Arbitration in Antitrust Cases

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Maintained

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This practice note identifies key topics and best practices to consider when representing a client in arbitration in an antitrust case. Specifically, this note explains certain aspects of arbitration that you should be familiar with when arbitrating an antitrust claim.

This practice note covers the following topics:

For a more comprehensive list of related antitrust litigation content, see *Antitrust Litigation Resource Kit (Federal)*.

Overview of Arbitration in Antitrust Cases

Arbitration in Antitrust Cases

When an antitrust claim is submitted to arbitration rather than tried in court, the consequences are substantial. In arbitration, one or three persons appointed as arbitrators will decide the claim, instead of a judge and jury. In arbitration, a class is rarely certified, and the proceedings are normally confidential. The arbitration process usually will proceed much more quickly than a lawsuit in court and usually with less discovery. The scope of judicial review will be much more limited than appellate review of a trial court judgment.

To commence arbitration, one party serves the other with a written demand for arbitration, typically in the form of a letter that states the claim briefly. The demand rarely has the length or detail of a complaint in a lawsuit, and frequently no answer is required. If the party receiving the demand does not agree to arbitrate, the demanding party can ask a court to issue an order compelling arbitration. Once the parties have agreed to arbitration or a court has compelled it, the following steps typically take place:

- Selection of the arbitrator or arbitrators
- A preliminary hearing or telephone conference conducted by the arbitrators to identify issues, and to schedule a hearing, discovery, and any prehearing activities
- Discovery and pre-hearing disclosures
- A hearing, at which the arbitrators receive evidence and arguments of counsel
- Briefing of the issues, either before the hearing, after it, or both
- Issuance of the arbitration award, which resolves the dispute and awards any relief

Parties can agree to skip most of these steps, except the selection of arbitrators, which is required. The arbitrators can also choose to dispense with any steps, unless a step is required by agreement of the parties or by arbitration rules that the parties have agreed to follow.

When representing a party to a dispute subject to arbitration, you will find that some of the procedural decisions, such as how many arbitrators will hear the dispute and whether any particular rules of procedure will govern, were already made when your client entered into the agreement to arbitrate. But you should consider, especially if you believe these procedural rules will place your client at a disadvantage, whether the arbitration agreement applies to the dispute. And, if your client is considering whether to agree to a contract containing an arbitration clause or to include an arbitration clause in its contacts, you will need to consider how to draft the arbitration clause to either require or preclude certain governing rules or procedures.

Governing Laws

The principal statute governing arbitration in the United States is the Federal Arbitration Act (the FAA), *9 U.S.C. §§ 9–16*. The FAA applies to the arbitration of any dispute arising under a contract involving interstate or foreign commerce. Any antitrust claim in arbitration that involves interstate or foreign commerce sufficiently for the Sherman Antitrust Act to apply, and most litigated antitrust claims do, would be subject to the FAA. In addition, most states have enacted arbitration statutes applicable to the arbitration of disputes affecting the state. See, e.g., *NY CPLR §§ 7501–7514* (New York); 710 ILCS 5/1-22 (Illinois); *Cal. Code Civ. Proc. §§ 1280–1294.2*; Uniform Arbitration Act; Revised Uniform Arbitration Act.

Role of the Courts

The FAA and the state statutes authorize courts to:

- Enforce agreements to arbitrate and stay lawsuits with arbitrable claims (FAA §§ 2–4)
- Appoint arbitrators in certain circumstances (FAA § 3)
- Enforce compliance with arbitrators' subpoenas to third parties (FAA § 7)
- Vacate or modify final arbitration awards on very limited grounds (FAA §§ 10-11)

- Where grounds to vacate are not established, enforce final arbitration awards (FAA § 9)

Essentially all other aspects of the arbitration process are left to the decision and control of arbitrators, including discovery, scheduling and management of the hearing, admission of evidence, and awarding relief.

Federal Court Jurisdiction

If a party to the arbitration agreement resists arbitration, the other party will need to ask a court to compel arbitration. That party will need to decide whether to file the request in federal or state court.

To bring an action in federal court to enforce an arbitration clause, a party must establish grounds for federal court jurisdiction. The FAA does not itself confer federal jurisdiction. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25 n. 32 (1983)*. One way to satisfy this requirement on a motion to compel arbitration is to show that the claim to be arbitrated arises under federal law. *Vaden v. Discover Bank, 556 U.S. 49, 62 (2009)*. If the claim asserts a violation of the Sherman Antitrust Act or another federal antitrust statute, a federal court will have jurisdiction under the FAA to compel arbitration, because the claim satisfies the requirements of federal question jurisdiction, *28 U.S.C. §§ 1331, 1337*. However, if the claim is for breach of contract, or is some other claim arising under state law, and the antitrust issue arises in a defense or a counterclaim, the requirements of federal question jurisdiction will not be satisfied due to the well-pleaded complaint rule, *Vaden, supra at 62*. Unless another ground for jurisdiction can be established, such as diversity of citizenship, *28 U.S.C. § 1332*, an action to compel arbitration can be filed only in state court.

