# Antitrust Arbitration Counseling

BY CHARLES E. BUFFON AND JOSHUA D. WOLSON

AT THE OUTSET OF A CONTRACTUAL relationship, the parties naturally hope that the relationship will go smoothly and will prove to be mutually beneficial. Unfortunately, disputes may arise, and it usually is better to anticipate likely problems than to improvise after the fact. In doing so, many attorneys incorporate a mechanism, either mandatory or optional, to resolve disputes.

Arbitration provisions are one common means of addressing potential disputes in either business or consumer agreements. Agreements to arbitrate are broadly enforced under the Federal Arbitration Act,[1] both as to statutory claims, such as antitrust claims, and common law claims. Merely because an arbitration clause may be enforceable does not, however, assure that it is the right choice in a particular setting. Mediation, cooling-off periods, contract termination, and even litigation are other mechanisms for dealing with future problems that may better serve a client's needs.

Because arbitration clauses typically encompass all types of claims arising from a particular contract and may be invoked by any party to the underlying agreement, it is necessary to consider all the potential claims that might be affected before deciding whether it is in the client's interest to include an arbitration clause that covers antitrust claims. Where possible, it may be useful to designate specifically which claims are to be covered by the arbitration clause and which, if any, are to be exempted.

The circumstances in which antitrust claims might arise vary widely; no one approach is the "right" one for every client. There are, however, common issues that should be considered when determining whether to seek arbitration of antitrust claims and, if so, how to draft contract language that will address recent court decisions and accomplish that objective, including:

- The parties to the agreement.
- The nature of the parties' relationship.
- Whether the contract involves an international party.
- The type of agreement in which the arbitration provision appears (e.g., business-to-business, consumer, etc.).
- Procedural differences between arbitration and litigation.
- The subject matter and temporal scope of claims to be arbitrated.
- The arbitration forum and choice of law.

*Charles E. Buffon is a Partner and Joshua D. Wolson an Associate of Covington & Burling. Both are counsel to a defendant in* In re Currency Conversion Fee Antitrust Litigation, *cited in this article.*

## Is Arbitration the Right Choice?

***Consider the Factual Setting.*** In thinking about arbitration, one category of factors to weigh is who the parties are and what their relationship is. In some circumstances, a client may value its relationship with the other party or parties to a contract more than it values the rights likely to give rise to disputes. Arbitration is, by definition, an adversarial process, and, like any adversarial process, it requires parties to take opposing positions and frequently results in parties criticizing each other in ways that are not easy to forgive or forget. While such conflicts are often necessary in adversarial proceedings, they also have the potential to poison the relationship between the parties. Mediation, in contrast, may provide a less adversarial way of resolving a dispute while maintaining the ongoing relationship between the parties, but it usually is not binding and thus may not achieve a final resolution of a dispute.

In addition, contracts that involve international parties present different considerations than do agreements involving only domestic parties. Since the Supreme Court's decision in *Mitsubishi Motors*,[2] there is no doubt that agreements to arbitrate international antitrust disputes are enforceable. That does not, however, answer the question of whether arbitrating such a dispute is desirable.

One of the advantages that arbitration may offer foreign parties is discovery that is more circumscribed than that typically available in U.S. litigation. For a foreign party that is troubled by the breadth and intrusiveness of American discovery, this may be a strong argument in favor of arbitration. On the other hand, discovery in arbitration may be more intrusive and expensive than might be available in a foreign court, and arbitration proceedings themselves may involve substantial discovery unless the parties' selection of an arbitral forum and procedural rules to govern arbitration effectively close that door.

In addition, foreign parties to a contract may be worried about facing a potential "home field advantage" if they are forced to litigate in a foreign court before a foreign jury. Arbitration may offer a way to alleviate such a concern. Of course, if a client is the domestic party to an international transaction, it may prefer to preserve that home field advan-

tage and avoid arbitration. Whichever side the client is on, choosing to arbitrate an international dispute, particularly before an international forum, creates the possibility of decision makers who, if not carefully selected, could be unfamiliar with the applicable law and could owe no allegiance to any state's policies and norms. A party that is wary of these risks and believes it is likely to have the stronger argument might want to forgo arbitration in favor of a judge who is more grounded in the principles of U.S. antitrust law and is subject to reversal if he or she ignores federal policy.

