What Every Antitrust Lawyer Should Know About Alternative Dispute Resolution

November 6, 2003 Presentation at the ABA
2003 Administrative Law Conference
by **Keith L. Seat**[1]

I. ADR IS APPROPRIATE FOR MOST ANTITRUST CASES

A. Big Picture – How Best to Resolve Antitrust Case?

- Antitrust litigators focus on preparing for trials and appeals (as they should), but almost all antitrust cases and claims are resolved out of court
- Parties settle many disputes directly with opposing parties without the help of counsel, although in appropriate circumstances counsel can be very useful to avoid problems and reach a better settlement
- Similarly, counsel settle many cases directly with opposing counsel without the assistance of a mediator, settlement facilitator, or other third party neutral, although in appropriate circumstances a third party neutral can be very helpful to avoid problems and reach a better settlement
- Simply settling a case doesn't mean that additional value for one or more parties wasn't missed in the process, or that the process wasn't more stressful on the parties (and counsel) than it needed to be

B. Range of Antitrust Cases

- Some antitrust cases more amenable to ADR than others
- Private antitrust claims and counterclaims which reflect commercial conflicts (such as distributor-dealer and similar business disputes) are most suitable for ADR
- Other private antitrust matters, including large bet-the-company cases, are good candidates for ADR

[1] Keith L. Seat is an independent mediator and arbitrator (see www.keithseat.com). He was formerly the General Counsel of the Antitrust Subcommittee of the United States Senate Judiciary Committee. Mr. Seat has years of experience as senior in-house counsel at a major telecommunications firm, and previously practiced as an antitrust litigator at Howrey, Simon, Arnold & White, following a clerkship with U.S. District Judge William H. Becker. Mr. Seat has been involved in numerous antitrust cases between private parties, as well as mergers, investigations and negotiations with both the Federal Trade Commission and the Department of Justice.

- Department of Justice and Federal Trade Commission have not (yet) embraced ADR in antitrust matters (including mergers), despite indications of interest

C. Dispute Resolution Alternatives

- Trend toward greater use of ADR in its various forms
    - Parties are incorporating ADR provisions into contracts and voluntarily turning to dispute resolution processes
    - Counsel who have experienced quality ADR processes see them as better ways to resolve clients' problems and deepen relationships with clients
    - Courts frequently encourage or require parties to try mediation before consuming judicial resources at trial
- No one is eager to roll the dice with a randomly chosen judge or jury; ADR gives parties more control over the outcome or at least the decision-maker
- ADR generally is private and confidential, so parties have more control over their public images and particular disputes can often be resolved without setting precedent or affecting other matters
- Mediation and arbitration, discussed below, are the primary ADR processes
- Many other ADR variations are possible, including:
    - Early Neutral Evaluation – helps the parties to be more realistic about their prospects to get an informed view on the merits of the case
    - Arb-Med – arbitrate for a set time period, seal decision, and then mediate, opening the arbitration decision only if mediation is unsuccessful
    - Med-Arb – mediate first, with arbitration following if mediation was not fully successful; however, can't use the mediator as arbitrator or parties may hold back in mediation discussions to keep from impacting future arbitration decision
    - Other variations are facilitation, mini-trials and fact-finding, among others (many of which differ more in name than concept)
- Mediation, arbitration and other ADR processes are quite different from one another – the main thing in common is that they are not litigation

