler*, 473 US 614 (1985), the US Supreme Court led the worldwide migration to the recognition of arbitrability of competition disputes at least in an international situation, assuming the parties have agreed to arbitrate these issues. Up till that time most, if not all, jurisdictions around the globe considered these antitrust competition matters to be strictly for the courts. To grasp the incredible impact of the decision, one should first consider the policy which the Court embraced to come to its conclusion that international competition cases are arbitrable.

The Supreme Court in *Mitsubishi* began by noting the “healthy regard for the federal policy favoring arbitration” as well as, in respect to international matters, the growth of American business and trade will not be encouraged if “we insist on a parochial concept that all disputes must be resolved under our laws and in our courts,” 473 US at 629. In holding antitrust claims arbitrable (that is, claims “encompassed within a valid arbitration clause in an agreement embodying an international

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commercial transaction”), the Court (per Justice Blackmun) observed with remarkable prescience in 1985 “[t]he controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the *potential* of these tribunals for efficient disposition of legal disagreements arising from commercial relations *has not yet been tested*,” 473 US at 638 (emphasis supplied). Thus, the Supreme Court was willing to embrace this “experiment” and require courts to “shake off” any hostilities to arbitration and essentially get with broad-minded international notions of progress in trade and commerce. *Id.*

The *Mitsubishi* Court did not shy away from stating the basic, fundamental policy behind its decision is that in international contracts, the better course to follow is allow the parties their freedom to contract to resolve their disputes in the way they want to. Again, emphasizing the globalist underpinnings, the Court, quoting from its landmark case *The Bremen v Zapata Off-Shore*, 407 US 1, 9 (1972), stated “notwithstanding solemn contracts, ... [w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, ... our laws, and ... our courts.” Following *The Bremen*, the Court “eschewed a provincial solicitude for the jurisdiction of domestic forums,” 473 US at 630.

Putting aside this globalist trade perspective, the *Mitsubishi* opinion took a 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.<sup>1</sup> The Court took this giant step forward and stated “we conclude that 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,” 473 US at 629. As noted, *Mitsubishi* was an optimistic and hopeful experiment in the commercial area if there ever was one from the Supreme Court. There was no way in 1985 for the Court to be so certain on the “capacities” of the international tribunals or that the process would lead to “predictability in the resolution of

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<sup>1</sup> See Emmanuel Gaillard’s quite astonishing (and indeed sometimes humorous) article on the far-reaching tentacles (the ‘sociology’) international arbitration has today, <https://www.arbitration-icca.org/media/7/70785051257890/emmanuel-gaillard--sociology-of-international-arbitration-042715-ia.pdf>.

disputes.” It was an experiment they were willing to embrace. This unquestionably was the motivation for the stinging dissent of Justice Stevens, joined by Justices Brennan and Marshall, as he noted: “the elected representatives of the American people would not have us dispatch an American citizen to a foreign land in search of an uncertain remedy for the violation of a public right that is protected by the Sherman Act. This is especially so when there has been no genuine bargaining over the terms of the submission, and the arbitration remedy provided has not even the most elementary guarantees of fair process,” 473 US at 666.

History has proven the *Mitsubishi* majority correct and the dissent incorrect, however, in that we have seen foreign arbitral institutions throughout the world to have developed innovative fair processes, as well as the global arbitration bar has stepped up and shown itself capable of robust resolution of the most complex disputes, be they grounded in foreign or domestic statutory or treaty rights. As noted by the *Mitsubishi* Court, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution,” 473 US at 626-27. The real threat to Justice Blackmun’s optimistic, pioneer view of a global trade order where both individual freedom of contract should be paramount in the policy chain of dispute resolution and advance agreement “on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting” *The Bremen*, 407 US at 13-14, is likely to be found somewhere in the nether fields of nationalistic political intrigue, seen daily today with greater frequency seemingly spreading all over the world.<sup>2</sup>

Thus, in the commercial arbitration area, although there is always room to improve, we have certainly seen since 1985 a robust development for increased efficient disposition of these complex claims in arbitration, and this has very much included antitrust/competition claims. It is fair to say at the time of *Mitsubishi*, antitrust/competition advocates were concerned about ceding private enforcement authority to arbitrators, while the arbitration practitioners, by virtue of language

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<sup>2</sup> Gary Born’s speeches on this phenomenon provide interesting backdrop. <http://riskandcompliance.freshfields.com/post/102f5vi/freshfields-hosts-33rd-annual-freshfields-and-queen-mary-university-arbitration-i> and <https://www.law360.com/articles/798830>.

in the opinion allowing courts to have a “second look,” were unsure just what the case would mean to the very cornerstone of arbitration, party autonomy in deciding how they want their disputes finally resolved. This will be taken up shortly.