As do agreements with international parties, contracts involving consumers or customers present different concerns than do domestic business-to-business contracts. A client that deals with a large number of customers or consumers (e.g., banks, credit card companies, airlines, and parcel companies) may be wary of the possibility of a large national class action against it or of defending consumer claims before a jury. If drafted properly, an agreement to arbitrate could offer an opportunity to avoid a jury trial and class actions and limit proceedings to individual consumers, thereby reducing the risk of an outsized judgment against the client. In addition, if a client faces a potentially large number of antitrust claims that are likely to go to trial, arbitration may provide a way to streamline the process and reduce litigation costs. In contrast, in an industry that is likely to face antitrust conspiracy claims, an arbitration clause may provide little comfort, because third parties with no contractual relationship with a company may still be able to sue that company under principles of joint and several liability.[3]

In a business-to-business context, jury trials, class actions, seriatim claims, and conspiracy claims may be less of a concern. However, in such a setting, the parties may have a strong incentive to keep the terms of their agreement, as well as the specifics of their dispute, confidential. The filing of a lawsuit, the allegations in the suit, and many of the documents that are subsequently filed are generally a matter of public record, and, with the continued development of electronic filing and litigation search tools, all of a company's competitors and business partners will have ready access to such filings. While parties can take some comfort in the entry of a confidentiality order, such orders are by no means foolproof, nor are courts obligated to enter them. Even if a court does enter such an order, it may provide only minimal benefit if sensitive documents are used as exhibits or are the subject of examination at a public trial.

In contrast, an arbitration proceeding can often be filed and processed confidentially. It is not necessarily a matter of public record, and the filings need only be sent to the governing body, the arbitrators, and the parties. Similarly, the final decision in an arbitration decision does not necessarily have to be published, allowing the parties to preserve the confidential nature of their dealings.

***Consider the Procedural Attributes of Arbitration.*** Arbitration procedures are not the same as those employed in litigation. Depending on the arbitration forum and rules selected, arbitration may offer a quicker and more cost-efficient proceeding relative to litigation, or it might create hurdles to success that a client is unwilling to accept.

In advising a client as to whether arbitration is a desirable method of dispute resolution, it is important to understand the various procedural differences between arbitration and litigation, the procedural choices that are available, and the way in which the procedures selected can impact a client's interests.

The most noticeable difference between arbitration and litigation in antitrust cases is the substitution of an arbitrator for a judge and jury. Arbitration provides the opportunity to avoid a jury trial and all of the special risks and complications that such a trial entails. Arbitration also allows the parties to choose the trier of fact for their dispute. Thus, in complex antitrust cases the parties to an arbitration agreement can choose arbitrators who are not only comfortable addressing technical legal arguments but also familiar with the competitive structure of the industry in question.

Arbitration may also offer the opportunity to reduce a client's potential damages exposure. Although (as explained below) an arbitration agreement cannot limit an arbitrator's ability to award treble damages, it might limit arbitration proceedings to complaining plaintiffs, thereby foreclosing class-wide damages. Some courts have held that the right to have antitrust claims heard in a class action is not absolute and that a party's agreement to give up that right in order to arbitrate its claims is enforceable.[4] If that line of cases is followed, a party to an arbitration agreement can limit its exposure to, at worst, treble the damage caused those individual plaintiffs who choose to initiate arbitration proceedings, rather than open itself to possible liability to passive members of a class encompassed in a class action. Similarly, arbitrators are typically not bound by principles of *stare decisis* or collateral estoppel. Thus, an adverse decision in one arbitration proceeding may not foreclose a client from winning others.

Depending upon the arbitration forum and rules selected, arbitration could provide more limited discovery and an earlier substantive hearing than litigation in court. For example, some arbitration rules do not permit depositions, but, instead, require witnesses to be called to a hearing before the arbitrator. Similarly, arbitration rules can be selected that do not allow document discovery that is as broad as that permitted under federal and state procedural rules, and courts have upheld such limitations so long as the parties are provided a fair opportunity to present their claims.[5] Some arbitration rules also reduce the amount and length of briefing that is permitted. Unlike formal litigation, arbitration proceedings may dispense with motions to dismiss and for summary judgment and move much more rapidly to the arbitration hearing and a final resolution. Given the very limited rights to appeal that arbitration permits, if the arbitration rules selected limit discovery and motions practice, arbitration may significantly reduce the time and cost involved in resolving a dispute.

