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Chapter 96

ARBITRATION OF ANTITRUST DISPUTES

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It is increasingly common for antitrust disputes to be resolved through arbitration rather than litigation. Arbitration is a particularly appealing forum for disputes in an international setting where there may be claims under the laws of multiple jurisdictions. This chapter reviews the standards governing the arbitrability of antitrust disputes. It then reviews the case law relating to the availability of class action remedies in arbitration. It closes with a discussion of the extent to which the discovery needed to prove an antitrust claim, especially from third parties, can be obtained in an arbitral forum.

1. Introduction

It is increasingly common for antitrust disputes, especially international ones, to be resolved through arbitration rather than litigation. This trend is likely to accelerate in the wake of the Second Circuit's decision in *JLM Industries v. Stolt-Nielsen SA*,[1] in which the court held that antitrust damage claims arising from a multinational cartel in the market for chemical parcel tanker transportation services were within the scope of a broad arbitration clause. This chapter examines both the arbitrability of antitrust disputes and some of the practical issues that confront practitioners faced with arbitrating an antitrust claim.

Many businesses view arbitration as having several important advantages over federal court litigation. Among other things, they believe arbitration allows disputes to be resolved more quickly and less expensively than litigation and with less attendant publicity. Arbitration can be less formal, discovery is generally more limited, and evidentiary standards more relaxed. In arbitration, the parties also have more control over the selection of the persons who will decide the dispute, as opposed to litigation where they may fear a decision by a generalist judge or, worse yet, by a jury they believe may have no understanding of complex business issues and may be biased in favor of the victims of the defendant's alleged misconduct.[2]

There can be additional advantages in an international setting. Arbitration can provide a neutral forum for dispute resolution between companies of different nationalities. Arbitration awards may also be easier to enforce than foreign court judgments.[3] The United States is a party to the 1958 New York Convention on the

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1. 387 F.3d 163 (2d Cir. 2004).
2. *See* Donald I. Baker & Mark R. Stabile, *Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel*, 48 BUS. LAW. 395, 414-16 (1993); *see also* Thomas Campbell, Roxane Busey & Peter Koch, *Arbitrating Antitrust Claims—The Road Less Traveled*, ANTITRUST, Fall 2004, at 8, 8.
3. *See* Hilton v. Guyot, 159 U.S. 113 (1895) (enforcement of foreign judgments is not automatic but instead governed by the principles of comity).

Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention.[4] The Convention requires national courts to recognize and enforce foreign arbitral awards, subject to certain exceptions such as when the "enforcement of the award would be contrary to the public policy of that country."[5] The Convention also requires national courts to recognize the validity of arbitration agreements and refer parties to arbitration when they have made a valid agreement.[6] More than 100 nations are signatories to the Convention.[7]

Arbitration may however suffer from some potentially serious shortcomings as a device for resolving antitrust disputes. Third parties who are not signatories to the contract cannot be compelled to join the proceedings. This may make it difficult to recover from alleged coconspirators with whom the claimant does not do business or may require a claimant to pursue its claims through multiple arbitrations rather than a single consolidated action. The typically limited discovery available in arbitration proceedings may impose disadvantages. A claimant may need broad-ranging discovery or third-party discovery. The absence of a written opinion and the limited grounds for challenging an award may also raise concerns in antitrust disputes, where the amounts at issue often reach into the hundreds of millions of dollars.[8]

In the United States, there is a strong federal policy in favor of arbitration. The Federal Arbitration Act (FAA), first enacted in 1925, provides that an arbitration agreement "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] The Supreme Court has noted that this "liberal federal policy favoring arbitration agreements, manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements."[10]

2. Arbitrability of antitrust disputes

Prior to 1985, arbitration's shortcomings caused most federal courts to hold arbitration clauses unenforceable in antitrust cases under the *American Safety* doctrine first articulated by the Second Circuit in *American Safety Equipment Corp. v. J.P. Maguire & Co.*[11] The *American Safety* doctrine relied on a 1953 Supreme Court decision, *Wilko v. Swan*.[12] There, the Supreme Court had held that claims brought under

4. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (done at New York June 10, 1958; entered into force June 7, 1959; for the United States Dec. 29, 1970).
5. *Id.* arts. 3 & 5; art. 5, ¶ 2(b).
6. *Id.* art. 2, ¶¶ 1, 3.
7. UN Commission on International Trade Law, Status 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *available at* http://uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.
8. *See* Campbell et al., *supra* note 2, at 8.
9. Act of Feb. 12, 1925, Pub. L. No. 68-401, ch. 213, § 2, 43 Stat. 883, 883 (codified at 9 U.S.C. § 2).
10. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).
11. 391 F.2d 821 (2d Cir. 1968).
12. 346 U.S. 427 (1953).

Section 12(2) of the Securities Act of 1933 were not subject to arbitration on public policy grounds.[13] The *American Safety* court held that the same was true for antitrust disputes for several reasons. First, the Court viewed the use of arbitration to resolve antitrust disputes as inconsistent with the role that private plaintiffs play as "private attorneys general."[14] Second, the Court feared that contracts of adhesion would impose arbitration clauses.[15] Third, the Court believed that antitrust disputes involved complex issues so that arbitration was an inappropriate forum.[16] Finally, the Court argued that "since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest."[17]

In 1985, the Supreme Court rejected the *American Safety* doctrine with respect to international antitrust disputes. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[18] a Puerto-Rican automobile dealer challenged the distribution arrangements and territorial restrictions in its agreement with Mitsubishi and CISA, the international distribution arm for Chrysler. The sales agreement contained a broad arbitration clause requiring arbitration in Japan before the Japanese General Arbitration Association.[19] When Mitsubishi brought an action to compel arbitration under the sales agreement, Soler counterclaimed against both Mitsubishi and CISA, asserting causes of action under the Sherman Act.[20] The district court compelled Soler to arbitrate all claims, including the antitrust claim.[21] The First Circuit reversed, applying the *American Safety* doctrine.[22]

In reversing, the Supreme Court declared that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[23] The Court adopted a broad two-step approach for determining whether a claim arising under a federal statute is arbitrable. The first step is for the court to determine whether the parties entered into an arbitration agreement that would encompass the statutory claim at issue.[24] The second step is to determine whether the text or legislative history of the statute demonstrates that Congress intended arbitration to be precluded.[25]

The Court held that the arbitration clause in *Mitsubishi* passed both steps of the test and was enforceable. In reaching this conclusion, the Court dismissed the concern that permitting arbitration of antitrust claims would lead to contracts of adhesion, noting that

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13. *Id.* at 435.
14. 391 F.2d at 826.
15. *Id.* at 827.
16. *Id.*
17. *Id.*
18. 473 U.S. 614 (1985).
19. *Id.* at 617.
20. *Id.* at 618-19.
21. *Id.* at 620-21.
22. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983), *aff'd in part and rev'd in part*, 473 U.S. 614 (1985).
23. *Mitsubishi*, 473 U.S. at 626-27.
24. *Id.*
25. *Id.* at 627-28.

the party resisting arbitration may directly attack the validity of the agreement.[26] The Court also rejected the premise that antitrust disputes were too complex to be arbitrated, holding that arbitration was sufficiently flexible to handle complex disputes.[27] Finally, the Court dismissed the concern that arbitrators drawn from the business community would not be sufficiently impartial, noting that international arbitrators are frequently drawn from both the legal and business communities.[28]

The holding of *Mitsubishi* itself was limited to international transactions, but subsequent decisions have extended *Mitsubishi* to purely domestic disputes as well. In 1989, the Supreme Court, relying on *Mitsubishi*, explicitly overruled *Wilko* and held that Securities Act claims were arbitrable even in domestic disputes.[29] Two years later, the Court cited *Mitsubishi* for the proposition that antitrust claims generally could be arbitrated.[30] Since these decisions, the lower courts have consistently declined to apply the *American Safety* doctrine and a majority of circuits have now either abandoned the doctrine explicitly or questioned whether it has any remaining validity.[31]

3. Scope of arbitration clauses

Arbitration "is a matter of consent, not coercion."[32] Therefore, after *Mitsubishi*, the first issue for a court to resolve is whether the dispute falls within the scope of the parties' arbitration agreement. In *JLM Industries v. Stolt-Nielsen SA*,[33] the Second Circuit read an arbitration clause broadly to permit arbitration of a dispute arising from a multinational cartel.

