

# Memorandum



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| Subject | Updated Guidance <sup>1</sup> Regarding the Use of Arbitration and Case Selection Criteria | Date | November 12, 2020                            |
| To      | All Section and Office Chiefs  | From | Makan Delrahim<br>Assistant Attorney General |

## I. Introduction

The Antitrust Division is authorized to use alternative dispute resolution techniques, including arbitration, by the Administrative Dispute Resolution Act of 1990 (“ADR Act”), Pub. L. No. 101–552, 104 Stat. 2736–48. Attorney General Order OBD 1160.1, “Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques,” (April 6, 1995) requires the Antitrust Division to give careful consideration to the use of alternative means of dispute resolution, including by providing Division attorneys with policy guidance on the use of Alternative Dispute Resolution techniques and by developing case selection criteria for using ADR in appropriate cases. The Antitrust Division previously issued guidance on the appropriate use of ADR techniques. *See* Fed. Reg. Vol. 61, No. 136 at 36896 et seq. This document updates and supplements the previous guidance, focusing on the Division’s use of arbitration. It reflects the Division’s experience using arbitration for the first time in *United States v. Novelis Inc. and Aleris Corporation*, to streamline the adjudication of a dispositive issue in a merger challenge.

ADR techniques have the potential to eliminate unnecessary civil litigation, shorten the time that it takes to resolve civil disputes, and achieve better case resolutions with the expenditure of fewer taxpayer resources. Often, ADR will accelerate settlements, avoid trials, and provide enhanced resolution of disputes that litigation cannot provide.

It is, therefore, the policy of the Antitrust Division to encourage the use of ADR techniques in those civil cases where there is a reasonable likelihood that ADR would shorten the time necessary to resolve a dispute, reduce the taxpayer resources used to resolve a dispute, or otherwise improve the outcome for the United States.

Arbitration allows a neutral third party to decide important or dispositive issues without the expense of a full trial and on a timeline that the parties can set by agreement with the arbitrator: this can mean a speedier and/or less costly resolution of cases. Arbitration also allows the parties to select an arbitrator with relevant expertise, such as

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<sup>1</sup> The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or Department policies.

in antitrust law or economics, which may allow the parties to streamline their advocacy or eliminate unnecessary expert testimony—thus arbitration can be more efficient than a full trial in federal court. The advantages of arbitration are more pronounced in certain cases and situations. For example, arbitration can be used to resolve discrete parts of a particular case, such as a dispositive issue. Arbitration also gives the parties to a dispute the flexibility to fashion their own procedures for presenting evidence and resolving the dispute—creative resolutions beyond what courts can offer. In addition, arbitration permits the parties to exercise more direct control over the remedy.

In sum, arbitration is an important litigation tool that the Antitrust Division has at its disposal. In appropriate circumstances it can help to enhance investigation and negotiation efforts, conserve resources, and achieve better civil antitrust enforcement results.

## **II. Case Selection Criteria**

The Antitrust Division is fully committed to encouraging consideration of arbitration in appropriate cases. The Division may initiate consideration of arbitration, or consider the use of arbitration if another party requests it. The use of arbitration requires the consent of all parties. *See* 5 U.S.C. § 575(a).

The following case selection criteria will serve as a guide to help identify Antitrust Division cases that would benefit from the application of arbitration. Although many civil cases brought by the Antitrust Division will not be good candidates for arbitration, there may be instances where involving a neutral arbitrator could resolve a factual or legal dispute in a manner that would speed the resolution of the case. Such cases should be considered for the use of arbitration.

### Factors Counseling in Favor of Arbitration

- Conservation of Enforcement Resources. Arbitration will be more efficient, and will protect consumers while decreasing taxpayer expense. Conversely, preparing the case for trial in federal court would require a burdensome commitment of significant resources without achieving a proportionate impact.
- Issues Lend Themselves to Resolution by Arbitration. The issues in the case lend themselves to efficient resolution via arbitration because they are clear and easily agreed upon for presentation to an arbitrator, and/or the issues to be resolved are dispositive.
- Factual or Technical Complexity. The parties would benefit from reliance on the subject matter expertise of an expert arbitrator.
- Particular Need to Control the Timing of the Resolution. Litigating in federal court could result in an unacceptable delay.

- Particular Need to Control the Scope of Relief. The parties prefer to decide the range of possible remedies in advance.

#### Factors Counseling Against Arbitration

- Judicial Decision Required. Arbitration will result in a lost opportunity to create valuable legal precedent.
- Judicial Resolution Necessary. The public's interest in the matter is of such significance that resolution by a federal judge in an open forum is necessary.

In analyzing a case for arbitration and considering these case selection criteria, some general considerations should be kept in mind. The factors listed above will not all be relevant in any given case. Factors not listed may also be present that weigh in favor of or against the use of arbitration. A threshold inquiry should be whether arbitration will be beneficial to a case; that is, whether it will be more cost efficient, faster or will enhance the opportunities for a better result than would be the case with traditional litigation.

