

DOJ Issues New Guidance on the Use of Arbitration To Resolve Antitrust Division Matters

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The Department of Justice issued new guidance last week on the use of arbitration in Antitrust Division matters. The Division's guidance comes in the wake of its use of arbitration for the first time in *United States v. Novelis Inc. and Aleris Corporation*. The new guidance sets forth the Antitrust Division's policy "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."^[1]

The Division identifies a number of cases that are particularly well suited for arbitration, including: (i) cases involving a clear dispositive issue; and (ii) cases that are factually or technically complex and would thus benefit from an arbitrator with relevant antitrust, economic, or industry-specific expertise. For example, the Division utilized arbitration in *Novelis* to streamline the adjudication of a dispositive issue in a merger challenge.

The Division details a number of additional factors that may favor arbitration, including: (i) a particular need to control the timing for a resolution of a dispute and/or the scope of the relief requested; and (ii) those cases where a decision is unlikely to achieve a proportionate impact in light of the resources required. As the guidance emphasizes, arbitration can result in significant cost savings by avoiding the need for a full trial and dispensing with burdensome procedural requirements that may be unnecessary for resolving certain discrete issues.

Conversely, the Division also highlights a number of factors that weigh against arbitration, including: (i) where the use of arbitration may result in a lost opportunity to create valuable legal precedent; or (ii) where there is significant public interest that necessitates proceeding in an open forum before a federal district judge. The threshold inquiry under the new guidance is whether arbitration "will be more cost efficient, faster or will enhance the opportunities for a better result than would be the case with traditional litigation."

The guidance further outlines the applicable arbitration procedure, which is governed by the ADR Act. Under the ADR Act, arbitration may be used "whenever all parties consent," thereby providing flexibility for the parties to arbitrate only certain issues in controversy, or to craft their own range of possible outcomes, including a maximum allowable award. See 5 U.S.C. § 575(a). Furthermore, this procedure allows (but does not require) the United States to file a complaint in district court before a matter is referred to arbitration. And the guidance notes that it may be beneficial to do so where court oversight of fact discovery or ongoing monitoring of a remedy may be needed.

In light of the incoming Biden administration, and the corresponding likely upcoming change in leadership throughout the Department of Justice, the impact of the Division's guidance on the potential use of arbitration going forward is currently unclear. For now, it appears unlikely that the Division will seek to arbitrate any of its large-scale actions, such as its anticipated future actions against "big tech" companies. But antitrust practitioners should take note that the Division has now opened the door to arbitrate certain of its actions, and particularly for those cases with discrete issues in dispute and where arbitration could lead to significant taxpayer savings.

^[1] The complete Updated Guidance Regarding the Use of Arbitration and Case Selection Criteria, as set forth in a November 12, 2020, Memorandum from Assistant Attorney General Makan Delrahim, is available at <https://www.justice.gov/atr/page/file/1336516/download>.

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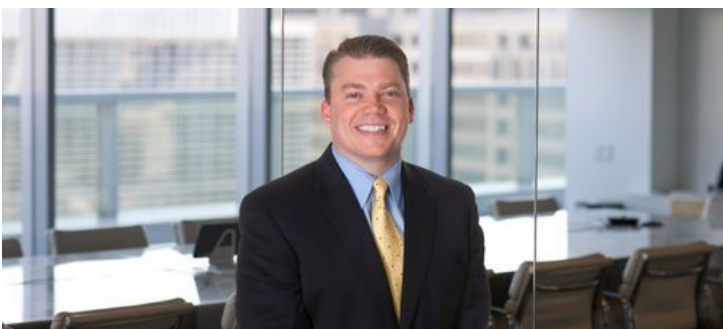
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