The jurisdictional rules are different after the arbitration has commenced. In *Badgerow v. Walters, 596 U.S. 1 (2022)*, the Supreme Court held that federal court jurisdiction to vacate, modify, or enforce a final arbitration award cannot be based on a showing that the underlying claim would satisfy the requirements of federal question jurisdiction. The Court's reasoning for this decision is that the provisions of the FAA that authorize a court to review awards do not contain language authorizing federal court jurisdiction based on the underlying claim. The same reasoning would apply to an action to enforce compliance with arbitrators' subpoenas. Hence any action in federal court for these forms of relief would likely require establishing diversity of citizenship.

New York Convention

Arbitrations of international commercial disputes are subject to an international treaty, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, which is known as the "New York Convention." The Convention is enforceable in the United States under *9 U.S.C. §§ 201–208*. An arbitration is subject to the New York Convention if the agreement or relationship leading to the dispute:

1 Arises from a commercial relationship, –and–

2 Either:

(a) Is not entirely between citizens of the United States,

(b) Involves property located abroad,

(c) Envisages performance or enforcement abroad, –or–

(d) Has some other reasonable relation with one or more foreign states

The New York Convention, like the FAA, authorizes courts to enforce arbitration agreements and to either confirm or vacate arbitration awards. The primary distinction is that actions under the Convention can be brought in federal court, regardless of whether an independent ground for federal court jurisdiction can be established. *9 U.S.C. § 203*. When a federal court decides a matter under the Convention, it generally will apply the rules of law developed under the FAA.

Compelling Arbitration

Arbitration is the product of an agreement of the parties. A party cannot be compelled to arbitrate a dispute unless it has agreed to arbitrate it. *Howsam v. Dean Witter Reynolds,* 537 U.S. 79, 83 (2002). Although parties can agree to arbitrate after their dispute has arisen, arbitration most often results from an arbitration clause in a commercial agreement formed between the parties before the dispute arises. For sample arbitration clauses, see *Arbitration Clauses*. You also need to consider whether the issue of arbitrability itself must be arbitrated. See the section on Arbitrating the Questions of Arbitrability, below.

Appropriateness of Arbitration for Antitrust Claims

At one time, certain federal circuit and district courts refused to enforce arbitration clauses for antitrust claims, reasoning that the antitrust laws were "of a character inappropriate for enforcement by arbitration." *American Safety Equipment Corp. v. J.P. McGuire & Co., 391 F.2d 821, 825 (2nd Cir. 1968)*. The Supreme Court rejected that position for arbitration clauses in agreements involving international commercial transactions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628–39 (1985)*. Subsequently, the Court has held that even if international commerce is not involved, arbitration clauses are applicable to claims arising from federal statutes, unless the statute reveals a congressional intention to preclude a waiver of judicial remedies. *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)*; *Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226–27, 239 (1987)*. Nothing in the Sherman Act or any other federal antitrust statute suggests a congressional intention to preclude a waiver of judicial remedies. As a consequence, the argument that arbitration is inappropriate for antitrust claims no longer has validity. The rules generally applicable to the enforcement of arbitration clauses are applicable in an antitrust case.

Compelling Arbitration Under the FAA

The FAA provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract," *9 U.SC. § 2*. The Act authorizes federal courts to issue orders compelling parties to arbitrate, *9 U.S.C. § 4*, and staying pending lawsuits on claims that the parties have agreed to arbitrate, *9 U.S.C. § 3*. When asked to compel arbitration, or to stay a lawsuit pending arbitration, a court applying the FAA will ask two questions: (1) have the parties agreed to arbitrate, and (2) does their dispute fall within the scope of their agreement to arbitrate? Each of these questions is discussed below.

Agreement to Arbitrate

To determine whether the parties agreed to arbitrate, you must ask—and the court will ask—whether the parties formed a contract and whether the contract contains an arbitration clause. *Mitsubishi Motors, supra at 626*. With antitrust claims, this issue usually is not subject to dispute. Ordinarily, the existence of a contract between the parties and the presence of an arbitration clause in that contract are obvious and incontestable.

Antitrust plaintiffs resisting arbitration often argue that the agreement to arbitrate is unenforceable. As grounds, they may contend that the agreement is a contract of adhesion, with unconscionable terms imposed on them by the defendants' exercise of their market power. Or they may contend that they were induced to enter the agreement by fraud. Courts will consider these arguments against enforceability only if the defendants' allegedly unconscionable or fraudulent conduct related specifically to the arbitration clause. If the defendants' alleged conduct relates to the agreement as a whole, then courts will find an enforceable agreement to arbitrate and will leave to the arbitrators the decision on whether the agreement is unconscionable or was induced by fraud. *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967)*. Because arbitration clauses usually receive little or no attention from the parties during contract negotiations, antitrust parties seldom succeed in avoiding arbitration on the contention that the agreement to arbitrate is unenforceable.