It bears emphasizing that the use of arbitration is not mandated, and the determination to use arbitration and the selection of the particular arbitration process should be done on a case-by-case basis.

The issuance by the Antitrust Division of case selection criteria for the use of arbitration relates solely to the government's voluntary participation in arbitration. Nothing herein should be construed to limit the government's duty to participate in arbitration according to court order or applicable local rules, except that Antitrust Division attorneys should resist participation in arbitration, by appropriate motion, whenever said participation would violate the United States Constitution or other governing law.

### **III. Arbitration Practices**

#### **A. The Arbitration Agreement**

The ADR Act provides that arbitration may be used "whenever all parties consent." 5 U.S.C. § 575(a). The parties may agree to submit only certain issues in controversy, or may agree that the award be within a range of possible outcomes. *Id.* The arbitration agreement must be in writing, must specify a maximum award that may be issued by the arbitrator, and may specify other conditions limiting the range of possible outcomes. *Id.*

A key benefit of arbitration is that it can be more efficient than a trial in federal court, saving taxpayer resources. Division attorneys therefore should seek to achieve efficiencies whenever possible and should seek to make the arbitration process as streamlined as possible given the needs of presenting the case.

The arbitration agreement should address the confidentiality of evidence and the confidentiality of the proceedings. At a minimum, it is the policy and the strong preference of the Division that the arbitrator's decision be made public, but any confidential information may be redacted.

#### B. The Arbitration Process

The United States may file a complaint in federal district court before the matter is referred to arbitration. For example, in *United States v. Novelis, Inc. and Aleris Corporation*, the parties agreed that the United States would file a complaint in federal district court and the matter would be referred to arbitration following the completion of fact discovery.

Filing a complaint in federal district court allows for court oversight of fact discovery, and Antitrust Division attorneys should consider the need for such oversight when evaluating whether to file a complaint.

Filing a complaint and a proposed consent judgment in federal district court also allows for court oversight of the remedy.<sup>2</sup> Court oversight may be needed to ensure enforcement of the remedy, such as in cases where the implementation of a remedy is complex or if there is a need for ongoing monitoring of the remedy.

If the Division files a complaint in federal court and has previously reached agreement with the defendants to resolve the matter by arbitration (or reaches the agreement after the complaint is filed), the Division should promptly file the arbitration agreement and an explanation of the plan for arbitration with the court.

#### C. Arbitrator Selection Criteria

The ADR Act provides that the arbitrator can be “any . . . individual who is acceptable to the parties,” provided that he or she has no conflicts with respect to the issues being arbitrated (unless the conflict is disclosed and all parties agree that the arbitrator may serve). 5 U.S.C. § 573(a).

An important benefit of arbitration is the ability to select an expert arbitrator, such as an antitrust specialist or former judge, either with economics training or with extensive experience handling complex antitrust cases. Such an arbitrator could bring an understanding of economic issues and testimony, which should provide for greater accuracy and efficiency, such as the elimination of unnecessary expert testimony.

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<sup>2</sup> As required by the Tunney Act, any proposed consent judgment the Division accepts must be filed in federal district court. *See* 15 U.S.C. § 16. After a period of public comment, the court may approve the proposed settlement upon finding that it is in the public interest. On the other hand, if the case to be arbitrated is not first filed in federal district court, a remedy may not trigger the Tunney Act process because the statute applies only to “[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws.” 15 U.S.C. § 16(b).

When identifying possible arbitrators, Division attorneys should consider the candidate's antitrust expertise, any economics training (to the extent relevant to the issue to be decided), experience with complex antitrust cases or arbitration, and cost.

Division attorneys should work with the other parties to select a single arbitrator, rather than a panel of arbitrators, if possible.

#### D. Arbitrator Compensation and Cost Shifting

The ADR Act requires that arbitrator compensation be "fair and reasonable to the Government." 5 U.S.C. § 573(e). Antitrust Division attorneys negotiating an arbitration agreement should consider whether a cost-shifting provision is appropriate under the circumstances. However, the Antitrust Division should not agree to pay private litigants' fees or expenses if the Division does not prevail in the arbitration.

#### E. Staff Training and Recognition

Just as it is important for Antitrust Division attorneys to develop good advocacy and litigation skills, and to be accomplished negotiators during settlement discussions, it is also important that they become knowledgeable concerning ADR techniques so that the Division can take advantage of the benefits that ADR provides.

It is the policy of the Antitrust Division to recognize the work of staff attorneys who handle matters in ADR by providing the same opportunities for promotion, awards and other professional recognition as those engaged in more traditional litigation. Often, ADR will accelerate settlements, avoid trials, and provide enhanced resolution of disputes that litigation cannot provide. Those who use ADR to these ends will be evaluated on their skills in these endeavors, and they will be recognized for the contributions they have made to the Department and the public.