Since that groundbreaking case, as noted a worldwide migration began. Cases around the world have followed suit, if not extending *Mitsubishi*, in recognizing the arbitrability to complex competition disputes, most notably *Eco Swiss China Time v Benetton Int'l*<sup>3</sup> in the EU. Furthermore, *Mitsubishi* has been unremarkably construed to cover US domestic as well as international disputes.<sup>4</sup> Now, in looking back on reflection more than thirty years later, *Mitsubishi*, in addition to its landmark ruling on arbitrability, on fresh reread, makes certain very critical corollary points on the path to reach its result on arbitrability which are of significant importance to the arbitration and competition law practitioner today.

The first significant corollary observation relates to the discussion regarding the concern that antitrust cases are too complex to be left in the hands of arbitrators and thus arbitrability should not be recognized by reason of this complexity. In framing the Soler party's position, the Court stated “[t]he cases “require sophisticated legal and economic analysis, and thus are alleged to be ‘ill-adapted to strengths of the arbitral process, *i.e.*, expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity,” 473 US at 632. The Court's dismissal of this concern was powerful and historic, and laid the very foundation of the acceptance of arbitration as a suitable and proper method to resolve disputes, irrespective of their complexity. These words set the stage in the Court's view that litigants in no way forfeit something critical in arbitration, rather if anything, the trade to arbitration is a trade up: “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration,” 473 US at 628.<sup>5</sup>

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<sup>3</sup> Case No C-126/97, [1999] E.C.R. I-3055 (E.C.J.)

<sup>4</sup> *ABA Antitrust Law Developments* (8th ed. 2017), p. 813.

<sup>5</sup> Or as the Supreme Court later stated in *ATT Mobility LLC v. Concepcion*, “[i]n bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and

The Court noted precisely that it is *because* of this complexity, as seen in many competition/antitrust cases that would be the very reason to favor arbitrability as “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,” 473 US at 633. Thus, we see today that many of the leading arbitral institutions have adapted to take on complex cases in their procedural rules and adapted to the push for expedition in spite of complexity.<sup>6</sup> 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.<sup>7</sup> This was recognized by the *Mitsubishi* Court as critical, as the Court’s reference to a kind of “anyway,” the cases in arbitration will most likely be vertical issues (an example being a distribution arrangement, subject to a contract containing an arbitration agreement) and not horizontal price fixing cartel cases, the “monstrous proceedings that have given antitrust litigation an image of intractability,” 473 US at 633.<sup>8</sup> It was arbitration’s “adaptability” and “access to expertise” that swayed the Court on the over-complexity argument, *id.*

The second corollary point that stands out on a *Mitsubishi* reread is the discussion of the concern raised by the Soler party against arbitrability that in competition disputes, the private treble damage procedure is too important to the business fabric to be thus relegated out of the United States’ courts and, furthermore, the arbitration process cannot

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speed, and the ability to choose expert adjudicators to resolve specialized disputes,” 131 S Ct 1740, 1751 (2011).

<sup>6</sup> See, e.g., Rules of the American Arbitration Association Rules on Procedures for Large Complex Commercial Cases, [https://adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://adr.org/sites/default/files/CommercialRules_Web.pdf) at p. 37 and The Singapore International Arbitration Centre (SIAC) Rules on Expedition, <http://www.siac.org.sg/our-rules/rules>, Rule 5.

<sup>7</sup> <https://www.wilmerhale.com/en/insights/publications/revi-sed-iba-rules-on-the-taking-of-evidence-in-international-arbitration-june-10-2010>, Articles 5 and 6.

<sup>8</sup> Nevertheless, horizontal cases such as price fixing have since been held to be arbitrable disputes. See, e.g. *JLM v. Stolt-Nielsen*, 387 F. 3d 163 (2d Cir 2004).

be counted on to enforce competition policy with arbitrators, many times foreign and many times chosen from the business community. “Just as just as ‘issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community - particularly those from a foreign community that has had no experience with or exposure to our law and values,’” 473 US at 632, *citing American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), which was the primary case before *Mitsubishi* holding the rights “conferred” by the antitrust statutes and policy were simply too important and “inappropriate” to be taken from the State and left to a private arbitration enforcement. Again, the relevance today in the US (and elsewhere<sup>9</sup>) with the current Administration’s “America First” push and its distrust of international tribunals is somewhat inescapable.<sup>10</sup>

The *Mitsubishi* Court, however, back in 1985, had no problem dismissing these concerns, noting what has been true today (more than 30 years later), through the party and institutional appointment process, the tribunals have for the most part remained impartial and competent, and even have had no special obstacles interpreting foreign law if needed, just as a judicial body would do under Fed R Civ P 44.1. As to the importance of the private treble damage remedy *ex post*, (*ex post* being pursuant to an arbitration agreement and the awarding of relief for conduct to have already occurred), the Court as well found no impediment in allowing a litigant to vindicate its full competition grievance through the arbitration process.<sup>11</sup> The private right of action

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<sup>9</sup> Examples may be the movement of some Latin American countries to withdraw from the ICSID convention and its private arbitration mechanism as a means to resolve investment disputes and CJEU’s decision in *Achmea v. Slovakia*, (Case C-284/16)[2018] stating that intra EU bilateral investment treaties calling for private arbitration of disputes were incompatible with EU law.

