

Arbitration in Antitrust Cases

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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 defending an antitrust claim. This practice note addressed the following topics:

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Overview of Arbitration in Antitrust Cases

When an antitrust claim is submitted to arbitration rather than tried in court, the consequences are substantial. In an arbitration, one or three persons appointed as arbitrators will decide the claim, instead of a judge and jury. In an 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. The scope of judicial review will be much more limited than appellate review of a trial court judgment.

To commence an arbitration, one party will serve 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 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 arbitration has been agreed or compelled, the following steps are typical:

- Selection of the arbitrator or arbitrators

- The arbitrators conduct a preliminary hearing or telephone conference to identify issues, and to schedule a hearing, discovery and any prehearing activities
- Discovery
- 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 dispense of any of these steps with an agreement, 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. The arbitrators are only required to give each party a fair opportunity to present its evidence.

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. 4.

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 the other party to the arbitration agreement resists arbitration, you will need to ask a court to compel arbitration. In that event, you will need to decide whether to file your request in federal or state court.

To bring an action in federal court to enforce an arbitration clause, or to seek other relief available under the FAA, 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 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 to grant relief under the FAA, 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, relief under the FAA would be available only in state court.

New York Convention

Arbitrations of international commercial disputes are also 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.

9 U.S.C. § 202.

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

If your client receives a demand for arbitration or wants to force the other party to a dispute to arbitrate, you need to consider whether a court will compel 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, Inc.*, 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 prior before the dispute arises. For sample arbitration clauses, please 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

It is no longer possible to argue that antitrust claims cannot be submitted to arbitration. 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 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.S.C. § 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 federal 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. The existence of a contract between the parties, and the presence of an arbitration clause

in that contract, ordinarily is obvious and incontestable.

Antitrust plaintiffs resisting arbitration often will 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 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 plaintiffs 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, Inc.*, 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 contains 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 contract contains such a broad arbitration clause, an antitrust

claim will fall within its scope. *See, e.g., 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 WL 2650689 (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, 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).

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, 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).

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)(A,B,C). 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 Arbitration 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.* If the dispute between the parties involves interstate and 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 the 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. The most prominent organization in the United States is the [American Arbitration Association](#) (the “AAA”). [JAMS](#) is another popular organization. Several trade associations and exchange organizations also have adopted measures to help manage arbitrations involving their members. These organizations generally have adopted rules, protocols and forms for parties to use in arbitration. The arbitration clause might require management of the process by a specified organization. If it does not, the parties might agree to management of their arbitration by an organization that they select.

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, weighting 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 and Consolidation

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. Certification of a plaintiff class in these cases can benefit the plaintiffs by making it feasible, and often highly lucrative, to assert claims that would be too small to litigate individually. Defendants, however, resist certification of a class, except when settling, because the class action transforms 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.

Class Arbitration

As a threshold matter, a case in arbitration can proceed as a class action. The American Arbitration Association has adopted [Supplementary Rules for Class Arbitrations](#), 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.

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 although the issue of whether a party agreed to class arbitration is for the arbitrators to decide, the mere silence of the parties on class arbitrations 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).

In subsequent decisions, the Supreme Court has expanded on *Stolt-Nielsen*. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Court held that arbitration clauses that include class action waivers are enforceable under the FAA and that the FAA preempts state laws prohibiting class action waivers. In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Court rejected the argument that an arbitration clause requiring individual and not class arbitration was not 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. If individual claims are not economically feasible, the defendant may have effectively immunized itself from liability for treble damages for an antitrust violation.

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. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). Three federal circuits have held that the availability of class certification is an issue for the court to decide, unless the parties clearly agree to delegate the issue to the arbitrators. *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). In other circuits, the question of who decides the availability of class certification is undecided. Regardless of the decision maker, defendants seeking to avoid class arbitration should include express class action waivers in their arbitration agreements.

