Access Antitrust

A Newsletter of the Antitrust Committee

CONTENTS

FROM THE CHAIR 1

SPRING MEETING PROGRAMS

JOINT VENTURES: IN THE ANTITRUST GUNSIGHTS AGAIN? 2

COMMITTEE BUSINESS MEETING 2

SECOND REQUESTS: AVOIDING, COMPLYING AND EVERYTHING IN BETWEEN 2

ARTICLES

MEDIATION AND ARBITRATION OF ANTITRUST DISPUTES 2

ANTITRUST STORMS ON THE HORIZON: THE CONWOOD DECISION POSES SIGNIFICANT NEW RISKS FOR "DOMINANT" FIRMS 5

APPROVAL OF THE MICROSOFT SETTLEMENT: SETTING THE STAGE FOR JUDICIAL REGULATION OF A RAPIDLY EVOLVING INDUSTRY 8

COMMITTEE LEADERSHIP 12

MEDIATION AND ARBITRATION OF ANTITRUST DISPUTES

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Use of alternative dispute resolution ("ADR") is steadily increasing, as both clients and counsel gain experience with its benefits and dissatisfaction mounts with the wastefulness and burdens of litigation. But is ADR suitable for complex business issues, and for antitrust disputes in particular? The answer is generally yes, with a few qualifications depending on the type of ADR.

Mediation and arbitration are the two predominant forms of ADR, with numerous other alternatives largely based on those foundations. While mediation and arbitration are often considered together (and are frequently confused even by sophisticated counsel), as detailed below, they have significant distinctions and are best suited to different circumstances. The processes, however, are not exclusive. Parties may first attempt to find an optimal resolution through mediation, and then fall back on an arbitration agreement to ensure that they will not have to litigate. These basic dynamics apply with equal force to antitrust disputes as to other complex commercial matters.

Mediation Offers Many Benefits in Resolving Antitrust Disputes

Mediation is a form of alternative dispute resolution in which a trained neutral facilitator helps the parties reach a voluntary, mutually agreeable resolution to a dispute. As a voluntary process, a mediator is involved and obtains information about the dispute only with the consent of the parties.

The mediator is not a decision-maker and does not hear evidence in order to render a decision, as would a judge or arbitrator. Instead, the mediator focuses on the business interests and concerns of each side and helps the disputants see where their interests converge and where they can find common ground. There is no binding agreement until the parties reach an outcome that is satisfactory to them, which ensures that the parties can live with the result.

Many antitrust disputes can be resolved through mediation to reach preferable outcomes for all parties. Antitrust claims or counterclaims are often surrogates for concerns about the course a business relationship has taken. Restoration of the relationship is generally not possible through litigation, or even through last minute settlement efforts, where tense negotiations on the eve of trial tend to focus on how to cut the baby in half. Mediation seeks to avoid zero-sum games – where any gain by one party is a loss to the other – by helping the parties examine alternatives and re-frame issues in ways that allow a satisfactory outcome for all. Even when it cannot resolve every aspect of a dispute, mediation often narrows the issues sufficiently to make it well worth the effort invested.

The primary benefits of mediation are often thought to be savings of time and money, which are considerable, but other benefits can be even more significant, including:

Parties Control Outcome. Antitrust disputes may represent a critical point in the life of a business, e.g., exposure to the potential of crippling treble damages or defining permissible ways of competing. Mediation leaves the parties in control of their destiny, rather than placing pivotal decisions in the hands of judges or other third party decision-makers. With mediation there is never fear of a "bad" decision by a third party. If a satisfactory outcome cannot be achieved for both (or all) sides through mediation, the parties are in the same position with the same options as they were before mediation.

Preserves Confidentiality. Antitrust disputes often involve sensitive business matters that parties desire to keep out of the public record and away from inquisitive reporters and investigators. Generally, mediation is confidential and information disclosed is not revealed to outsiders, or to the other party, if requested. Thus, each side can reveal confidential strategies and goals that will not be shared with the other parties, permitting the mediator to determine if there are overlapping outcomes or compromises possible that the parties could not ascertain in the absence of a trusted third party.

Restores or Maintains Relationships. Mediation can help parties sort out their underlying problems in a way that permits them to do business together in the future. This can be critical in antitrust disputes between companies that have depended on each other in the marketplace, where litigation "wins"

are unlikely to restore business relations. The mediator can help defuse animosity or frustrations that may have built up during unsuccessful negotiations between the parties, and avoid the hostility that can result from litigation (or even arbitration). Moreover, resolving disputes to restore relationships may allow damages to be addressed more successfully through ongoing business arrangements that can allocate profits or provide significant benefits to the party harmed without necessarily imposing out-of-pocket costs on the other party.