Scope of the Arbitration Clause

The second question for a court applying the FAA on a motion to compel or stay is whether the arbitration clause in the agreement applies to the dispute. Courts resolving this issue apply ordinary rules of contract law, *Mastrobuono v. Shearson Lehman Hutton,* 514 U.S. 52, 58–63 (1995), but the application of these rules is not even-handed. Under the FAA, which is understood to express a strong federal policy favoring arbitration, "any doubts concerning the scope

of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24–25 (1983)*. To avoid arbitration of an antitrust claim under this rule of construction, an arbitration clause must either be very narrowly written, so that application to antitrust claims was clearly not intended, or more likely, the clause must contain an exclusion from arbitrability that clearly includes antitrust claims. For example, an exclusion in the arbitration clause for claims arising from statutes would be sufficient to avoid arbitration of an antitrust claim. *Mitsubishi Motors, supra at 628*.

The arbitration clauses found in most commercial contracts contain no exclusions and are written very broadly to cover not only the interpretation and enforcement of the parties' contract but also other disputes that have some relationship to the contract. A broad arbitration clause might, for example, require arbitration of

- "any controversy, claim or dispute between the parties arising out of or relating to this agreement"
- "any dispute arising from the making, performance or termination of this agreement"
- "any and all differences and disputes of whatsoever nature arising out of this agreement"
- "all disputes relating to this agreement"

Courts regularly find that if the contact contains such a broad arbitration clause, an antitrust claim will fall within its scope. See, e.g., *In re Remicade (Direct Purchaser) Antitrust Litigation, 938 F.3d 515, 523 (3d Cir. 2019)*; JLM Industries, Inc. v. Stolt-Nielsen SA, 387 F.3d 163 (2nd Cir. 2004); *Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 721–22 (9th Cir. 1999)*; *In re TFT-LCD (Flat Panel) Antitrust Litigation, 2011 U.S. Dist. LEXIS 72389 (N.D. Cal. July 6, 2011)*; *In re Universal Service Fund Telephone Billing Practices Litigation, 300 F. Supp. 2d 1107, 1122–25 (D. Kan. 2003)*; *In re Currency Conversion Fee Antitrust Litigation, 265 F. Supp. 2d 385 (S.D.N.Y. 2003)*; *Bischoff v. DirectTV, Inc., 180 F. Supp. 2d 1097, 1106 (C.D. Cal. 2002)*. In the few cases where courts have found antitrust claims outside of the scope of a broad arbitration clause, the courts generally have found that the antitrust claim has no reasonable relationship to the contract containing the arbitration clause. See e.g., *AlliedSignal v. BF Goodrich, Co., 183 F3d 568 (7th Cir. 2009)*.

For examples of arbitration clauses that compel arbitration of antitrust claims, see *Arbitration Clauses*.

Arbitrating the Question of Arbitrability

The two threshold questions, whether the parties agreed to arbitrate and whether their dispute falls within the scope of their arbitration agreement, ordinarily would be decided by the court. These questions can themselves be submitted to arbitrators for decision, but only if the parties "clearly and unmistakably provide" for arbitrating these issues. *AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986)*. For example, language in an arbitration clause stating that the arbitrator "shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable," has been interpreted to delegate threshold questions of arbitrability to the arbitrator. *Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 66 (2010)*. Courts have found that language in an arbitration clause incorporating arbitration rules that empower the arbitrator to rule on objections to arbitrability, such the AAA Commercial Arbitration Rules, is sufficient to delegate the issue of arbitrability to the arbitrators. See *Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842 (6th Cir. 2020)*; *Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005)*.

Appellate Review

Should a federal district court deny a petition to compel arbitration, or deny a motion to stay litigation of a claim subject to an agreement to arbitrate, the court's decision is immediately appealable. *9 U.S.C. § 16(a)(1)*. Litigation of the dispute is stayed pending the appeal. *Coinbase, Inc. v. Bielski,* 599 U.S. 736 (2023). By contrast, a district court order compelling arbitration, or staying a lawsuit pending arbitration, is not immediately appealable. *9 U.S.C. § 16(b)*. Such an order can be reviewed on appeal only by an interlocutory appeal under *28 U.S.C. § 1292(b)*, or by appeal from the final judgment of a court confirming or vacating an arbitration award, *9 U.S.C. § 16(a)(3)*.

State Antitrust Laws

Most state arbitration laws have language similar to the FAA on the enforcement of arbitration agreements. See, e.g., *NY CPLR §§ 7501–7503*; 710 ILCS 5/1-3; *Cal. Code Civ. Proc. §§ 1281*; Uniform Arbitration Act § 2; Revised Uniform Arbitration Act § 7. If the dispute between the parties involves interstate or foreign commerce, the court will have authority to compel arbitration under both the FAA and the applicable state arbitration law.

To the extent that a state law provides a narrower scope for the enforcement of arbitration agreements, or provides an exception to enforcement not recognized in the FAA, the FAA as a federal statute will preempt the state law, unless the FAA is found inapplicable. *Southland Corp. v. Keating, 465 U.S. 1, 10–11, 16 (1984)*. It is a rare antitrust case that does not involve interstate or foreign commerce and hence does not fall under the FAA. Consequently, the FAA almost always will determine the arbitrability of antitrust claims, and state arbitration laws will be largely irrelevant to the issue.