<sup>10</sup> This maybe best exemplified in the recently concluded NAFTA (USMCA) negotiations, in which a much watered down version of investment dispute settlement is what ultimately ended up in the agreement, <https://www.reuters.com/article/us-trade-nafta-factbox/winners-and-losers-from-the-new-nafta-deal-idUSKCN1LF2O9>.

<sup>11</sup> This is as opposed to *ex ante* application of antitrust or competition law in which government enforcement (*e.g.* criminal enforcement, merger enforcement or EC unlawful state aid enforcement) would not be arbitrable as there would be no arbitration agreement between the governmental competition authorities and the target of enforcement. On the European front, there has been discussion of arbitration of behavioral 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, 19 Eur. Bus. L.

statute in the United States<sup>12</sup> will remain just as viable in arbitration as in judicial litigation and thus as “the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies,” 473 US at 636. “The importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court,” 473 US at 635.

In this writer’s judgment, perhaps the single or strongest negative issue to the allowance of competition matters to be arbitrated is that arbitration is generally confidential and not open to the public. In fact, the public would not as a general matter know of an arbitration proceeding or award unless the parties agreed to disclose the fact or the award becomes public in the enforcement stage in court. The arbitration policy of confidentiality indeed in certain respects collides with public policy importance of antitrust enforcement as a “charter of economic liberty”<sup>13</sup> in which obviously carries with it a strong public interest and a right to know. And while the *Mitsubishi* Court recognized and cited favorably language in the Court of Appeals’ opinion that stated the antitrust law enforcement is no “private matter,” the Court then somewhat pushed the importance of the public nature of competition law enforcement aside in noting “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum [via treble damages], the statute will continue to serve both its remedial and deterrent function,” 473 U.S. at 638. Justice Stevens’ important dissent indeed stresses the importance of the public to know of antitrust enforcement (a “public right”) even if it is by private enforcement, 473 US at 655.

This author’s suggestion is that the key stakeholders in the arbitration of competition cases (arbitral institutions, the business and legal community, scholars, and legislators) should consider developing certain rules leading to more transparency in these arbitrations, inasmuch if the practices and violations alleged are proven, they could not be

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Rev. 7 (2008). We have seen recently in the US the use of arbitration proposed by parties seeking government approval in a merger case (ATT and Time Warner) and the court endorsing it as a means to deter anticompetitive conduct *ex ante*. *US v. ATT, et al*, <http://www.dcd.uscourts.gov/sites/dcd/files/17-2511opinion.pdf>. (at pages 41, 149 fn. 51) affirmed <https://www.cadc.uscourts.gov/internet/opinions.nsf/390E66D6D58F426B852583AD00546ED6/%24file/18-5214.pdf>.

<sup>12</sup> Section 4 of the Clayton Act, 15 USC sec 15.

<sup>13</sup> *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4 (1958).

concealed in the process; and, equally important, awards be made public, if only in partially redacted format so that both arbitration tribunals would have the benefit of knowing how other tribunals have decided these disputes on matters of such public gravity, and a public deterrence comes into the open in having the information of such enforcement activity. This would allow or at least help ensure greater consistency on interpretations and rulings of public statutory rights. The public importance to antitrust enforcement would seem to favor this transparency. Antitrust/competition law enforcement, be it through arbitration, the judiciary, or the regulators is sewn for the most part in the public policy or *ordre public* in virtually every jurisdiction. There is no reason why the arbitration of these disputes cannot follow the trend in investment arbitration disputes which are of equal public importance to be sure. The primary administration of these disputes is by the International Centre for Settlement of Investment Disputes inside the World Bank which has promulgated amended new rules calling for greater transparency in the arbitration of investment disputes, including enhanced facility in the publication of awards.<sup>14</sup>

Likely the aspect of *Mitsubishi* that has engendered the most discussion from scholars and counsel has been the important reference in that opinion to the role of the national courts in the review, enforcement, or vacatur procedures of arbitration awards. The Court stated: “[h]aving permitted the arbitration to go forward, the national courts of the United States 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,” 473 US at 638. This is the language that spawned the so-called “second look” doctrine although the Supreme Court does not use that phrase. As well, the European Court of Justice affirmed in *Eco Swiss* that the national courts in the EU should grant annulment of any award where “its domestic rules of procedure require it ... for failure to observe national rules of public policy.”<sup>15</sup> This reference to national court review has received so much attention as it pits the policy of party

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<sup>14</sup> <https://www.asil.org/insights/volume/22/issue/15/2018-proposals-amendments-icsid-rules-icsid-enters-era-trump-populism>.

<sup>15</sup> *Eco Swiss* E.C.R. I-3055, para 37.



autonomy, the fundamental policy behind arbitration, against the policy of mandatory law and that arbitration cannot be used to subvert a country's mandatory law.