***Consider Potential Problems with Arbitration.*** Arbitration is not a panacea for all of the pitfalls of the judicial system. It also has its own potential problems and limitations that may make arbitration a less-desirable alternative than litigation. For example, under some rules and under some circumstances, arbitration may take as long, or longer, than litigation in court.

Among the potential problems with arbitration is that it may reduce the possibility of a complete win and, particularly, of winning early. As part of its streamlined process, an arbitration proceeding may not offer an opportunity to move to dismiss or to obtain a preliminary injunction. An arbitration panel could require the parties to proceed with at least some discovery and a hearing before making a dispositive motion. For example, the National Arbitration Forum requires the parties to engage in discovery and to have either a document hearing or a participatory hearing before obtaining a substantive ruling.[6] Thus, in cases involving intellectual property, an agreement to arbitrate may prevent either party from seeking the preliminary injunctive relief that may be necessary to enforce such rights effectively. Arbitrators may also be more likely than a judge or jury to adopt a "split the baby" approach and seek a resolution somewhere between the parties' positions. While this approach may limit risk to both parties, it also decreases the likelihood that a client will achieve a total victory. As a result, in situations in which it is important for a client to achieve an early and decisive victory, such as intellectual property enforcement, arbitration may not offer the best option.

Many clients and even lawyers are also surprised to learn of the very limited scope of appellate review available to them if they opt to arbitrate. The FAA only permits an arbitrator's award to be overturned if procured by corruption or fraud, if there is evidence of partiality or corruption of the arbitrators, where the arbitrators are guilty of misconduct, or where the arbitrators exceeded their authority. *See* 9 U.S.C. § 10. Some courts have also overturned an arbitration award found to be contrary to public policy, if it is arbitrary and capricious, or if it is manifestly contrary to law.[7] Nevertheless, absent extremely limited circumstances, courts are bound to enforce an arbitrator's decision (*see* 9 U.S.C. § 9), thereby making it highly likely that the arbitration award will be final and effectively unappealable

An inability to appeal may be very unattractive in a complicated antitrust case that an arbitrator might decide incorrectly. Arbitrators, like any fact finders, may be moved by the facts of the case to strain to reach what they view as an "equitable" result. Attorneys frequently rely on courts of appeal to examine the legal merits of a case in a more detached manner than will a fact finder—be it a jury, a judge, or an arbitrator. In an antitrust case, for example, a fact finder may be moved by anti-corporate sentiment to find parallel action to be the result of a conspiracy or to grant an excessive damages award, and the defendant would then rely on its right of appeal to provide a more dispassionate review of the liability evidence or to reduce or eliminate the damages award. If a client is likely to face claims that it expects will require the detached legal analysis typically expected from a court of appeals, it may prefer litigation in court to arbitration.

Similarly, the benefits of arbitration may be illusory in situations in which the client is likely to face a large number of individual claims. Although eliminating class actions may seem advantageous, forgoing class action procedure or the streamlined discovery of a multijurisdictional proceeding in favor of arbitration could result in multiple arbitration proceedings pending against the client at the same time and make it impossible to achieve a single settlement applicable to all claimants. Separate proceedings may force a client to absorb the expense and burden of defending each proceed-