Arbitration Organizations

Various organizations have been formed to help parties manage arbitrations. Prominent arbitration organizations in the United States include: the *American Arbitration Association* (AAA), the Judicial Arbitration and Mediation Services(*JAMS*), and the International Institute for Conflict Prevention and Resolution (CPR). Organizations specializing in international arbitrations include the International Centre for Dispute Resolution (ICDR), which is a part of the AAA, the International Chamber of Commerce (ICC), and the London Court of International Arbitration (LCIA). Several trade associations and exchange organizations also have adopted measures to help manage arbitrations involving their members. These arbitration organizations generally have adopted rules, protocols, and forms for parties to use in arbitration. The arbitration clause might require a specific organization to manage the process. If the arbitration clause does not specify an organization, the parties may agree to select an organization to manage the process.

Many organizations also provide a range of services, in exchange for a fee, that can assist parties in arbitration. For example, in commercial arbitrations administered by the AAA, the services offered by the Association include:

- Access to the AAA's National Roster of Arbitrators
- A process for the selection of neutral arbitrators, when the parties do not agree.
- Initial determination of the location for the arbitration, when the parties do not agree
- A process for challenging the qualifications of arbitrators
- A process for seeking emergency relief prior to the appointment of arbitrators
- Maintenance of a docket
- Enforcement of each party's obligation to pay the neutral arbitrator
- An optional process for appellate review of a final award by a panel of arbitrators

Parties are obligated to use these services when their arbitration clause calls for "arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules" or similar language. In the absence of such language in the arbitration clause, the parties can agree to use the AAA services, or the services of another organization, or they can forego the services of any arbitration organization.

The decision of whether a party should agree to arbitration administered by the AAA or another organization should be made on a case-by-case basis, weighing the benefits of the services against their cost. In general, when parties anticipate difficulty in appointing the arbitrators, which can be one of the most critical steps in the arbitration process, the cost of the AAA's services can be justified.

Class Actions

Private antitrust claims frequently are brought as class actions. This is particularly the case with actions seeking treble damages for price-fixing or other forms of anticompetitive collusion among competitors.

A case in arbitration can proceed as a class action. The American Arbitration Association has adopted *Supplementary Rules for Class Arbitrations*, which apply in any case where the parties agree to adopt any AAA Rules and which provide for arbitrators to decide on class certification, to determine a class-wide award, to approve a class-wide settlement, and to require notice to class members. The rules also remove the presumptions of confidentiality and privacy that ordinarily apply in arbitrations. Under these rules, a class claim in arbitration would have largely the same benefits and burdens for the parties as a class action in federal court under *Fed. R. Civ. P. 23*.

Certification of a plaintiff class in antitrust cases can benefit the plaintiffs by making it feasible, and often highly lucrative for the lawyers, to assert claims that would be too small to litigate individually. For defendants, however, certification of a class can transform a small claim into a suit that is large, is complicated and expensive to defend, and poses the threat of a massive award of damages.

Due to this divergence of interests, defendants usually will resist certification of classes in arbitration, as they do in litigation, except when settling. In the context of arbitration, defendants can resist certification of a class not only by asserting that the requirements for class certification under the applicable rules have not been met but also on the threshold issue of whether a class arbitration can be ordered over their objection.

Compelling Class Arbitration

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 684 (2010)*, the Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." The Court further held that the mere silence of the parties on class arbitration is not sufficient to find an agreement. *Id. at 687–88*. Certification of a class action in arbitration without the agreement of all parties means that "the arbitrators have exceeded their powers," the Court held, *id. at 676–77*. Arbitrators exceeding their powers is one of the few grounds available under the FAA for vacating an arbitration award, *9 U.S.C. § 10(a)(4)*.

If the arbitration clause neither authorizes nor prohibits class arbitration in clear terms, then the issue of whether the defendant agreed to class arbitration becomes an issue of interpreting the contract. In *Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019)*, the Supreme Court held that contractual language that is ambiguous about the availability of class arbitration but that could be interpreted to authorize it was an insufficient basis for compelling a party to submit to class arbitration. Following Lamps Plus only unambiguous language in an arbitration clause will suffice to compel class arbitration.

The Supreme Court has not considered whether that the availability of class certification is an issue for the court or the arbitrators to decide. All of the Courts of Appeals to address the issue have decided that the availability of class arbitration is an issue for the court, unless the parties clearly agree to delegate the question to the arbitrators. *Shivkov v. Artex Risk Solutions, Inc., 947 F.3d 1051,1064-69 (9th Cir. 2020)*; 20/*20 Communications, Inc. v. Crawford, 930 F.3d 715 (5th Cir. 2019)*; *Herrington v. Waterstone Mortgage Corp., 907 F.3d 502 (7th Cir. 2018)*; *JPay, Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018)*; *Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966 (8th Cir. 2017)*; *Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016)*; *Opalinski v. Robert Half International, Inc., 761 F.3d 326 (3rd Cir. 2014)*; *Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013)*; see also *Robinson v. Home Owners Management Enterprises Inc., 590 S.W.3d 518 (Tex. 2019)*.

