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### DOJ Antitrust Division Issues Guidance on Case Selection of Criteria for Use of Arbitration

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The Department of Justice Antitrust Division (the “Division”) recently released updated guidance outlining when and how the Division will use arbitration in civil cases and merger investigations in the place of traditional litigation.<sup>1</sup> The Division now encourages the use of arbitration in “appropriate” cases that would benefit from the use of such alternative dispute resolution techniques.<sup>2</sup>

#### The Divisions Approach to Arbitration

Historically, the Division has not used its authorization to employ alternative dispute resolution techniques, like arbitration, provided by the Administrative Dispute Resolution Act of 1996 (“ADRA”).<sup>3</sup> Shortly after the ADRA became law, that same year the Division first issued regulations on the possible use of alternative dispute resolution techniques.<sup>4</sup> However, the Division did not invoke its own guidance until 2019, when it used arbitration for the first time, in *United States v. Novelis Inc., et al.*, to streamline the adjudication of a dispositive issue in a merger challenge.<sup>5</sup> The updated guidance issued last month crystallizes the Division’s learning from the *Novelis* matter, and outlines its contemporary approach to such techniques.

The Division now promotes the use of alternative dispute resolution techniques, like arbitration, and believes that they accelerate settlements, avoid trials, and enhance the resolution of disputes in ways that traditional litigation cannot.<sup>6</sup> Further, the Division now expressly recognizes the value of arbitration in eliminating unnecessary civil litigation, shortening the time that it takes to resolve civil disputes, and achieving better case resolutions with the expenditure of fewer taxpayer resources.<sup>7</sup>

#### Selection Criteria for Use of Arbitration

The Division’s updated guidance supplements and updates previously issued statements on the appropriate use of alternative dispute resolution techniques.<sup>8</sup> The updated guidance provides revised selection criteria to identify civil cases and merger challenges to submit for arbitration. The threshold inquiry for whether a case is appropriate for arbitration is whether the use of arbitration will be beneficial to the case—whether arbitration will allow the case to “be more cost efficient, faster or will enhance the opportunities for a better result than would be the case with traditional litigation.”<sup>9</sup> Other key factors the Division will consider when identifying cases and matters appropriate for arbitration are:

- whether the use of arbitration will shorten the time necessary to resolve a dispute, reduce the taxpayer resources used to resolve a dispute, or otherwise improve the outcome for the government;

- whether the case's complexity would benefit from the subject matter expertise of an expert arbitrator;
- the nature of the dispute makes arbitration more effective, such as disagreement over discrete dispositive issues;
- the need for flexibility in controlling the timing for any resolution of the matter;
- whether the parties involved prefer to decide the range of possible remedies in advance of any proceedings;
- whether or not there is an opportunity to create valuable legal precedent in cases involving significant public interest; and
- the requirement that all parties involved consent to the use of arbitration and whether a cost-shifting provision is appropriate.<sup>10</sup>

### Other Factors to Consider Before Agreeing To Arbitration

The Division's updated guidance provides selection criteria to identify appropriate matters for arbitration. However, the arbitration process under the updated guidance and the ADRA raise other factors that practitioners should consider before entering into an arbitration agreement.

First, all parties to an arbitration proceeding have the *option* to participate in the selection of the arbitrator under the ADRA.<sup>11</sup> As a practical matter, it is difficult to envision an instance in which a party would not choose to participate in the selection process, and therefore counsel for a party should promptly consider qualified, appropriate candidates that both the party and the Division would find acceptable.

Second, parties should consider the possibility of whether the government will seek federal district court supervision of the arbitration process when considering whether to enter into an arbitration agreement. In *Novelis*, the government filed a complaint in federal district court and submitted an arbitration plan to that court, detailing expected procedures for discovery and arbitration for the federal court to oversee. The Division's updated guidance advises the Division to consider filing a complaint in federal court before proceeding to arbitration if the matter would benefit from court oversight of any remedies.<sup>12</sup> District court oversight may counteract any efficiencies that are contemplated through the use of arbitration.

Lastly, parties should be aware of the relative finality of arbitration proceedings when compared to federal litigation. Under the ADRA, judicial review of arbitration proceedings is available under limited grounds, such as review for fraud in the proceeding or arbitrator misconduct.<sup>13</sup>

### Conclusion

The Division's recent release of guidance regarding the use of arbitration in civil matters and merger cases illustrates the Division's commitment to alternative dispute resolution mechanisms in the future. Although the Division only recently first utilized arbitration in *Novelis*, the dissemination of arbitration guidance to all sections of the Division indicates a potential role for arbitration across other investigations and matters.

Parties involved in merger investigations or civil litigations involving the Division should take note of the arbitration case selection criteria and evaluate whether any issues, or the entire matter itself, lends itself to adjudication by arbitration. In many cases, parties may find the same value in arbitration as the Division: benefits in the form of temporal and financial efficiencies and the flexibility afforded by arbitration in case management and remedies.

- <sup>1</sup> See Department of Justice, Antitrust Division, *Updated Guidance Regarding the Use of Arbitration and Case Selection Criteria*, (Nov. 12, 2020), available at <https://www.justice.gov/atr/page/file/1336516/download>.
- <sup>2</sup> See Department of Justice, Office of Public Affairs, *Justice Department Issues Guidance on The Use Of Arbitration And Launches Small Business Help Center*, (Nov. 12, 2020), available at <https://www.justice.gov/opa/pr/justice-department-issues-guidance-use-arbitration-and-launches-small-business-help-center>.
- <sup>3</sup> See 5 U.S.C. § 571 et seq.
- <sup>4</sup> See Fed. Reg. Vol. 61, No. 136 at 36896 et seq.
- <sup>5</sup> Arbitration Decision, *In re Arbitration of United States v. Novelis, Inc., et al*, (Mar. 9, 2020), available at <https://www.justice.gov/atr/case-document/file/1257031/download>.
- <sup>6</sup> See *supra* note 1, p. 1.
- <sup>7</sup> See *supra* note 1, p. 1.
- <sup>8</sup> See Fed. Reg. Vol. 61, No. 136 at 36896 et seq.
- <sup>9</sup> See *supra* note 1, p. 3.
- <sup>10</sup> See *generally supra* note 1.
- <sup>11</sup> See 5 U.S.C. § 577.
- <sup>12</sup> See *supra* note 1, p. 4.
- <sup>13</sup> See 5 U.S.C. § 581; 9 U.S.C. §§ 10-11.

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