### Checklist for Drafting Arbitration Clauses Applicable to Antitrust Disputes

1. Determine whether arbitrating antitrust disputes is the best choice for a client.
2. Make the arbitration provision noticeable—use capital letters or a bold typeface.
3. Specify that arbitration applies to all disputes arising from the parties' "relationship."
4. Specify that the parties agree to arbitrate statutory and common law claims.
5. Give other parties an opportunity to reject and/or opt out of the relationship before becoming bound by an agreement to arbitrate.
6. Make the arbitration provision mutual.
7. Specify whether arbitration is mandatory, whether it is mandatory if elected by one party, or whether the parties must consent to arbitrate at the time a dispute arises.
8. Choose an arbitration forum and, if applicable, the rules of procedure that will apply to the dispute.
9. Include the means by which the parties will select an arbitrator.
10. Specify whether an arbitrator will decide questions about enforceability and scope of the arbitration provision.
11. Specify whether the arbitration provision covers corporate affiliates, successors, and other related parties.
12. Include a confidentiality provision.
13. Specify any (permissible) limitations on remedies.
14. Specify any time limitations for filing a demand for arbitration.
15. If not covered in the applicable rules of procedure, specify any cost-shifting rights and obligations for expenses paid to the arbitration forum, to the arbitrator(s), or for costs and attorneys' fees.

ing separately. In addition, as the number of proceedings increases, so too do the odds of an adverse judgment in at least some of them.

Opting for arbitration in some circumstances may even result in higher litigation costs than would litigating in court. Depending on the forum and rules selected, discovery and motions practice in arbitration may be equivalent to that in federal and state courts, and arbitrators, unlike judges, are paid for their time by the parties. The client may also have to file a motion to enforce its arbitration rights under the Federal Arbitration Act and then return to court to enforce an arbitration judgment.[8] In addition, efforts to arbitrate may lead to challenges to the scope or enforceability of the arbitration provision, including whether it applies to antitrust cases, the arbitrator's application of the law, or the arbitrator's power to impose certain remedies. Opting for arbitration could require the client to fight these battles twice: once before the arbitrator and again in a court challenge. Under such circumstances, arbitration ultimately may increase the costs of prosecuting or defending an antitrust case.

Arbitration also has limitations that may make other forms of dispute resolution more attractive under certain circumstances. For example, arbitration will not prevent the award of treble damages. The Supreme Court has held that treble damages are an important remedial attribute of the antitrust laws, and both the Supreme Court and other courts have relied on the availability of treble damages in arbitration as a reason to permit antitrust claims to be arbitrated.[9] In addition, in an antitrust conspiracy case, an arbitration provision may not allow escape from conspiracy claims asserted by third parties who have no contractual relationship with a company.[10] Such individuals have not agreed to arbitrate their claims against the company, and they likely cannot be compelled to do so. Similarly, an arbitration provision will not prevent a government enforcement action, because the government will not be a party to the agreement.

Finally, to be enforceable, an arbitration provision may have to be mutual—i.e., it may have to permit both parties to opt for arbitration.[11] Thus, in order to ensure that antitrust claims asserted against it are subject to arbitration, a client will in all likelihood have to agree to permit any claims that it might want to assert to be arbitrated, too.

These are only a small number of the myriad factual circumstances and procedural considerations that could impact the advisability of arbitration as a manner of resolving antitrust disputes. The overarching message is that, in all circumstances, an attorney should consider all predictable consequences of opting for arbitration as opposed to other ways of resolving antitrust and any other types of claims that might arise.

## Ensuring that Claims Will Be Heard in Arbitration

***Ensure the Enforceability of the Arbitration Provision.*** Once a client has decided to include an arbitration provision in a contract, what can be done to ensure that any antitrust (and other) claims arising out of the contractual relationship will be referred to arbitration? The FAA places agreements to arbitrate on the same footing as other contracts, making them susceptible to the same defenses as other contracts.[12] Thus, it is necessary that an arbitration provision be drafted in a way that a court will find valid and enforceable.

The most important step in drafting an arbitration provision applicable to antitrust claims is to ensure that the clause is sufficiently broad to encompass antitrust claims, including antitrust conspiracy claims. *Mitsubishi Motors* and its progeny leave little doubt that statutory claims, such as antitrust claims, are arbitrable, so long as the parties agree to arbitrate them. If, however, the parties do not agree to arbitrate statutory claims, or if the arbitration provision can be read to exclude some types of statutory claims, then a court could refuse to refer the claims to arbitration.[13] Thus, any arbitration provision that is intended to apply to antitrust claims must make that intent clear.