Some courts have found an agreement to delegate the issue of class arbitration to the arbitrator in an arbitration clause that incorporate rules authorizing the arbitrator to decide whether to proceed as a class arbitration, such as the rules of the American Arbitration Association, See Rule 3 of the AAA Supplementary Rules for Class Arbitration, even if the arbitration clause does not reference the class arbitration expressly. See *Jock v. Sterling Jewelers Inc., 942 F.3d 617, 624-25 (2d Cir. 2019)*; *JPay, Inc. v. Kobel, 904 F.3d 923, 936 (11th Cir. 2018)*; *Dish Network L.L.C. v. Ray,* 900 F.3d 1240, 1245-48 (10th Cir. 2018); *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1233-35 (11th Cir.

2018). Other courts have found that incorporating arbitration rules is not by itself sufficient proof of an intention to authorize the arbitrator to decide on class arbitration. *Catamaran Corp. v. Towncrest Pharm., 864 F.3d 966, 973 (8th Cir. 2017)*; *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 758-66 (3rd Cir. 2016)*; *Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013)*.

When arbitrators decide the issue of whether an arbitration clause authorizes class arbitration, their decision will be subject to the very limited judicial review generally applied to arbitrators' decisions, see Judicial Review of Arbitration Awards below, and will be upheld so long as it draws its essence from the contract. *Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013)*.

Class Action Waivers

A related issue is the enforceability of class action waivers in arbitration clauses. In *AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)*, the Court held that such clauses are enforceable under the FAA and that the FAA preempts state laws prohibiting class action waivers in arbitration clauses. In *American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013)*, the Court held that an arbitration clause requiring individual and not class arbitration was enforceable, even though the cost of arbitrating individual claims would exceed the potential recovery. Taken together, these decisions provide that when an arbitration clause prohibits class arbitration, the defendant has effectively protected itself from a class action, whether in arbitration or in court.

Mass Arbitration

In response to the Supreme Court decisions limiting the availability of class actions in arbitration, some plaintiffs' attorneys have resorted to a process known as "mass arbitration," for antitrust and other claims. In mass arbitration, individual demands for arbitration are issued for similar claims, in large numbers, sometimes thousands, against a single defendant, or a group of defendants alleged to be coconspirators. The goal is to coordinate the prosecution of the claims as much as possible to achieve at least some of the economies of scale and other efficiencies of a class action and to gain the settlement leverage of the defendants' exposure to a very large total of damages awards. Counsel for the claimants might seek to consolidate all of the individual claims into a single proceeding, as discussed below, which could achieve even more efficiencies.

Mass arbitration requires the plaintiffs' counsel to incur a very large upfront investment. They must find and be retained by a large number of claimants with similar and viable claims, prepare an arbitration demand for each of them, pay the fees required by an arbitration organization for each demand, and deposit funds required for arbitrator compensation. For mass arbitration on behalf of thousands of claimants, this initial investment would likely amount to many millions of dollars. For this reason, mass arbitration is often funded by litigation finance organizations.

Mass arbitration is a new development. Experience in the coming years will reveal its effectiveness as an alternative to class actions.

Consolidation

To achieve some efficiencies outside of a class action, claimants' attorneys might try to consolidate a large number of similar individual claims into a single arbitration proceeding. Whether this tactic would succeed is currently unclear. The FAA and most state arbitration laws do not authorize courts to compel consolidated arbitrations. The Revised Uniform Arbitration Act, which currently has been adopted in 23 states, does authorize a court to order consolidation of arbitration proceedings. See RUAA § 10.in addition, many arbitration organizations have established a procedure for an arbitrator to order consolidation at the request of a party. *See, e.g.,* AAA Commercial Arbitration Rules R-8.

A defendant might ask a court to vacate an arbitration award resulting from a consolidation ordered over its objection. Its argument would rely on the Supreme Court's decision in *Stolt-Nielsen* that a party cannot be compelled to participate in class arbitration without its agreement, because "parties may specify with whom they choose to arbitrate their disputes." *559 U.S. 683*. A defendant could argue that the arbitration clause in any contract represents its

agreement to arbitrate with the other party to that contract, not with the parties to multiple other contracts. The one court to address this issue so far, *Champion Chrysler v. Dimension Service Corp., 118 N.E.3d 490, 496 (Ohio App. 2018)*, held that *Stolt-Nielsen* is inapplicable and that the arbitrators acted within their powers to consolidate the arbitration for discovery and motion practice but to allow separate hearings.

Additional issues can arise if antitrust plaintiffs seek to consolidate multiple defendants into a single arbitration proceeding. With such a consolidation, the arbitration would take on a form similar to lawsuits alleging price-fixing or other forms of collusion among competitors, in which plaintiffs typically name as defendants most or all of the competitors that allegedly participated in an illegal agreement. The defendants might be able to argue that their respective arbitration clauses contain incompatible terms. For example, if the arbitration clauses of the agreements call for each party to have the right to name an arbitrator, for the arbitration venue to be the defendant's hometown, or for different rules to govern the conduct of the arbitration, it may be impossible for an arbitration to proceed in compliance with all the different arbitration clauses. This is another issue that a future court will have to decide.

Number of Arbitrators

An arbitration will have either a single arbitrator or a panel of usually three arbitrators. A single arbitrator will be neutral between the parties. With a panel of three, typically each party will appoint one arbitrator, and either the party-appointed arbitrators or the parties directly will appoint the third arbitrator, a neutral. On a three-member panel, the neutral is the presiding arbitrator, commonly called the "umpire" or the "chair." The panel decides by majority vote, following deliberation by all three arbitrators.