In *JLM*, a group of affiliated corporations that trade in chemicals brought a putative class action alleging a conspiracy among chemical parcel tanker carriers to allocate customers and to fix prices in violation of the Sherman Act, state antitrust laws, and the Connecticut Unfair Trade Practices Act.[34] The defendants moved to compel arbitration of all of JLM's claims pursuant to the terms of the standard form agreement among the parties.[35] The district court held it improper to compel arbitration because "JLM's [Sherman Act] claim in no way depends upon interpretation, construction, or applications of any provision of the charter."[36]

The Second Circuit reversed, holding that the alleged violation of Section 1 of the Sherman Act fell within the scope of the arbitration clause. The *JLM* court noted that federal courts strongly favor arbitration, particularly in the international context.[37] The

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26. *Id.* at 632 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)).
27. *Id.* at 632-33.
28. *Id.* at 634.
29. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).
30. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
31. *See* Campbell et al., *supra* note 2, at 8-9, and cases cited therein.
32. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).
33. 387 F.3d 163 (2d Cir. 2004).
34. *Id.* at 167-68.
35. *Id.* at 168.
36. JLM Indus. v. Stolt-Nielsen SA, No. 3:03CV348 (DJS), slip op. (D. Conn. June 24, 2003), *rev'd*, 387 F.3d 163 (2d Cir. 2004).
37. *JLM Indus.*, 387 F.3d at 171 (citing David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.3d 245, 248 (2d Cir. 1991)).

Supreme Court has held that "any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration."[38]

In interpreting the scope of a broad arbitration clause, courts employ a "touch matters" standard, which derives from *Mitsubishi*, to determine whether or not a statutory claim is sufficiently related to the contract to compel arbitration.[39] In *JLM*, the Second Circuit held that "[*i*]*f the allegations underlying the claims 'touch matters' covered by the parties' . . . agreements,* then those claims must be arbitrated, whatever the legal labels attached to them."[40] In so holding, the court rejected an argument that the claims fell outside the scope of the arbitration clause because they raised "factual allegations which concern matters beyond the making of a particular contract between the parties and the performance of its terms."[41] The Court noted that JLM would not have suffered its alleged damages had it not entered into "nearly 80" contracts with the defendant and that its claims were therefore sufficiently related to those contracts as to be arbitrable.[42]

Even a broad arbitration clause has limits, of course. The Tenth Circuit refused to compel arbitration of certain antitrust claims in *Coors Brewing Co. v. Molson Breweries*.[43] In 1985, Coors, an American corporation, entered into a licensing agreement with Molson, a Canadian corporation, in which Coors gave Molson access to trademarks and marketing information in return for Molson's best efforts to distribute Coors in Canada.[44] In 1993, Miller entered into a partnership with Molson.[45] Coors challenged the partnership agreement both in arbitration for alleged violations of their contract and in district court for antitrust violations.[46] The Tenth Circuit compelled arbitration on claims arising out of the licensing agreement but not on Coors's antitrust claims under Section 7 of the Clayton Act because those claims did not relate to the licensing agreement.[47]

4. Class arbitration

Class actions are widely used by purchasers seeking damages under antitrust law. An important question, therefore, is whether the class action mechanism is available where parties have agreed to subject their dispute to arbitration. The Supreme Court faced the issue in a nonantitrust case in the 2002-03 term in *Green Tree Financial Corp.*

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38. *Id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp. 460 U.S. 1, 24-25 (1983)).
39. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 622 n.9, 624 n.13 (1985).
40. *JLM Indus.*, 387 F.3d at 172.
41. *Id.* at 175.
42. *Id.*
43. 51 F.3d 1511 (10th Cir. 1995); *see also* AlliedSignal, Inc. v. B.F. Goodrich Co., 183 F.3d 568, 573 (7th Cir. 1999) (holding that because B.F. Goodrich could fully comply with their agreement with AlliedSignal and still cause AlliedSignal antitrust injury by charging uncompetitive prices, AlliedSignal's claims did not arise under the agreement and were not subject to arbitration).
44. 51 F.3d at 1512-13.
45. *Id.* at 1513.
46. *Id.*
47. *Id.* at 1517-18.