Having the benefit of thirty four years of hindsight, if the second look means a stare or intense study vs a mere quick look, we should probably quietly turn the lights out on the name "second look" doctrine, as there really is likely no proper "second look." In fact, as will be noted *infra*, the Supreme Court in *Mitsubishi* did not mean for there to be a genuine "second look," if that look meant that the second look by the courts was equal to the first look by the arbitration tribunal; and we do nothing to further the laudable goals of either competition policy or arbitration policy to keep that doctrine, named as such, breathing. The doctrine could have very well originated at a time in the 80's once the *Mitsubishi* decision was rendered, when there was perhaps less confidence in the process of international and even domestic arbitration (recall arbitration of complex disputes had not been "tested"), and we can see this in the strong *Mitsubishi* dissent of Justice Stevens, an eminent jurist to be sure, 473 US at 665. But no one must lose sight that 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," 473 US at 638.

At the outset, as noted above, there is no issue that in most countries a large part of the competition law forms an integral part of a state's public policy or *ordre publique*, the mandatory law that defines its core values to the rule of law. 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 has the opportunity to "look" at the award and determine if it comports with the state's public policy, NY Convention V (2) (b). Furthermore, in meeting the expectations of the parties, the Tribunal should do its level best to issue an enforceable award, which goal is embodied in some institutional rules, such as Article 42 of the ICC Rules. Thus, the Tribunal must consider the different competition regimes which touch the controversy; *i.e.* the public policy of the jurisdictions where the award will be enforced.<sup>16</sup> In fact, *failure* to apply a particular

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<sup>16</sup> Professor Radicati di Brozolo has written well on "which competition law," including the mention of the "auto-rattachement" 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*, 27 LCIA Arbitration International 1 at page 19-20 (2011); also, of note, Professor Mayer stated in 1986 that even though arbitrators "are neither guardians

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."<sup>17</sup>

A failure by the arbitrator to make the necessary competition assessment can happen in a number of scenarios, some more benign than others. The most problematic is when the arbitration process itself is potentially infected with an anticompetitive animus. The US Supreme Court in *Mitsubishi* did mention a form of 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 competition regime in that other country. The *Mitsubishi* Court clearly spoke 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. In a sense, this unusual 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. In fact, if one takes this scenario to a darker next step, this would not be too different than if the parties' colluded to instruct the arbitral tribunal not to apply competition law at all, an unquestionable illegal agreement.<sup>18</sup> As stated by two well-known English barristers, in this situation an arbitrator should not proceed in conducting an arbitration to effectuate a cartel scheme for public policy reasons as well for reasons to avoid personal liability as a participant for "[t]here is now

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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*, 2 J. Int. Arb. 274, 284-86 (Kluwer 1986).

<sup>17</sup> See Radicati di Brozolo, *supra* note 16, at p. 20.

<sup>18</sup> See *id.* at p. 22.

nothing in legal principle to distinguish an illegal cartel from illegal money laundering, drug dealing, prostitution, or slavery.”<sup>19</sup>

In the same vein, in the more typical case in which the arbitration award is reviewed at the enforcement stage, the question then becomes what kind of “look” does the enforcement court engage, and this more typical fact pattern would assume none of the mischief is present in the preceding paragraph in which the arbitration itself could be or is used as an instrument to facilitate competition or antitrust violations. To be sure, the national court, at the enforcement stage, must take into consideration the same two overriding policies; the first policy that the parties’ freedom to contract and choose arbitration as the way to decide their dispute carries 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; and two, proper consideration of the mandatory public policy of a country’s competition regime.

Scholars have written extensively in this area and there seems to have developed, originally soon after *Mitsubishi*, two schools of thought on the proper extent of judicial review of arbitration awards in competition disputes which could impact 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 judicial approaches have been characterized by some commentators a couple decades ago as the maximalist and minimalist positions.<sup>20</sup> The maximalist position, of course, 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.<sup>21</sup> And the minimalist position is, as one would expect, a more deferential approach by the reviewing court to the arbitrator’s judgement 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

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<sup>19</sup> Veeder and Stanley in G Blanke and P Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer, 2010, p. 103.

<sup>20</sup> See, e.g., Radicati di Brozolo, *supra* note 16, at pp.4-5; the reader is also referred to the thorough compendium on this general subject put together by G Blanke and P Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners*, Kluwer, 2010, cited in note 19, *supra*. The chapters by A Moure, L Radicati di Brozolo, as well as this writer, all very much state the law is trending to adopt and should adopt the minimalist standard of review of awards. See Chapters 1, 22, and 39.