Party-appointed arbitrators may or may not be required to be neutral between the parties, depending upon the terms of the arbitration agreement and the rules governing the arbitration. The AAA and the American Bar Association have jointly issued a *Code of Ethics for Arbitrators* in Commercial Disputes, which imposes different obligations on neutral and non-neutral party-appointed arbitrators. Canons III.B, IX, X. The FAA authorizes courts to vacate arbitration awards on a finding of "evident partiality" by one or more of the arbitrators,. *9 U.S.C. § 10(a)(2)*, but courts rarely vacate an award for the evident partiality of party-appointed arbitrators, recognizing that they "are expected to serve as de facto advocates." *Certain Underwriting Members of Lloyds of London v. Florida Dept.. of Financial Services, 892 F.3d 501, 508 (2nd Cir. 2018)*; accord *Sphere Drake Insurance Ltd. v. All American Life Insurance Co., 307 F.3d 617, 620 (7th Cir. 2002)*.

Arbitration clauses typically stipulate the number of arbitrators. In the absence of a stipulation in the clause, the *AAA's Commercial Arbitration Rules* call for a single arbitrator, but provide that the AAA staff can, in its discretion, require three arbitrators. Rule R-16. The Rules further provide that the AAA will appoint three arbitrators whenever a claim or counterclaim involves at least $1 million, although it can decide to appoint only one arbitrator if the case involves financial hardship for one party or other special circumstances. Rule L-2.

The principal benefit of a single arbitrator is lower cost. A major benefit of a three-member panel is that the arbitrators' decisions are the product of a deliberative process, which can be more thorough and careful than the decisions of a single arbitrator acting alone. The deliberative process can be very valuable with an antitrust claim that presents complex legal issues or economic evidence. In addition, the ability of each party to select one non-neutral arbitrator has several benefits, including:

- Each party can ensure that at least one member of the panel is disposed favorably to its position or at least not favorably disposed to its opponent's position.
- Subject to the rules and agreements governing the arbitration, the parties may be allowed to have *ex parte* communications with their appointed arbitrator for a period that usually ends before the hearing.
- During the panel's deliberation, each party-appointed arbitrator can ensure that the positions and arguments of his or her appointing party are fully heard and considered.

With antitrust claims involving stakes, counsel usually find that the benefits of a three-member panel, with two non-neutral party-appointed members, justify the additional cost.

Appointment of Neutral Arbitrators

Arbitration clauses frequently set out a process for appointing the arbitrator in a single member panel or the umpire in a three member panel. Many clauses also state that in the absence of an agreement between the parties, the arbitrator or umpire will be appointed by a designated arbitration organization, such as the AAA, which has a process for selecting umpires. See AAA Commercial Arbitration Rules, Rule R-13. If the parties fail to select an arbitrator or umpire, by agreement or by a process set out in their arbitration clause, then a court, on the application of one of the parties, may make the appointment. FAA § 5.

In drafting an arbitration clause, a company should consider the qualifications that it wishes arbitrators to possess. For example, the clause might require that the arbitrator hold certain professional credentials or be a current or former officer of a company engaged in a particular industry.

Discovery and Pre-hearing Disclosures

The arbitrators usually have complete discretion on the extent of discovery and pre-hearing disclosures, limited only by the terms of the arbitration clause or arbitration rules that the parties have agreed to follow. Frequently, arbitrators exercise their discretion to restrict discovery, motivated by a desire to control the cost of the proceeding. In addition, arbitration usually progresses to a hearing much more quickly than a civil action would proceed to trial, leaving less time available for discovery. For these reasons, discovery in arbitration often is substantially less extensive than it would be if the same case were tried in court.

In antitrust litigation, this limit on discovery generally favors defendants, because plaintiffs typically have a need for more discovery. In most antitrust cases, defendants will have control of a greater portion of relevant documentary evidence than the plaintiffs, and more of the defendant's employees and persons under their control will have relevant testimony to offer than will employees and persons under the control of the plaintiffs.

Third-Party Discovery

The FAA authorizes arbitrators to issue subpoenas to third parties, compelling them to testify and to produce documents. 9 U.S.C. § 7. Arbitral subpoenas "shall be served in the same manner as subpoenas to appear and testify before the court." This language incorporates *Fed. R. Civ. P. 45*, including Rule 45(b)(2), which allows service "at any place in the United States." The federal district court for the district where the arbitrators are sitting can compel a third party to comply with these hearing subpoenas. Id.