II. PROS AND CONS OF MEDIATION AND ARBITRATION

A. Mediation v. Arbitration

- Mediation is a form of ADR in which a neutral facilitator helps the parties reach a voluntary, mutually agreeable resolution of their dispute
    - The mediator is not a decision-maker and does not decide the case, as would a judge or arbitrator
    - The mediator helps the parties focus on their business interests and concerns and see where interests converge and where the parties can find common ground; many mediator will evaluate the merits of the case when helpful
- Mediation is more versatile and creative than arbitration, and permits the parties to control the outcome, but does not ensure there will be a final resolution
- Mediation is typically faster than arbitration; mediations are often convened quickly and may be resolved within a day or two, although complex antitrust cases may take longer
- Mediation legal fees and expenses are typically far less than in arbitration, and the distraction of business executives is reduced
- Arbitration relies on a neutral third party – essentially a private judge – to hear evidence from the parties and render a decision that can be binding (if the parties have agreed that it will be)
- Arbitration ensures that there will be some outcome, but the parties lose control over the outcome, just as in litigation
- Arbitration and mediation are not mutually exclusive – parties can mediate first and arbitrate only if the mediation is unsuccessful (in whole or part)

B. Benefits of Mediation

- Mediation's best known benefits– savings of time and money – are desirable, but often the most significant benefit can come from achieving better outcomes by addressing underlying interests
- Control of outcome by parties – mediation does not force an outcome that is unacceptable to the parties, so there is no fear of a "bad" decision by a third party judge or arbitrator
- Creative results – mediation is more flexible than other alternatives and can reach novel solutions to satisfy interests of all parties

- Restores or preserves relationships – mediation can help parties resolve conflicts in a way that restores positive business relationships or permits them to continue

- Saves time and money – mediation is much quicker and far less expensive than litigation, without lengthy discovery, motions practice, extensive briefing, trial or appeals.

- Other options remain – if a satisfactory outcome cannot be achieved for all parties through mediation, they can arbitrate or pursue other remedies

- High success rate – commercial cases (including antitrust cases) have a high rate of settlement through mediation, and even narrowing the issues in dispute can be a significant benefit

C. <u>Disadvantages of Mediation</u>

- Loss of image and position – party may be viewed as weak and willing to compromise if suggest negotiation or mediation

- Loss of information – party or counsel may reveal information or perspective on case that will be detrimental in future proceedings

- Loss of focus – possible distraction from trial preparation

D. <u>Benefits of Arbitration</u>

- Certainty of decision – arbitration ensures that a decision will be rendered (one way or the other) on a critical issue or dispute

- Certainty of timing – arbitration can generally ensure that a definitive decision will be rendered within a reasonable timeframe set by the parties

- Binding outcome – parties can agree that an arbitration decision will be final and conclusive

- Choice of arbitrators – parties can chose arbitrators with expertise and good judgment, greatly increasing the likelihood of a reasonable outcome

- Saves time and money – arbitration is typically quicker and less expensive than litigation, although becoming more formal than in the past

- Fallback –the benefits of both mediation and arbitration can be obtained by mediating first and then using binding arbitration to resolve any outstanding issues

E. Disadvantages of Arbitration

- Compromised outcomes – possibility of unprincipled compromise decisions by arbitrators (who don't want to alienate either party)
- Expense and delay – if not binding, arbitration often just adds expense and delay on top of litigation
- Lack of appealability – if binding, inability to appeal decisions that may be based on errors of fact or law
- Limited to legal claims – arbitration can't reach underlying interests of parties

III. NUTS AND BOLTS OF TIMING AND PROCESSES

A. Mediation Specifics

- Parties influence process – parties have significant input into the form of mediation, ranging from choice of mediator and style of mediation to details such as when and where meetings are held and whether to proceed by teleconferences
- Choice of mediator – success of mediation often depends on the skill and effort of the mediator; key factors in selecting a mediator include:
    - Expertise in mediation process, substantive knowledge and experience are critical
    - Style of mediation is important; some mediators prefer a facilitative style (which emphasizes helping the parties resolve the dispute based on the parties' own determination of what is reasonable and proper) while other mediators prefer an evaluative style (which involves the mediator providing an evaluation of the case from the mediator's perspective); "transformative" and other mediation styles also exist
    - Use of caucuses is significant; some mediators rely very heavily on private caucuses and shuttle back and forth between parties who do not talk directly to one another, while other mediators encourage the parties to talk directly to one another as much as possible, with only occasional caucuses
    - Neutrality is essential, although the mediator does not act as decision-maker
    - Personality, temperament, flexibility and the parties' ease in working with the mediator should also be considered