<sup>21</sup> See Born, *International Commercial Arbitration* (2d ed.2014, Kluwer) at p. 3326.

conclusions of law. Public policy issues as respects mandatory law that arbitration tribunals cannot ignore include a broad spectrum of subjects more than just competition issues, and can be from Truth In Lending law, certain corruption and anti-bribery laws, certain banking issues, certain bankruptcy laws, certain export/import trade laws, certain labor issues, drug testing laws, to gambling laws and more; and while courts worldwide still can significantly diverge in the degree of respect they afford public policy and mandatory law determinations by arbitral tribunals,<sup>22</sup> at least in the competition area, it seems the strong trend today and in the past several years is pretty well favoring a minimalist approach of review.<sup>23</sup> Thus, the definite trend today for judicial review of an arbitration tribunal's award on competition issues is to determine if there is a gross misapplication of competition policy resulting or potentially resulting in a serious economic injury or distortion to a geographic and product market. Mere error of law is not enough to cause a reviewing court to intervene via what has been coined "the second look doctrine."<sup>24</sup>

Has review of competition awards thus been at the vanguard of a wave for a deferential position of courts to the review of awards involving mandatory public policy concerns? This maybe so although it is perhaps too early to know. Certainly, in the antitrust area, the *Mitsubishi* court offered one reason why we can be sanguine of the robust quality of arbitration awards and that is arbitration affords the parties and any appointing institution to select people who are expert in the field, which at least would be the starting point for judicial deference to the award. In answer to the Soler party's concern that antitrust disputes are not appropriate for arbitration because arbitrators as opposed to public judges might harbor some "innate hostility" to the restrictions on business activity that the antitrust laws provide, the Court stated: "[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." The Court then noted in an accompanying footnote, "[t]he obstacles confronted

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<sup>22</sup> This is well laid out by Born, *Id* and presumably all are arbitrable at least in US, EU, and Switzerland. Cf Shehata, Application of Overriding Mandatory Rule in International Commercial Arbitration, 11 *World Arbitration and Mediation Review* 383 (2017).

<sup>23</sup> To be sure, there are outlier court decisions in the competition area in countries other than the United States, and this is pointed out by Professor Born, *supra* note 21 at p. 3331.

<sup>24</sup> *Id.* at 3330. See also, Radicati di Brozolo, *supra* note 16, at p. 5; *Baxter v. Abbot Laboratories*, 315 F 3d 829, 833 (7<sup>th</sup> Cir.2003), discussed *infra*.

by the arbitration panel in this case, however, should be no greater than those confronted by any judicial or arbitral tribunal required to determine foreign law.<sup>25</sup> Moreover, while our attachment to the antitrust laws may be stronger than most, many other countries, including Japan, have similar bodies of competition law,” 473 U.S. at 634.

Accordingly, judicial recognition of the deference required in the review of competition awards in fact began with Justice Blackmun himself 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,” 473 US at 638. After *Mitsubishi*, one of the most respected appellate judges, Frank Easterbrook on the US Court of Appeals for the 7<sup>th</sup> Circuit, stressed in *Baxter Int’l v. Abbott Laboratories*, 315 F 3d 829 (7<sup>th</sup> Cir.2003), 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,” 315 F 3d at 832. Thus, in the United States at least, there is a clear weight of authority favoring a respectful and non-interventionist judicial approach in dealing with the review of competition or antitrust awards.

Furthermore, generally outside the US, at least in the EU and member states, the review of competition awards is not too different or should not be (there are outlier decisions as noted in cited in the reference in footnote 23). In the US, private court enforcement of the antitrust laws is much more prevalent than in the EU,<sup>26</sup> where competition enforcement is chiefly in the European Commission or the national enforcement authorities. Given the deference seen by US courts, there is thus every

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<sup>25</sup> See, e. g., Fed. Rule Civ. Proc. 44.1.

<sup>26</sup> 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.

reason to expect the judiciaries in the member states should be just as hospitable to arbitration awards involving competition policy.<sup>27</sup> The bell cow case of *Eco Swiss v. Benetton* in the EU, as noted, stated that national courts should grant annulment in case of a breach of public policy, the European Court of Justice went on to note “it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances,” *Eco Swiss* E.C.R. I-3055, para 35. And to the same effect and perhaps carried further than what Justice Blackmun would have allowed, is *Thales v Euromissile*<sup>28</sup> in the Paris Court of Appeal in 2004, where the court refused to consider a competition law infringement allegedly that “creve les yeux,” but was not even examined for better or for worse by the “yeux” of the arbitrators. The court followed *Eco Swiss* and French procedural rules and refused to intervene to set aside the award.

Thus, to sum up the “second look” analysis, the reviewing court is required to balance the policies of arbitration as seen in *Mitsubishi* and *Eco Swiss* (that is the policy of party autonomy in choosing how their disputes will be resolved), and the mandatory policy in favor of robust competition law. This balancing process and review is not an extensive one 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 was 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.<sup>29</sup>

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<sup>27</sup> See Radicati di Brozolo in G Blanke and P Landolt *EU and US Antitrust Arbitration: A Handbook for Practitioners*, supra note 19, at p.763.