The FAA clearly authorizes subpoenas compelling witnesses to testify at the hearing and to bring relevant documents with them. Federal courts are split on whether the arbitrator's subpoena powers are broader. The Eighth Circuit has held that the FAA authorizes arbitrators to issue subpoenas for pre-hearing depositions and document production. See *Security Life Ins. Co. and Duncanson & Holt, Inc., 228 F.3d 865 (8th Cir. 2000)*. Most federal courts have disagreed. These courts have held that an arbitrator cannot compel a third party to testify at a deposition prior to the hearing, relying on the FAA's language authorizing arbitrators to issue subpoenas compelling witnesses "to attend before them or any of them as a witness," 9 U.S.C. § 7. See *Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3rd Cir. 2004)*. These courts also have held that the FAA does not authorize subpoenas duces tecum, because the statute provides only that the arbitrators may require a witness "to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case," 9 U.S.C. § 7. See *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1159-61 (11th Cir. 2019)*; *CVS Health Corp. v. Vividus, LLC, 878 F.3d 703 (9th Cir. 2017)*.

One potential way to overcome the limits on third-party discovery is for the arbitrators to hold a preliminary hearing to receive documents and testimony from third parties. Subpoenas for a preliminary hearing would be enforceable by a court. The process, however, requires the arbitrators to agree to hold a preliminary hearing with at least one arbitrator present and to hear testimony from a witness who is producing the documents. See *Stolt-Nielsen SA v. Celanese*

AG, 430 F.3d 567, 577 (2nd Cir. 2005). A few courts have held that the FAA does not authorize subpoenas to appear by videoconference, that the witness must appear in the physical presence of the arbitrator presiding over the preliminary hearing. See *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1160 (11th Cir. 2019)*; *Broumand v. Joseph, 522 F. Supp. 3d 8, 24-25 (S.D.N.Y. 2021)*. Because a subpoena cannot require a witness to appear more than 100 miles from where he or she resides, is employed, or regularly transacts business, *Fed. R. Civ. P. 45(c)(1)(A)*, the arbitrator and counsel may have to travel to the witness's hometown to conduct the preliminary hearing. A party objecting to third-party discovery can argue to the arbitrator that the cost, burden, and delay of a preliminary hearing outweigh the benefit of the evidence to be obtained.

Alternatively, parties can seek to compel third-party discovery under state arbitration proceedings. Several, but not all, state arbitration laws allow the arbitrators to issue subpoenas for pre-hearing depositions and document production. See, e.g., Revised Uniform Arbitration Act § 17. Parties might also be required to seek enforcement of arbitral subpoenas in state court, because they cannot establish federal court jurisdiction for the enforcement proceedings. The FAA does not itself establish federal jurisdiction. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25 n. 32 (1983)*.

A disadvantage with proceeding under state law is that state courts generally can enforce a subpoena only If it is served within the boundaries of the state. Although some states have provisions authorizing a court to enforce a subpoena issued by arbitrators sitting in another state, *see* Revised Uniform Arbitration Act § 17(g), many states do not have such provisions.

Due to these restrictions on enforcing arbitral subpoenas in federal and state courts, parties to antitrust arbitrations may find that they cannot obtain discovery from third parties to the same extent that they would expect in a civil action. The inability to obtain third-party discovery can be a serious hindrance to the development of evidence in an antitrust case. Discovery from third parties is often critical in antitrust litigation, as relevant knowledge and documentation may be held by customers, suppliers, or competitors of the defendants or by the defendant's former employees. Most often, it is the plaintiffs who have a greater need for third-party discovery, but that is not always the case.

Expert Witnesses

Expert witnesses usually play an important role in antitrust litigation, particularly on issues of the competitive effects of practices at issue, injury from the alleged violation, and the amount of damages. In arbitration, the admissibility of expert testimony is entirely at the discretion of the arbitrators. Although arbitrators would commonly allow expert testimony, the process relating to the admission may differ significantly from litigation.

In particular, nothing in the law of arbitration requires the disclosure of an expert's opinion, prior to the hearing, in a report or otherwise, as *Fed. R. Civ. P. 26(a)(2)* requires in federal courts. Arbitrators frequently, but not always, require similar disclosures. Parties to antitrust arbitration would be prudent to agree to make these disclosures.

Furthermore, nothing in the law of arbitration requires expert opinions to meet certain standards for admissibility, such as those set out in *Fed. R. Evid. 702*, or requires the arbitrators to review expert opinions in advance of the hearing and exclude those that fail to meet the applicable standards, as federal courts do under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)*. Arbitrators seldom exercise such screening, unless the parties have agreed that they should do so. Rather, arbitrators typically expect to consider objections to the validity, reliability, and relevance of expert testimony in the context of the weight that they give the testimony.

Dispositive Motions

Dispositive motions play a critical role in antitrust litigation. Such motions give defendants an opportunity to challenge the legal sufficiency of the complaint or of the plaintiffs' evidence, and to obtain dismissal before trial, without risking an adverse jury verdict. Defendants often succeed, because decisions of the Supreme Court have established a series of burdens that antitrust plaintiffs must meet to survive motions to dismiss and motions for summary judgment.

In claims under Sherman Act § 1, the plaintiff must plead and prove a conspiracy or an agreement, either horizontal or vertical. Plaintiffs frequently lack direct evidence of an agreement and attempt to rely on circumstantial evidence. In these cases, plaintiffs encounter the holdings of *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986)* that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case" and that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Under this standard, a court will dismiss a complaint alleging a Section 1 claim if it relies entirely on allegations of the defendant's parallel conduct and does not allege facts plausibly showing that the parallel conduct was the result of agreement. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564–70 (2007)*. If the complaint survives a motion to dismiss, a court will grant defendant's summary judgment at the end of discovery unless the plaintiff submits evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. *Matsushita at 588*. Many Section 1 claims fail to survive these motions. A similar challenge confronts plaintiffs in many claims under Sherman Act § 2, where defendants can attack their claims of monopoly power or exclusionary conduct.