v. Bazzle.[48] *Bazzle* held that the arbitrator, not the courts, should determine whether the arbitration agreement allowed for class arbitration.[49]

Prior to *Bazzle*, nearly every circuit to consider the issue under the FAA had held that class arbitration was not available unless the parties expressly agreed to it. The reasoning leading to this result is well illustrated by the Seventh Circuit decision in *Champ v. Siegel Trading Co*.[50] The plaintiffs moved for class certification in an arbitration action against the defendants, claiming violations of the Commodity Exchange Act, the Racketeer Influenced and Corrupt Organizations Act, and various state laws.[51] The court held that the district court could not invoke Federal Rule of Civil Procedure 81(a)(3) to certify a class for arbitration under Federal Rule of Civil Procedure 23.[52] The court in *Champ* did not want to substitute its "own notion of fairness in place of the explicit terms of [the parties'] agreement," as that "would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate."[53] The court held, therefore, that it should enforce "the type of arbitration to which these parties agreed, which does not include arbitration on a class basis."[54]

The First Circuit and several state courts had reached a contrary conclusion under state arbitration laws. In *New England Energy, Inc. v. Keystone Shipping Co.*, the First Circuit held that the FAA does not preempt state law and thus "state law may supplement that Act on matters collateral to the agreement to arbitrate."[55] There was also an applicable state law to use as a supplement: Massachusetts had enacted the

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48. 539 U.S. 444 (2003).

49. *Id*. at 453.

50. 55 F.3d 269 (7th Cir. 1995); *see also* Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 728-29 (8th Cir. 2001) (holding that district court properly compelled individual arbitration where clause made "no provision for an arbitration clause as a class"); Johnson v. W. Suburban Bank, 225 F.3d 366, 377 n.4 (3d Cir. 2000) (pursuing a class action in an arbitral forum "appears impossible . . . unless the arbitration agreement contemplates such a procedure"); Government of U.K. v. Boeing Co., 998 F.2d 68, 74 (2d Cir. 1993) ("district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation"); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991) ("a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"); Baesler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990) ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) ("the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration"); Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987) (holding that a federal court's role is to "determine only whether the contract provides for consolidated arbitration"); Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F.2d 635, 636 (9th Cir. 1984) ("It is clear that the parties here did not consent to joint arbitration. There are two separate agreements. Each agreement contains its own arbitration clause and each clause requires only arbitration between the parties to the arbitration.").

51. 55 F.3d at 271.

52. *Id.* at 276-77.

53. *Id.* at 275 (quoting Universal Reinsurance Corp. v. Allstate Ins. Co., 16 F.3d 125, 130 (7th Cir. 1994)).

54. *Id.* at 277.

55. 855 F.2d 1, 4 n.2 (1st Cir. 1988).

Uniform Arbitration Act, which expressly authorizes consolidation, even where contracts are silent on the matter.[56]

Some state courts likewise ordered class arbitration when the agreement was silent. In *Keating v. Superior Court of Alameda County*, the California Supreme Court remanded a case to the trial court for a determination of whether to order class arbitration.[57] The Court spoke favorably of class action, noting that it "eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."[58] While the determination should be made on a case-by-case basis balancing various factors regarding efficiency and equity,[59] ordering class arbitration when there is an "adhesion" contract "would call for considerably less intrusion upon the contractual aspects of the relationship."[60] A California appellate court affirmed a class arbitration order in *Blue Cross of California v. Superior Court of Los Angeles County*.[61] Going further than the *Keating* Court, the *Blue Cross* Court relied on language from the U.S. Supreme Court that refused to apply FAA Section 4 to proceedings in state courts and a state supreme court holding that Section 4 did not operate in California courts.[62] Although the FAA would preempt a state procedural rule if the two were in direct conflict, state procedure that supports the goals of the FAA are not preempted.[63]