In order to make this intent clear, it will generally be useful to specify that the arbitration provision is not limited to disputes about the contract but applies more broadly to all disputes arising from the parties' relationship.[14] Examples of such language include the following:

- "arising from or relating in any way to this Agreement or your Account;"[15]
- "any claim or dispute (whether in contract, tort or otherwise) in any way relating to the Agreements or such similar agreements for prior years involving the same parties or relating to the relationships of such parties;"[16]
- "[a]ny dispute, controversy or claim arising under or in connection with [the agreement]."[17]

Courts have routinely enforced such broad language, including with reference to antitrust claims.

In addition, it is often helpful to specify that the agreement to arbitrate extends to statutory as well as contract and common law claims. Consideration should be given to identifying (without limitation) antitrust claims and other types of potential statutory claims specifically. The agreement to arbitrate should also make clear that it is not limited to disputes solely between the parties to the agreement, but rather applies to any conspiracy or other multiparty claims as well.

Such broad language can, however, have unintended consequences. For example, while the parties may want to arbitrate all commercial disputes arising out of their relationship, they may not want to permit unrelated noncommercial claims to be injected into the proceeding. Very broad language may, for example, prove an "open sesame" to a wide range of possible counterclaims. If this a concern, it may prove more useful to spell out with some precision exactly which type of claims the parties are agreeing to send to arbitration, e.g., antitrust claims, RICO claims, tort claims, etc., and to provide that claims not arising from the parties' commercial relationship will not be included.

Beyond encompassing antitrust disputes, an agreement to arbitrate must also be part of a valid, enforceable contract.

Most significantly, this requires that the contract not be "unconscionable," a broad term encompassing both procedural unconscionability—i.e., the way in which the contract was formed—and substantive unconscionability—i.e., the contents of the contract.[18] In terms of formation, the most common complaint about arbitration provisions encompassing antitrust claims, particularly in a consumer context, is that they are contracts of adhesion. Although courts have generally rejected the idea that an arbitration agreement is unenforceable merely because it is boilerplate language or included in a form contract,[19] use of a form contract may lead to a challenge to enforceability.[20]

Whether a form contract or not, all parties must receive notice of the arbitration provision and have an opportunity to reject it. It is, therefore, important that an agreement to arbitrate not be placed in fine print or otherwise presented in a way that would make it appear to be buried.[21] The arbitration provision should instead be set off in some way to attract the reader's eye, whether it be a larger typeface, all capital letters, or some other manner.[22] Consumers must also be given an opportunity to reject the agreement, either by walking away from the transaction, returning the product, or in some other way.[23] Giving consumers a meaningful choice makes it more likely that a decision to go forward will be found knowing and voluntary.[24]

An arbitration agreement also must be substantively fair. For example, some courts have held that such an agreement must impose a mutual obligation to arbitrate disputes—it cannot give one party the option to arbitrate while imposing a mandatory duty on the other.[25] In addition, the arbitration agreement cannot unfairly impose costs on a party that cannot afford them and thereby deter the party from ever bringing a claim.[26] The agreement also cannot require either party to give up rights that are provided to it by an antitrust statute, including the right to treble damages.

Courts have generally held that arbitration clauses need not contain an explicit waiver of an party's Seventh Amendment right to a jury trial in order to satisfy the notice requirement.[27] Nonetheless, because litigants continue to challenge arbitration agreements on this basis, including a specific reference to the fact that the parties are relinquishing their right to a jury trial and that they are aware of the fact that they are doing so may help foreclose such a challenge.

***Consider Other Factors in Drafting Arbitration Provisions.*** Once an attorney has covered all the bases to ensure that the arbitration agreement is enforceable, there are a number of other technical factors to consider. One issue is the forum in which the arbitration will be heard, its location, the number of arbitrators, how they are to be selected, and the rules of procedure that will govern. There are a number of fora that courts have found acceptable in determining whether to enforce these agreements, including the National Arbitration Forum,[28] JAMS,[29] the American Arbitration Association,[30] and the International Chamber of Commerce.[31] Each has its own fee structure, rules, and code of procedure, and an attorney should review each before making a selection.