<sup>28</sup> Cour d’appel de Paris, 1re Chambre, section C, 18 Novembre 2004 (n° 2002/19606, *SA Thalès Air Défense c/ GIE Euromissile et EADS*).

<sup>29</sup> Thus, in a certain sense, it would seem possible an arbitral tribunal finding of violation may very well be less vulnerable to draw a negative judicial reaction, than a tribunal concluding no competition infringement. In that case, at least the arbitral tribunal’s “consideration” of the competition issue is manifest. See also Born, *International Commercial Arbitration* at p. 3322 where he notes that “[p]ublic policy has generally been invoked

After the discussion of the “second look” parameters and the limitations thereon, what does this mean for arbitrators in these cases, frequently highly complex disputes infused with economics? Certainly, as in most arbitrations, it places a very heavy burden to get it right as there is no meaningful appellate review. But the mandatory public policy of competition law delegated by contract to an arbitration tribunal involves nothing less than a private tribunal deciding issues of the very fabric of “democratic capitalism” and of “national interest” to at least in the US economy, as *Mitsubishi* notes, 473 US at 635-36 and there is no reason to think the disputes are less important in most other countries. The importance is heavy, the policy is real, even such that arbitrators, in the view of many scholars, have the duty to raise and apply the relevant competition regimes on their own motion.<sup>30</sup> Thus, this note will touch on a few issues the author has experienced, noting that *Mitsubishi* has had a long and wide effect, and its fundamental policy of the nature of arbitration may help creative practitioners take the issues the disputes present and bring them to “efficient disposition” as predicted by *Mitsubishi*. The focus will only be on three central topics in the resolution of complex antitrust/competition disputes, namely discovery, experts, and summary disposition, but the reader could obviously expand this list using the penumbra *Mitsubishi* affords.

The Supreme Court noted in *Mitsubishi*, as referenced above, that “vertical restraints which most frequently give birth to antitrust claims covered by an arbitration agreement will not often occasion the monstrous proceedings that have given antitrust litigation an image of intractability. In any event adaptability and access to expertise are hallmarks of arbitration,” 473 US at 633. And of course, as also noted, horizontal restraint allegations are now properly presented in arbitration<sup>31</sup> and many 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

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only in cases of clear violations of fundamental, mandatory legal rules, not in cases of judicial disagreement with a tribunal’s substantive decisions or procedural rulings.”

<sup>30</sup> See, e.g., Radicati di Brozolo, *supra* note 16, at p. 22; Veeder and Stanley, in *EU and US Antitrust Arbitration: A Handbook for Practitioners*, *supra* note 19, at pp. 97, 104.

<sup>31</sup> E.g., Stolt-Nielsen, *supra* note 8.

for information. These “monstrous proceedings” which are not based on any contractual relation would not be seen in arbitration.<sup>32</sup>

Thus competition arbitrations, in both disputes of vertical and horizontal issues, have latched on to the very “adaptability” or flexibility point stressed by Justice Blackmun and are capable to be successfully resolved with tailored discovery or information exchange; this writer has found the leading guidepost for discovery in complex arbitrations to be “soft law” protocol contained IBA Rules referenced above, soft law in that the rules are not intended to replace the arbitral institution’s rules to which the parties agreed.<sup>33</sup> The IBA Rules in these complex arbitrations strike the right balance between the parties’ necessity to obtain information in a complex antitrust dispute and the principles of expedition and reasonable cost of proceedings. 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 US court discovery. The Rules provide for a Request for Production (if the arbitration tribunal and parties agree), which is much more tailored than what is seen in the Federal Rules of Civil Procedure. But for that matter, 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.<sup>34</sup> For the sake of expedition and reasonable expense, depositions are not generally allowed even in these complex disputes, unless that witness is critical to the case and/or cannot appear live.<sup>35</sup> And while tailored document exchange is the preferred method of information exchange, this author would very much agree “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

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<sup>32</sup> See note 11 *supra*.

<sup>33</sup> See note 7 *supra*.

<sup>34</sup> Another soft law protocol, the Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration) have recently been published. <http://praguerules.com/>. These rules offer a civil law alternative approach to discovery 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 even more circumscribed under the Prague Rules, and while there are provisions allowing limited document exchange involving specific documents, including requests from the Tribunal, the “parties are encouraged to avoid any form of document production,” Article 4.2.

<sup>35</sup> See IBA Rules Article 4.9.



evidence, short of ‘fishing exercises.’”<sup>36</sup> All this said, this is arbitration, not court litigation, and broad discovery is not necessarily a given.<sup>37</sup>

Taking all considerations in mind, this writer has found that discovery of some dimension is usual and necessary in a complex arbitration, like a competition-based arbitration; generally, the best practice is one of proportionality, that is the more complex the case, the more discovery is needed and vice versa. Many institutions have adopted rules to deal with the complexities in arbitrations, such as competition cases, an example being the AAA’s 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 can come up in international disputes can be daunting and this writer has previously written on this position and the importance of keeping a level playing field between the different parties who may face different privilege national laws and protocols.<sup>38</sup>

Justice Blackmun also notes the importance of “access to expertise” as being a “hallmark” of arbitration; the Court refers both to arbitrator expertise as well as expert opinion testimony, “arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal,” 473 US at 633. Antitrust and competition disputes are very much expert driven as the jurisprudence in major antitrust regimes throughout the world has trended to be grounded in solid economics.<sup>39</sup> Issues such as definitions of relevant markets, the impact on the defined market of the behavior in question, whether a particular price is supra competitive, barriers to entry, and questions as to whether there are fair nondiscriminatory licensing practices all are commonly seen in these disputes and are based in fundamental economics and most dependent on expert opinion.