In *Bazzle*, the Supreme Court did not overrule, invalidate, or even mention any of the earlier federal appellate decisions holding that a consolidated or class arbitration cannot be imposed on the parties where the arbitration agreement does not affirmatively authorize it. *Bazzle* involved a contract between a commercial lender, Green Tree Financial Corporation, and its customers, which included a broad arbitration agreement.[64] The South Carolina Supreme Court had held that the contracts were silent in regards to class arbitration and as a matter of state law accordingly authorized it.[65] The South Carolina Supreme Court also cited *Keating* and *Blue Cross* to support its holding.[66]

Justice Stephen Breyer wrote the plurality opinion in which Justices Antonin Scalia, David Souter, and Ruth Bader Ginsburg joined. Relying on *Howsam v. Dean Witter Reynolds, Inc.*, the Court simply held that when a contract provides for arbitration of "any and all disputes," the question of whether that contract allows class arbitration is itself an arbitrable dispute.[67] In his dissent, Chief Justice William Rehnquist argued that

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56. MASS. GEN. LAWS ANN. ch. 251, § 2A.
57. 645 P.2d 1192, 1210 (Cal. 1982).
58. *Id.* at 1206.
59. *Id.* at 1210.
60. *Id.* at 1209.
61. 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 2d Dist. 1998)
62. *Id.* at 790-91 (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ, 489 U.S. 468, 476-77 (1989); Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061 (Cal. 1996)).
63. *Id.* at 791-92.
64. 539 U.S. 444, 447 (2003).
65. Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 359-60 (S.C. 2002), *vacated by* 539 U.S. 444 (2003).
66. *Id.* at 360-61 (citing Blue Cross of Cal., 78 Cal. Rptr. 2d at 779; Keating v. Superior Court of Alameda County, 645 P.2d 1192, 1210 (Cal. 1982)).
67. *Bazzle*, 539 U.S. at 452-53 (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)).

a court could determine whether an agreement permits class arbitration where it was plain from the face of the contract that it did not permit class arbitration, as he argued was the case in *Bazzle*.[68]

In response to *Bazzle*, the American Arbitration Association (AAA) has promulgated its Rules for Class Arbitrations to govern proceedings brought as class arbitrations.[69] The AAA rules require that in order for there to be a class arbitration, each class member must have "entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members."[70] Assuming this threshold requirement is met, the rules provide that the arbitrator must first make a clause construction award determining whether or not the arbitration agreement permits class arbitration. The rules specifically admonish arbitrators not to consider the existence of the AAA rules as "a factor either in favor of or against permitting the arbitration to proceed on a class basis."[71] Upon making the award, the arbitrator is compelled to stay proceedings for at least 30 days to permit any party to ask for judicial review. Proceedings can resume only once the court has rendered a decision, the time expires, or all parties inform the arbitrator that they do not intend to seek judicial review.[72] If the arbitration agreement permits class arbitration, the rules require the arbitrator to determine whether a class should be certified, applying similar prerequisites required by Federal Rule of Civil Procedure 23.[73] The rules require the arbitrator to give a rationale for his decision, set out in the class certification award, which is immediately subject to judicial appeal.[74] If a class is certified, the rules set forth procedures for notice to class members and opportunity to opt out, again modeled after Rule 23.[75] Under the AAA procedures, the usual presumption of privacy and confidentiality does not apply in class arbitrations.[76] The AAA maintains a Web site that includes many of the relevant documents and information about each pending class arbitration.[77]

The AAA rules allow for interlocutory appeals of both the clause construction award and the class certification award.[78] Section 9 of the FAA requires a court to confirm an arbitrator's award unless vacated, modified, or corrected per Sections 10 and/or 11. Section 10 allows a court to vacate an award that was acquired by fraud, corruption, misconduct, or partiality on the part of the arbitrator, or where the arbitrator exceeded his powers. Section 11 allows a court to correct an award where there was a mistake in