Consolidation of Individual Claims

Where class arbitration is not available and the antitrust claims are too small to be pursued individually, the plaintiffs might try to consolidate a large number of individual claims into a single arbitration proceeding. Whether this tactic would succeed is currently unclear. One of the grounds for the Court's decision in *Stolt-Nielsen* that a party cannot be compelled to participate in class arbitration without its agreement is a notion that "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 particular contract, not with the parties to multiple other contracts. A future court will have to determine the merits of that argument.

Antitrust claimants might also 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. In response, the defendants could argue, based on *Stolt-Nielsen*, that they agreed only to bilateral arbitration with individual claimants and not to a proceeding in which their competitors are parties. In addition, the defendants might be able to argue that their respective arbitration clauses contain incompatible terms. For example, if the arbitration clauses of the defendants call for each defendant to have the right to name an arbitrator, for the arbitration venue to be the defendant's home town, or for different rules to govern the conduct of the arbitration, it may be impossible for an arbitration to proceed that complies with all of the different arbitration clauses. This is another issue that a future court will have to decide.

Number of Arbitrators

An arbitration usually will have either a single arbitrator or a panel of 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.

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 and 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.
- 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 more than very modest stakes, counsel usually find that the benefits of a three-member panel, with two non-neutral party-appointed members, outweigh the additional cost.

Discovery

In arbitration, the arbitrators usually have complete discretion on the extent of discovery. Frequently, arbitrators exercise their discretion to restrict discovery, motivated by a desire to control the cost of the proceeding. In addition, arbitrations usually progress 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, these restrictions on discovery generally favor 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 defendants' 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

Third-party discovery is a special challenge in arbitration. The FAA authorizes arbitrators to issue subpoenas to third parties, compelling them to appear to testify at the hearing and to bring relevant documents with them. A federal court can compel a third party to comply with these hearing subpoenas. 9 U.S.C. § 7. The FAA, however, contains no provision explicitly authorizing courts to enforce an arbitrators' subpoena for pre-hearing discovery.

The federal circuits are split on the authority of the courts to compel discovery from third parties. Some circuits have held that courts have authority to compel third parties to produce documents prior to the hearing. *See In re Arbitration between Security Life Ins. Co. and Duncanson & Holt, Inc.*, 228 F.3d 865 (8th Cir. 2000); *see also COMSAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999) (document discovery from third parties can be compelled upon a showing of special need or hardship). Other circuits have held that courts have no authority to compel third-party document production. *See Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2nd Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004). No court has held that it has the authority to compel a third party to give a pre-hearing deposition.

These restrictions on 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 defendants' former employees. Most often, it is the plaintiffs who require third-party discovery, but that is not always the case.

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. It also contemplates that documents will be produced and testimony will be given under the direct supervision of the arbitrators. 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. In these circumstances, parties to antitrust arbitrations will often find that they cannot obtain discovery from third parties to the same extent that they would expect in a civil action.

Dispositive Motions

One potential downside of arbitration compared to court proceedings in antitrust cases is that in arbitration defendants may not be able to bring dispositive motions, which can play a critical role in disposing of civil antitrust cases before trial. Such motions give defendants an opportunity to challenge the legal sufficiency of the complaint without risking an adverse verdict and to obtain dismissal before trial. 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. Plaintiff 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 defendants' 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 defendants 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 readily apparent, 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 greater time restrictions in arbitration and the perception that extensive motion practice is one of the inefficient features of litigation that arbitration should avoid where possible.

As a consequence, antitrust defendants in arbitration frequently have no opportunity to challenge the plaintiffs’ 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 arbitrator should be able to decide the issues fairly without substantial discovery. If a motion would require the arbitrator 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 arbitrator may see little benefit in deciding the motion separately from conducting a full hearing.

Outcome of Arbitration Cases

After completion of the hearing, the arbitrators will issue an award that either grants or denies the relief the plaintiffs seek. 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.

Judicial Review of Arbitration Awards

Should an antitrust defendant 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, it can challenge the sufficiency of the plaintiffs' evidence under decisions such as *Matsushita*, which is discussed above in connection with dispositive motions.

The antitrust defendant 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 particular 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 particular court has exclusive jurisdiction to hear a petition to confirm or vacate.

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