Another consideration is who will decide any disputes about the enforceability of an arbitration agreement—a court or an arbitrator. Last year, the Supreme Court ruled that agreements to have an arbitrator determine the scope and enforceability of an agreement to arbitrate are enforceable.[32] Nevertheless, in order to ensure effectiveness, the agreement should make clear that all disputes about the enforceability of the contract are reserved to the arbitrator.[33] In addition, to permit the arbitrator to decide certain issues—such as whether the parties have a valid arbitration agreement at all or whether a binding arbitration clause applies to a certain type of controversy—the language of the arbitration agreement must contain clear and unmistakable evidence of the parties' intent that such disputes be referred to the arbitrator.[34] Agreements to refer "all disputes arising from or relating to" a contract to arbitration have been held to provide clear and unmistakable authority to the arbitrator to decide such threshold issues.[35]

An arbitration provision can also define the time period to which it applies, including applying retroactively.[36] Courts have, for example, enforced agreements requiring arbitration of "all claims now in existence or that may arise in the future," construing such provisions to apply to claims that accrued even before the contract.[37] Such language can prove particularly useful in compelling arbitration of conspiracy claims, when the plaintiff may argue that the conspiracy predates the arbitration agreement, even if the plaintiff was unaware of it and did not bring suit until after the arbitration agreement was agreed to.

In addition, it may be possible to shorten the statute of limitations for some claims in connection with an arbitration provision. Parties generally have the power to shorten a statute of limitations by contract, so long as the agreement is reasonable under the circumstances.[38] Thus, an arbitration agreement that requires the parties to file their claim within one year after becoming aware of a claim has been held enforceable, even when the statue of limitations period would otherwise be longer.[39]

An arbitration provision can also often be extended to include corporate affiliates of the party agreeing to the contract. Although such entities should be able to rely on an affiliate's arbitration provision on an estoppel theory,[40] if a company's parent, subsidiary, or corporate sibling may reasonably be expected to be included in an antitrust suit as a result of the company's relationship with a client, the company may want to include language specifying whether the right and/or obligation to arbitrate applies to corporate affiliates, successors, assigns, officers, employees, etc., and, if so, which ones.

The choice of particular state law to govern the agreement as a whole might affect whether and how the agreement's arbitration provision will be enforced. While federal law will provide the rule of decision for the substantive federal antitrust claims, the agreement to arbitrate such claims is a

matter of contract and, as such, will be governed by state law.[41] Some states have proven more reluctant to enforce arbitration provisions than others, and it is important to take that into account in determining what state's law will apply to the contract.

In addition to choosing the applicable law, it is usually useful to include language specifying the manner by which the parties will choose the arbitrators. This process can often be lengthy, and it may prove desirable to have an agreed-upon process rather than accepting a randomly assigned arbitrator or haggling over the process after the underlying contractual relationship has soured.

Finally, the parties to an agreement may wish to include an agreement to maintain the confidentiality of the proceedings and the decision.[42] While it is unclear what effect this will have if either party files a court challenge to the arbitration decision or an action to enforce the decision, the agreement provides an opportunity to prevent pleadings and other confidential information revealed in arbitration from becoming a part of the public record. ■

[1] 9 U.S.C. § 1 et seq. (FAA).

[2] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). *See also* JLM Indus., Inc. v. Stolt-Nielsen SA, 2004 WL 2382231, at *13 (2d Cir. Oct. 26, 2004).

[3] *See In re* Currency Conversion Fee Antitrust Litig., No. MDL 1409, 2004 WL 2327938, at *14 (S.D.N.Y. Oct. 15, 2004) (*Currency Conversion II*). *But see JLM Indus.*, 2004 WL 2382231, at *11 n.7.

[4] *See, e.g.*, *In re* Universal Serv. Fund Tel. Billing Practices Litig., 300 F. Supp. 2d 1107, 1137 (D. Kan. 2003) (nothing in text or legislative history of Sherman Act or Clayton Act indicates non-waivable right to class action); *cf.* Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002) (holding claims under Fair Labor Standards Act arbitrable even if plaintiff cannot bring class action arbitration). To the contrary, *see, e.g.*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172–73, 1175–76 (9th Cir. 2003); Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2002).

[5] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991).

[6] *See* National Arbitration Forum Code of Procedure, Rule 5 (July 1, 2003). The availability of such motions will depend on the applicable rules of the chosen forum.

[7] *See, e.g.*, Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 778–79 & nn. 2–3 (11th Cir. 1993).