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<sup>36</sup> Veeder and Stanley, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, *supra*, note 19, at p. 105.

<sup>37</sup> Judge Easterbrook noted in a recent domestic US case in the Seventh 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 \$1 million 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>.

<sup>38</sup> <http://kluwerarbitrationblog.com/2017/08/14/privilege-international-arbitration/?print=pdf>.

<sup>39</sup> In the United States, see *US v ATT, et al*, *supra* note 11; *Ohio v. American Express*, 138 S. Ct. 2274 (2018).

Counsel's and the arbitral tribunal's relationship to these experts may vary depending on the composition of the tribunal, the law governing the dispute, the seat of arbitration and other factors as US counsel, British counsel, even Canadian counsel, all have their own protocols with experts including different laws regulating the presentation of their testimony and any discovery in advance of expert testimony at the hearing. Civil law disputes are still dramatically different than the common law approach as the expert's allegiance is to the process and the tribunal.<sup>40</sup> The IBA Rules, which has aimed to infuse both common and civil law approaches in the guidelines, again have detailed and well thought out procedures in Articles 5 and 6 of the Rules.

This writer has found after years of dealing with competition/economic experts in court, in the agencies in the US and the EC, and in arbitration, that the very "adaptability" which the *Mitsubishi* Court considers also to be the "hallmark" of arbitration, allows for a better avenue to truth than even the courts provide and, therefore, we hope, real justice. This proposition is actually quite remarkable.<sup>41</sup> The traditionally respected method in common law of 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 regarding a definition of a relevant market, has there been more competition over time, has new entry occurred or can it occur in spite of not having occurred, and has there been a prices increase and why not, the list goes on.

Thus, arbitration presents the parties and the arbitral institutions to get to the truth in a faster, and less expensive way than the courts; and the *Mitsubishi* case has red flagged that this method of dispute resolution can be encouraged in complex cases such as antitrust or competition disputes. Arbitrators need only utilize the flexibility of the process to streamline the critical economic evidence in a way, with counsel's approval, that will be easier to employ than if the case were in court. "[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

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<sup>40</sup> See generally *EU and US Antitrust Arbitration: A Handbook for Practitioners*, *supra*, note 19, chapters 8 and 9.

<sup>41</sup> Messrs. Veeder and Stanley refer to this as "procedural and evidential flexibility," *supra* note 19, at p. 106.

resembling full-scale ‘cross-examination’ of the experts by counsel is likely to be productive.”<sup>42</sup>

Accordingly, while the author is not certain of the benefits of the use of *only* tribunal-appointed experts, and the procedures contemplated by Article 6 of the IBA Rules and Article 6 of the Prague Rules, I completely agree that simple or rigorous cross examination of party appointed economic experts alone is nothing short of wasting the very tools of flexibility that arbitration offers in an antitrust dispute. Therefore, this writer has used and has found very beneficial to the tribunals of which I have been a part, a form of witness conferencing with experts as the most robust method to arrive a comfortable resolution, and with any luck, wisdom and truth. The procedure is neither difficult nor controversial and is simply after some structured cross examination of the expert(s) by counsel, the tribunal should have its turn to pin point the expert down on point A, then asking the opposing expert her views on that point, then moving to Point B. The writer has also had simultaneous back and forths between opposing experts as well, just that the tribunal needs tightly to control this process with the tribunal only questioning, sometimes with counsel participating and sometimes after the expert witness’ structured testimony from counsel. The author has used this most recently with opposing experts on foreign competition legal regimes, questions remaining after the written memoranda have been submitted on foreign law.<sup>43</sup> Of course, “hot tubbing,” not at all too different than the above procedure, and an in vogue method of streamlining expert evidence to get to the truth better and faster, also puts to use the flexibility of arbitration, as well as certain “meet and confer” procedures between experts, contemplated by the IBA Rules as in Article 5.4. These procedures and other creative ways at approaching economic expert testimony, of course, should be established in advance at an appropriate case management conference.<sup>44</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> The Chartered Institute of Arbitrators (Singapore) has recently issued new guidelines on witness conferencing reflecting that there is no “single established process” for this tool and the conferencing can take many forms, reflecting the very flexibility of this dispute resolution process. In draft form, the guidelines can be seen at <https://www.ciarb.org/media/3064/witness-conferencing-guidelines-draft-for-consultation.pdf>.

