The [Quick] Second Look Doctrine:
Twenty-Five-Plus Years after Mitsubishi

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Outline

This paper addresses three things.

First, this paper addresses the origin and content of the "Second Look" doctrine as articulated by the U.S. Supreme Court in *Mitsubishi v. Soler Chrysler-Plymouth* in 1985. The key passage in that 5-3 Opinion is:

> "Having 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 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." * * *. While 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."

An extract is attached

Second, this paper reviews how *Mitsubishi* and the second look doctrine have come up in U.S. Court decisions over the past twenty five years.

Third, this paper the 2003 decision of the Seventh Circuit Court of Appeals in the *Baxter v. Abbott* where a majority wrote: "The arbitration tribunal in this case 'took cognizance of the antitrust claims and actually decided them.' Ensuring this is as far as our review legitimately goes." (A copy is attached.)

Given the practical weaknesses of this doctrine, the dissent in *Mitsubishi* is revisited and thoughts are offered as to the motivation of the Court in formulating the doctrine in the first place.

EXTRACT BY DAVID CARON APRIL 2010

MITSUBISHI MOTORS CORP. V. SOLER CHRYSLER-PLYMOUTH
THE SUPREME COURT OF THE UNITED STATES
473 U.S. 614 (1985)

JUSTICE BLACKMUN delivered the opinion of the Court.

The principal question presented by these cases is the arbitrability, pursuant to the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, of claims arising under the Sherman Act, 15 U. S. C. § 1 *et seq.*, and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction.

I.

Petitioner-cross-respondent Mitsubishi Motors Corporation (Mitsubishi) is a Japanese corporation which manufactures automobiles and has its principal place of business in Tokyo, Japan. Mitsubishi is the product of a joint venture between, on the one hand, Chrysler International, S.A. (CISA), a Swiss corporation registered in Geneva and wholly owned by Chrysler Corporation, and, on the other, Mitsubishi Heavy Industries, Inc., a Japanese corporation. The aim of the joint venture was the distribution through Chrysler dealers outside the continental United States of vehicles manufactured by Mitsubishi and bearing Chrysler and Mitsubishi trademarks. Respondent-cross-petitioner Soler Chrysler-Plymouth, Inc. (Soler), is a Puerto Rico corporation with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico.

On October 31, 1979, Soler entered into a Distributor Agreement with CISA which provided for the sale by Soler of Mitsubishi-manufactured vehicles within a designated area, including metropolitan San Juan. On the same date, CISA, Soler, and Mitsubishi entered into a Sales Procedure Agreement (Sales Agreement) which, referring to the Distributor Agreement, provided for the direct sale of Mitsubishi products to Soler and governed the terms and conditions of such sales. Paragraph VI of the Sales Agreement, labeled "Arbitration of Certain Matters," provides:

> "All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."

Initially, Soler did a brisk business in Mitsubishi-manufactured vehicles. As a result of its strong performance, its minimum sales volume, specified by Mitsubishi and CISA, and agreed to by Soler, for the 1981 model year was substantially increased. In early 1981, however, the new-car market slackened. Soler ran into serious difficulties in meeting the expected sales volume, and by the spring of 1981 it felt itself compelled to request that Mitsubishi delay or cancel shipment of several orders. About the same time, Soler attempted to arrange for the transshipment of a quantity of its vehicles for sale in the continental United States and Latin America. Mitsubishi and CISA, however, refused

permission for any such diversion, citing a variety of reasons,[1] and no vehicles were transshipped. Attempts to work out these difficulties failed. Mitsubishi eventually withheld shipment of 966 vehicles, apparently representing orders placed for May, June, and July 1981 production, responsibility for which Soler disclaimed in February 1982.

The following month, Mitsubishi brought an action against Soler in the United States District Court for the District of Puerto Rico under the Federal Arbitration Act and the Convention.[2] Mitsubishi sought an order, pursuant to 9 U. S. C. §§ 4 and 201, to compel arbitration in accord with para. VI of the Sales Agreement.[4] Shortly after filing the complaint, Mitsubishi filed a request for arbitration before the Japan Commercial Arbitration Association.

Soler denied the allegations and counterclaimed against both Mitsubishi and CISA. It alleged numerous breaches by Mitsubishi of the Sales Agreement,[5] raised a pair of defamation claims, and asserted causes of action under the Sherman Act, 15 U. S. C. § 1 *et seq.*; the federal Automobile Dealers' Day in Court Act, 70 Stat. 1125, 15 U. S. C. § 1221 *et seq.*; the Puerto Rico competition statute, P.R. Laws Ann., Tit. 10, § 257 *et seq.* (1976); and the Puerto Rico Dealers' Contracts Act, P.R. Laws Ann., Tit. 10, § 278 *et seq.* (1976 and Supp. 1983). In the counterclaim premised on the Sherman Act, Soler alleged that Mitsubishi and CISA had conspired to divide markets in restraint of trade. To effectuate the plan, according to Soler, Mitsubishi had refused to permit Soler to resell to buyers in North, Central, or South America vehicles it had obligated itself to purchase from Mitsubishi; had refused to ship ordered vehicles or the parts, such as heaters and defoggers, that would be necessary to permit Soler to make its vehicles suitable for resale outside Puerto Rico; and had coercively attempted to replace Soler and its other Puerto Rico distributors with a wholly owned subsidiary which would serve as the exclusive Mitsubishi distributor in Puerto Rico.

After a hearing, the District Court ordered Mitsubishi and Soler to arbitrate each of the issues raised in the complaint and in all the counterclaims save two and a portion of a third.[7] With regard to the federal antitrust issues, it recognized that the Courts of

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[1] The reasons advanced included concerns that such diversion would interfere with the Japanese trade policy of voluntarily limiting imports to the United States; that the Soler-ordered vehicles would be unsuitable for use in certain proposed destinations because of their manufacture, with use in Puerto Rico in mind, without heaters and defoggers; that the vehicles would be unsuitable for use in Latin America because of the unavailability there of the unleaded, high-octane fuel they required; that adequate warranty service could not be ensured; and that diversion to the mainland would violate contractual obligations between CISA and Mitsubishi.

[2] The complaint alleged that Soler had failed to pay for 966 ordered vehicles; that it had failed to pay contractual "distress unit penalties," intended to reimburse Mitsubishi for storage costs and interest charges incurred because of Soler's failure to take shipment of ordered vehicles; that Soler's failure to fulfill warranty obligations threatened Mitsubishi's reputation and goodwill; that Soler had failed to obtain required financing; and that the Distributor and Sales Agreements had expired by their terms or, alternatively, that Soler had surrendered its rights under the Sales Agreement.

[4] Mitsubishi also sought an order against threatened litigation.

[5] The alleged breaches included wrongful refusal to ship ordered vehicles and necessary parts, failure to make payment for warranty work and authorized rebates, and bad faith in establishing minimum-sales volumes.

[7] The District Court found that the arbitration clause did not cover the fourth and sixth counterclaims, which sought damages for defamation, or the allegations in the seventh counterclaim concerning discriminatory treatment and the establishment of minimum-sales volumes. Accordingly, it retained jurisdiction over those portions of the litigation. In addition, because no arbitration agreement between

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