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68. *Id.* at 458-60.
69. American Arbitration Association, American Arbitration Association Policy on Class Arbitrations (July 14, 2005), http://www.adr.org/ClassArbitrationPolicy.
70. *Id*.
71. American Arbitration Association, Supplementary Rules for Class Arbitrations, Rule 3 (¶ 2) (Oct. 8, 2003), http://www.adr.org/sp.asp?id=21936.
72. *Id.* Rule 3 (¶1).
73. *Id.* Rule 4(a).
74. *Id.* Rule 5.
75. *Id.* Rules 5(c) & 8(d).
76. *Id.* Rule 9(a).
77. *Id.* Rule 9(b); *see also* AAA Class Arbitration Docket, *available at* http://www.adr.org/sp.asp?id=25562.
78. *Id.* Rules 3 (¶1) & 5(d).

damage calculation, the arbitrator ruled on an issue not submitted for arbitration, or the award was imperfect in form but not affecting the substance of the award. Under these sections of the FAA, it would appear that any judicial review of a class award would be quite limited, as is judicial review of any arbitration award.

Since the AAA rules were adopted, AAA panels have consistently found class arbitration permissible in otherwise silent arbitration agreements, despite the pre-*Bazzle* case law that overwhelmingly barred consolidation in those circumstances. These AAA panel decisions have mostly involved small consumer and employment claims. To a large degree, the arbitrators in these panels have gone beyond the plain language of the agreements at issue and relied on an unstated policy of protecting small claims that would not be prosecuted absent class proceedings.[79] In effect, the arbitrators seem to be following the trend in state courts finding it unconscionable to disallow class proceedings where the claimants could not and would not prosecute their claims individually. Other recent AAA decisions permitting class arbitration also rely on state law.[80] A significant subset of these decisions were brought under the Fair Labor Standards Act. That act contains an independent federal right to collective action.[81] To date, none of these clause construction awards have been reviewed in a reported judicial decision.

Courts have vacated three of these AAA panel decisions. In one case, the court vacated the panel's clause construction award because the panel erroneously relied on the AAA rules as evidence that the parties intended to authorize class arbitration.[82] In a second case, the court found that the panel had disregarded substantial extrinsic evidence that the parties did not intend to authorize class arbitration.[83] And in a third case, the court held that the arbitrator had exceeded his authority in ruling that the parties' agreement to bar class arbitration was unconscionable.[84] In addition, in perhaps the broadest reaching decision, Judge Jed Rakoff of the Southern District of New York ruled in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*[85] that class arbitration is not available under the arbitration clause used in most standard charter party agreements. The clause in question was silent on the subject of class arbitration. The court, therefore, relied on testimony showing that class arbitration would be contrary to the custom and usage in the maritime trade since there had never been a class arbitration in the nearly four decades that arbitration clause had been in use.

In the wake of *Bazzle*, and in light of these AAA panel rulings, many entities are now expressly prohibiting class arbitration in their agreements. Courts have split on whether

79. *See* Erin Cole & Nick Kaufman v. Long John Silver's Restaurant, http://www.adr.org/si.asp?id=1659.
80. *See, e.g.*, DirecTV Inc. v. Cable Connection Inc., http://www.adr.org/si.asp?id=3643 (applying California law).
81. *See* Stacey Smith v. TeleTech Holdings, Inc., http://www.adr.org/si.asp?id=3656.
82. Goldstein v. Ibase Consulting, Civ. No. 03-100, Oral Argument re Pending Motions (D. Conn. Aug. 2, 2004).
83. DirecTV Inc. v. Cable Connection Inc., No. BS095987, Ruling on Petition to Vacate Arbitration Award (Cal. Super. Ct. Nov. 1, 2005), *available at* http://www.adr.org/si.asp?=3820.
84. Sports & Fitness Clubs of Am. v. Allen, No. BS093362, Notice of Ruling on Petition to Vacate Award (Cal. Super. Ct. June 1, 2005).
85. 435 F. Supp. 389 (S.D.N.Y. 2006).