<sup>44</sup> 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. <http://arbitrationblog.kluwerarbitration>.

In the US, dispositive motions (summary judgment motion practice) play a critical part in the development of the antitrust law, mainly as a result of several Supreme Court antitrust decisions, including one a year after *Mitsubishi, Matsushita Elec v. Zenith Radio*, 475 US 574. (1986) (a plaintiff at the dispositive motion stage (after some or more discovery) must show that the inference of illegal conspiracy is “plausible” to defeat the motion if defendants put forth evidence that there is a competing benign explanation for the behavior) and, more recently, *Bell v. Twombly*, 550 US 544 (2007), (a plaintiff at the early pleading stage must allege facts showing allegations of illegal conspiracy are plausible not merely conceivable). As a result of these and other lower court decisions, a substantial US antitrust jurisprudence has developed from decisions decided (for plaintiffs and defendants) at the dispositive motion stage. And today in arbitration practice, dispositive motion practice has become an important topic in light of the concern for expedition and expense and many institutional rules have begun to adopt these procedures.<sup>45</sup>

In *Mitsubishi*, Justice Blackmun noted that “[b]y agreeing to arbitrate a statutory claim, a party ... trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration,” 473 US at 628. There is no sound reason why the present interest in this summary process in arbitration and the judicial trend in the Supreme Court and lower courts in competition cases cannot meld together such that more institutions can come on board, especially in these complex disputes. For one, Justice Souter noted for the majority in *Twombly* that a policy behind the decision is to avoid the potentially enormous discovery expense absent a solid plausible claim for antitrust violation, 550 US at 558-60. Moreover, dispositive motion practice plays a potentially much more benign or intrusive role in arbitration as the same fact finder, the tribunal, will resolve the case anyway--- with or without a plenary evidentiary hearing; in the US at least, a summary judgment takes the decision process away from the jury, a citizen’s right under the Seventh Amendment of the Constitution.

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com/2019/01/18/a-teaching-session-for-the-efficient-management-of-technical-evidence-in-international-arbitration/.

<sup>45</sup> See, e.g., Article 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.

Thus, there is a potential synergistic convergence of policies when considering dispositive motions in complex arbitrations, such as competition cases. At one time, not too long ago, arbitration and any of the following could not be used together in the same sentence or paragraph: complex disputes, antitrust, dispositive motions, needed discovery, and other such similar phrases. These antitrust cases have traditionally been heavy document oriented and involve massive discovery, and for many years even dispositive motions in antitrust cases were discouraged because “the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot,” *Poller v. CBS*, 368 US 464, 473 (1962). Then in 80s, the courts became chary of simply green lighting expensive antitrust claims with no plausible basis and at the same time, with the groundswell of arbitration, *Mitsubishi* came down and courts began asking “why not” bring simplicity, informality, and expedition to these same disputes? As the penumbra of *Mitsubishi* has developed, scholars and institutions have advanced the idea of achieving the policy of *Mitsubishi* through devices as dispositive motions. To be sure, the case must be a correct one for a dispositive motion, and the tribunal must keep in mind Article V (I) (B) of the New York Convention ensuring procedural fairness (a right to be heard) in the arbitration.<sup>46</sup> A dispositive motion in favor of either claimant or respondent, when used properly, can potentially reduce the time and expense in a case, which are primary hallmarks of arbitration.<sup>47</sup>

*Mitsubishi* was a landmark decision in the area of arbitration, competition disputes, and, reading closely the language of the opinion, the case is especially important in the arbitration of complex matters generally. The Court was very emphatic that it was the flexibility of arbitration that was the important factor opening the arbitrability issue for the Court. Users of arbitration should adopt that very flexibility and put it to creative use in a complex arbitration, such as in areas of discovery, experts, and dispositive motions. The list should not stop there as for example in the area of fact of damage in antitrust cases, a tribunal could adopt flexible procedures to deal with quantum damage

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<sup>46</sup> Born’s treatise is particularly helpful on this score, *supra* note 21, at pp. 3492-3541.

<sup>47</sup> This writer first wrote an article on dispositive motions in competition arbitrations about a decade ago (pre-*Twombly*), 24 J. Int. Arb. 2 (Kluwer 2007), Certain Procedural Issues in Arbitrating Competition Cases, (dispositive motion discussion at pp. 201-209), (with Kurkela, Liebscher, and Sommer).

issues.<sup>48</sup> One can hope that the primary stakeholders--judges, arbitral institutions, scholars, and policy makers--continue to push the envelope, adopt creative procedures and walk through the door that *Mitsubishi* has opened.

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<sup>48</sup> In any case, to have proper standing, courts have adopted a liberal approach in allowing a private plaintiff to show the fact it suffered damage as opposed to any difficulty it may have to prove the amount of recovery. *See, e.g., Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U. S. 656, 364 U. S. 660 (1961).