Superior Outcome Likely. The biggest benefit of mediation is the likelihood of a better outcome than other means of resolving disputes. Mediation works to find solutions that satisfy the legitimate interests of the parties to the greatest extent possible, rather than choosing a winner and a loser based on the positions presented, as other processes do. The mediator works with the parties to help them focus on and advance their critical interests, which are often different from or only loosely related to the initial claims. The issues are often stated in monetary terms, but even in business disputes the parties' deeper interests often lie in being treated properly in a business relationship or maintaining an ongoing business interest.

Mediation is not a panacea, but its potential benefits make it desirable to consider seriously in every antitrust dispute.[1] Mediation is real work, and depends on the good faith and real commitment to the process by the parties. Some conflicts are simply not suitable for resolution through mediation, or may only be resolved in part. For example, mediation may not be successful where one party has every incentive to delay or "wins" simply through a war of attrition that imposes high litigation costs. But, the large majority of antitrust cases, however, are good candidates for successful mediation if the parties are willing, and often worth it even if a court compels mediation. When mediation is not successful or leaves issues unresolved, arbitration can be a useful backstop to ensure that litigation is not required.

[1] While the focus is on private antitrust disputes, consideration is under way within the federal agencies about whether or how to bring more mediation into the Department of Justice's Antitrust Division and the Federal Trade Commission's Bureau of Competition.

Benefits of Arbitration in Resolving Antitrust Disputes

Arbitration is a form of ADR in which one or more neutral third parties (arbitrators) hears evidence and renders a decision, in a role comparable to a judge. Because the arbitrators make the decision, arbitration is much more formal than mediation, with defined processes for accepting evidence and rendering a decision, and strict limits on *ex parte* contact by the parties.

Parties in a business arrangement can agree when forming or updating their relationship that antitrust and other disputes will be resolved through arbitration, and choose whether the arbitration decision will be binding or subject to appeal.[2] Contractual provisions to arbitrate do not preclude parties from voluntarily proceeding with mediation first, and then using arbitration to resolve any disputes that remain after mediation.

As detailed below, arbitration shares several benefits with mediation: choosing the third-party decision maker, preserving confidentiality, avoiding unfavorable fora, and minimizing the burdens of litigation. Arbitration has a big advantage over mediation, because it ensures a resolution to the dispute. The resolution, however, generally lacks the innovative solutions possible with mediation, and the parties lose control over their dispute.

Ensures Decision Will Be Made. Arbitration addresses a key shortcoming of mediation by providing certainty that a decision – one way or the other – will be made. This is a critical factor that still allows parties to avoid litigation if mediation has not succeeded (or the parties have not chosen to pursue it). The parties may well recognize the value of an expeditious decision of antitrust disputes to avoid the ongoing distraction of key business people, excessive legal fees, and debilitating uncertainty, which can

[2] Exceptions may apply to protect weaker parties from contracts of adhesion or as a result of particular statutory provisions, such as the Bono Arbitration Bill which was enacted in November 2002 and provides that agreements to arbitrate between auto dealers and their franchisees are only enforceable if executed after a dispute arises (Sec. 11028, H.R. 2215, the 21st Century Department of Justice Appropriations Authorization Act (Nov. 2, 2002)).

often be more costly and harmful to the parties than any reasonable resolution of the dispute by a well-chosen arbitrator.

Choose Decision-Maker. The ability of the parties to choose arbitrators who have subject matter expertise and good judgment is highly desirable to reach a reasonable decision, and preferable to randomly selected judges and jurors. In antitrust disputes, there are significant benefits in using an arbitrator with antitrust background and expertise. Indeed, it is selection of an expert arbitrator (or panel of three) that helps give parties the confidence to make the outcome binding.

Preserves Confidentiality. As noted above, many antitrust cases involve sensitive business information that one or both parties need to keep confidential. Often, even the dispute itself is something that the parties would rather not have disclosed publicly. Like mediation, arbitration can be conducted so that the parties have greater control over what, if anything, is made public.

Avoid Disadvantageous Forum. Arbitration, like mediation, avoids the disadvantages of a judicial forum that may be undesirable, either because of harmful precedent within the jurisdiction or because of the manner in which cases in the forum are handled.

Control Timing and Costs. Arbitration can often meet a schedule to render a decision in time to satisfy the business needs of the parties. This helps keep the costs of arbitration lower than litigation, although the formality of the arbitration process generally requires more time and expense than mediation. Complex antitrust litigation, by contrast, can result in years of expense, distraction and uncertainty, with no date certain when a decision will be reached, much less when appeals will be final. Arbitration gives parties more control over excessive cost and delay – including loss of executive time and focus.

Conclusion

Mediation and arbitration should be considered seriously for use in any antitrust dispute, and can be sequenced to permit the parties to seek an optimal solution through mediation first, and then rely on arbitration to resolve any remaining issues. This approach avoids the negatives of litigation and offers tremendous benefits in resolving disputes.