- Timing of mediation – considerations:
    - Mediation should be considered at various points – before filing the complaint, after some discovery, prior to summary judgment motions, after summary judgment decision, prior to trial, and after verdict but before appeal
    - Mediating when there is time to consider how to satisfy the underlying goals and interests of the parties is superior to hasty resolution on the courthouse steps
    - Early mediation that does not reach settlement may clarify issues that need more attention in discovery or lay the groundwork for future resolution
- Binding outcomes – achieved only if the parties reach an agreement that is satisfactory to them
- Written agreements – desirable to document and sign at least an outline of the agreement before the parties leave the mediation; counsel may later finalize the language and complete documentation of the settlement

B. Arbitration Specifics

- Arbitration process – formal with ex parte limitations; much more similar to litigation than mediation
- Arbitration organizations required – an entity such as AAA, JAMS or the National Arbitration Forum is used to set up the arbitration and avoid ex parte contact between arbitrators and parties
- Arbitration rules – chosen by the parties by contract or subsequent agreement, and typically rely on published rules of AAA, JAMS, CPR, or the Forum, which may differ according to subject matter
- Size of panel – carefully selecting a panel of three arbitrators (with all neutral and no party arbitrators) reduces risk of bad decisions, but increases costs
- Litigators present case – style is similar to a courtroom, but with circumscribed procedural and evidentiary rules

IV. SUGGESTIONS FOR EFFECTIVE ADR ADVOCACY

A. Tips for Antitrust Mediation

- Importance of preparation – mediation can be more free form than arbitration and requires broader preparation to handle unexpected issues

- Focus on interests, rather than positions
  - Clearly identify your client's interests and goals
  - Realistically analyze your client's BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative)
  - Think through opposing party's needs and interests
  - Listen actively to opposing side; be sure to ask yourself "why" and "why not"
  - Don't assume that the case and the parties' interests are just about money, even when presented that way
- Prepare clients
  - Explain process and role of all participants, especially involvement of clients, who are likely to have a much larger role than in arbitration or litigation
  - Be conscious of requirement of settlement authority
  - Carefully determine best individuals from client to be at the mediation; often will be those most involved, but not always
  - Role play so client can explain situation and interests in compelling way while avoid defensiveness
  - Take the high road; avoid sinking to level of opposing parties when matters become contentious
- Look for mutual gain whenever possible in order to avoid zero-sum outcomes
- Focus on problem-solving, putting the dispute behind the parties and looking to the future
- Always look for and note any areas of agreement between parties
- Negotiate at optimal points; don't wait for settlement on courthouse steps
- Share facts and information about your case and client's goals and concerns, keeping in mind that mediation may not succeed
- Counsel must be careful not to get in the way; mediation is rare opportunity for clients to communicate directly with opposing parties
- Treat opposing counsel and parties with respect; make it easy for them to agree to your proposals

- Use mediator:
    - To ask questions of the other side that cannot be asked directly
    - To convey information and proposals to opposing side that would be treated with suspicious or devalued if heard directly; suggest how mediator might articulate proposals to make them most appealing
- Think through what is important for settlement to be comprehensive; bring draft settlement agreement on disk to mediation
- Be ready to litigate, if necessary

B. <u>Tips for Antitrust Arbitration</u>

- Importance of preparation – comparable to litigation, except with procedural and evidentiary shortcuts
- Arbitration is initially more comfortable than mediation for most litigators:
    - Arbitration rules generally include the possibility of discovery, motions practice, ex parte rules
    - Arbitration sometimes seems like "litigation lite"
- Prepare clients – explain process and role of participants
- Focus on the essence of claims, and also explain why equities favor your clients
- Prepare case for decision by arbitrators, but be open to opportunities that may arise to work out settlement