they will enforce such arbitration agreements. A recent decision of the California Supreme Court refused to enforce an agreement that prohibits class arbitration.[86] The court held that class arbitrations on behalf of consumers are permitted under California law even where expressly prohibited by an arbitration agreement. The court found language prohibiting class actions in adhesion contracts used by large companies was unconscionable as against small consumers. The Ninth Circuit took this approach and invalidated a clause prohibiting class action proceedings in its arbitral forum in *Ingle v. Circuit City Store*.[87]

Courts in the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits have come to the opposite conclusion and enforced agreements prohibiting class arbitration.[88] In *Iberia Credit Bureau v. Cingular Wireless, LLC*,[89] the Fifth Circuit refused to hold an express bar on class arbitration as unconscionable. The *Iberia* court noted that the Supreme Court has explained "the fact that certain litigation devices may not be available in arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition."[90] The *Iberia* court noted Ninth Circuit precedent, but it explained that the differences in state law, particularly that the Louisiana Unfair Trade Practices Act did not permit individuals to bring class actions, distinguished the cases.[91]

5. Discovery in arbitration

American antitrust practitioners are accustomed to expansive judicial discovery with wide-ranging and extensive document production from both parties and nonparties. Discovery in arbitration is much more limited. The AAA rules grant arbitrators the authority to direct discovery but admonishes them that the rules do not "contemplate full-blown, litigation like discovery."[92] The parties to an arbitration agreement, nevertheless, have a great deal of latitude to provide for whatever rules to which they agree. The Supreme Court has cautioned courts: "parties are generally free to structure their arbitration agreements as they see fit."[93]

Often, the greatest challenge is obtaining evidence from parties not bound by the arbitration agreement. The FAA does not have an exact equivalent to Federal Rule of Civil Procedure 45, which allows a nonparty to be deposed or compelled to produce documents. The corresponding provision for arbitration is Section 7 of the FAA, which

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86. *See* Discover Bank v. Superior Court of L.A. *ex rel.* Boehr (Boehr), 2005 Cal. LEXIS 6866, at *14 ("An adhesion contract is not a normal arbitration setting, however, and what is at stake is not some abstract institutional interest but the interests of the affected parties."); *see also id*. at *26 ("class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights").

87. 328 F.3d 1165, 1175-76 (9th Cir. 2003); *see also* Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003).

88. Elizabeth M. Avery, *Class Actions and the Future of Arbitrating Antitrust Disputes*, ANTITRUST, Fall 2004, at 24, 27.

89. 379 F.3d 159 (5th Cir. 2004).

90. *Id.* at 173 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (internal quotation remarks omitted)).

91. *Id.* at 174.

92. American Arbitration Association, A Guide for Commercial Arbitrators, http://www.adr.org/si.asp?id=2516.

93. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ, 489 U.S. 468, 479 (1989).

provides that third parties may be compelled by district courts to attend an arbitration hearing and bring "any book, record, document, or paper which may be deemed material as evidence in the case."[94] Enforcement powers are granted to the arbitrator, who may invoke the district court to punish recalcitrance "in the same manner provided by law for . . . neglect or refusal to attend in the courts of the United States."[95]

Circuit courts are split on whether Section 7 of the FAA confers upon arbitrators the power to order third-party production of evidence before the panel. The Eight Circuit held that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[96] However, the Third Circuit disagreed in *Hay Group v. E.B.S. Acquisition Corp.*[97] Otherwise, there would be "more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration."[98]

6. Conclusion

Arbitration is likely to continue to increase in importance as a forum for resolving antitrust disputes. The question is no longer whether arbitration agreements are enforceable as to antitrust claims but instead the practicalities on how to arbitrate an antitrust claim effectively. This chapter has identified some of the key issues, many of which have yet to be resolved.

94. 9 U.S.C. § 7.

95. *Id.*

96. *In re* Sec. Life Ins. Co. of Am., 228 F.3d 865, 870-71 (8th Cir. 2000).

97. 360 F.3d 404 (3d Cir. 2004).

98. *Id.* at 409 (citing COMSAT Corp. v. NSF, 190 F.3d 269, 276 (4th Cir. 1999) ("The rational for constraining an arbitrator's subpoena power is clear. Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their dispute. A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process.")).