Defendants may not be able to mount such challenges in arbitration. Arbitrators are not required to consider dispositive motions before the hearing. Under the *AAA's Commercial Arbitration Rules*, a dispositive motion is permitted "only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." Rule R-33. When a dispositive motion presents complex evidence and argument, and its likely success is not clear, the arbitrator can be persuaded to disallow the filing of the motion, even if a court would have heard and granted the same motion. Another factor discouraging arbitrators from allowing dispositive motions is the perception that extensive motion practice is one of the inefficient features of litigation that arbitration should avoid where possible.

Consequently, antitrust defendants in arbitration frequently have no opportunity to challenge the plaintiff's case until the hearing, when the challenge carries with it the risk of an adverse final decision. In arbitration, plaintiffs often can succeed in reaching a hearing, and putting the defendants at risk of loss on a case that a court may well have dismissed prior to trial.

To obtain the benefit of a dispositive motion, defendants need to be selective about the issues that they raise in proposed motions. The issues need to be narrowly focused, and the arbitrators should be able to decide the issues fairly without substantial discovery. If a motion would require the arbitrators to consider most of the critical substantive issues in the case, or if the motion cannot be decided until the completion of most discovery, the arbitrators may see little benefit in deciding the motion separately from conducting a full hearing.

In drafting an arbitration clause, a company might consider adding language requiring the arbitrators to consider a dispositive motion filed in certain circumstances, such as after the completion of discovery. The clause might also provide that the arbitrators will decide the motion in accordance with *Fed. R. Civ. P. 56*.

Outcome of Arbitration Cases

After completion of the hearing, the arbitrators will issue an award that either grants or denies the relief the parties seek, in whole or in part. The award usually takes one of two forms: a short statement of the final decision and the relief to be awarded or the same statement accompanied by a summary of the arbitrators' reasons. The latter is known as a "reasoned award." In some cases, the arbitrators will issue findings of fact and conclusions of law, comparable to a court's decision following a bench trial, but those cases are not common. The parties can agree on the form of the award. In the absence of agreement of the parties, the form of award is left to the arbitrators' discretion.

Antitrust defendants usually benefit from a reasoned award and where possible from a detailed statement of findings and conclusions. In the process of drafting a lengthier award, the arbitrator is more likely to carefully consider the several burdens and requirements that courts have imposed on antitrust plaintiffs. With a three-member panel, the lengthier form of award gives the defendant's party-appointed arbitrator more of an opportunity to concentrate the panel's deliberations on these legal burdens and requirements.

Under a doctrine known as *functus officio*, once the arbitrators have issued their final award, their authority ends. See *Hyde v. Doctor's Associates, Inc., 198 F.3d 368, 370 (2nd Cir. 1999)*. There are limited exceptions to this rule: the arbitrators can correct a mistake that is apparent on the face of the award or clarify an ambiguity in the award. See General Re Life Corp. v. Lincoln National Life Insurance Co., 909 F. F.3d 544 (2nd Cir. 2018). However, unlike a court, the arbitrators cannot, without the parties' consent, reconsider any part of the award or exercise continuing jurisdiction over the dispute.

Judicial Review of Arbitration Awards

Should a party in an antitrust lawsuit suffer the unhappy experience of an adverse jury verdict, or an adverse decision after a bench trial, it still has an opportunity to prevail on appeal. In the appellate court, either party can challenge the trial court's rulings on issues of law and save for harmless error, can also challenge the court's procedural and evidentiary rulings. Sufficiency of the evidence can also be challenged, to a limited extent.

The antitrust litigant has no similar opportunity in arbitration. The FAA authorizes courts to vacate arbitration awards on only a few grounds, including "evident partiality" of the arbitrators. FAA § 10(a). Errors of law or fact are not among the grounds for vacating an award. As a practical matter, the merits of an arbitration award are unreviewable. This feature of arbitration raises the risks to both parties of taking a claim to hearing and a final award. That risk should influence the decision of all parties on whether and when to settle an antitrust claim that is subject to arbitration.

If no grounds exist to vacate an arbitration award, a court can, at the request of one of the parties, confirm the award, which makes the award enforceable as a judgment of the court. FAA § 9.

The arbitration clause might provide that any petition to vacate or to confirm the award shall be filed in a certain court. If the arbitration clause is silent on the forum for judicial review, a party can file a petition to vacate in the district court for the district in which the arbitrators made their award, FAA §§ 9, 10(c), or in any other court that has jurisdiction over the parties and in which venue is appropriate. See *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co., 529 U.S. 193 (2000)*. Arbitration clauses frequently include the statement: "Judgment on any award rendered by the arbitrators may be entered by any court of competent jurisdiction." The purpose of this statement is to preclude an argument that the parties agreed that a specific court has exclusive jurisdiction to hear a petition to confirm or vacate.

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