[8] Section 4 of the FAA, 9 U.S.C. § 4, provides for motions to compel arbitration, and Sections 10 and 11 of the FAA, 9 U.S.C. §§ 10–11, provide for challenges to an arbitrator's decision.

[9] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977) (treble damages are remedial); Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982) (same); *Mitsubishi Motors*, 473 U.S. at 637 (agreements to arbitrate antitrust disputes are enforceable as long as statute continues to serve its remedial purpose).

[10] *See, e.g.*, *Currency Conversion II*, 2004 WL 2329738, at *14.

[11] *See, e.g.*, Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 168–70 (5th Cir. 2004); Flores v. Transamerica HomeFirst, Inc., 113 Cal. Rptr. 2d 376, 382 (Cal. Ct. App. 2001).

[12] *See* 9 U.S.C. § 2; Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 275 (1995).

[13] *See, e.g.*, Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1057 (11th Cir. 1998).

[14] *Compare* Hunt v. Up N. Plastics, Inc., 980 F. Supp. 1046, 1048 (D. Minn. 1997) (arbitration provision applicable to disagreements arising out of sale or use of products at issue applied to antitrust claims), *with* Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1515 (10th Cir. 1995) (antitrust claim unrelated to contract was not subject to arbitration because scope of arbitration clause was limited to disputes arising out of contract).

[15] *In re* Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 404–05 (S.D.N.Y. 2003).

[16] Carbajal v. H&R Block Tax Servs., Inc., 372 F.3d 903, 904 (7th Cir. 2004).

[17] Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 76 (2d Cir. 1998).

[18] *See, e.g.*, Cooper v. MRM Inv. Co., 367 F.3d 493, 503–04 (6th Cir. 2004) (describing procedural and substantive unconscionability); Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2002) (same). The precise contours of what constitutes an unconscionable agreement will be defined by state law.

[19] *See, e.g., Iberia Credit Bureau*, 379 F.3d at 170–71; *Carbajal*, 372 F.3d at 906.

[20] *See, e.g., Ting*, 319 F.3d at 1148–49 (standardized contracts are procedurally unconscionable under California law).

[21] *See, e.g., Iberia Credit*, 379 F.3d at 170–71.

[22] *See, e.g., Currency Conversion*, 265 F. Supp. 2d at 411 n.7.

[23] *See, e.g.,* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171–72 (9th Cir. 2003).

[24] Different courts, nevertheless, have somewhat different views of how much freedom a customer must have to make a meaningful choice. *Compare Carbajal*, 372 F.3d at 906, and *Currency Conversion*, 265 F. Supp. 2d at 411 n.7, *with Ingle*, 328 F.3d at 1171–72.

[25] *See supra* note 9.

[26] *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000); *accord* Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 56 (1st Cir. 2002).

[27] *See, e.g., Cooper*, 367 F.3d at 506.

[28] *See Green Tree*, 531 U.S. at 95 & n.2 (Ginsburg, J., concurring in part and dissenting in part).

[29] *See Currency Conversion*, 265 F. Supp. 2d at 412–13.

[30] *See Green Tree*, 531 U.S. at 95 & n.2 (Ginsburg, J., concurring in part and dissenting in part).

[31] *See* Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 443, 450 (3d Cir. 2003) (enforcing agreement to arbitrate under rules of International Chamber of Commerce).

[32] *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451–52 (2003).

[33] *See id.*; *see also Carbajal*, 372 F.3d at 905.

[34] *Bazzle*, 539 U.S. at 451–52.

[35] *Id.*

[36] *See Currency Conversion*, 265 F. Supp. 2d at 406–07.

[37] *Id.*

[38] *See* Morrison v. Circuit City Stores, Inc., 70 F. Supp. 2d 815, 826–27 (S.D. Ohio 1999); Letourneau v. FedEx Ground Package Sys., Inc., Civ. No. 03-530-B, 2004 WL 758231, at *1 (D.N.H. Apr. 7, 2004); *but see* Graham Oil Co. v. ARCO Prods. Co., 43 F.3d 1244, 1247 (9th Cir. 1994) (arbitration clause cannot force party with lesser economic power to relinquish important statutory right, including right ensured by statute of limitations).

[39] *See Morrison*, 70 F. Supp. 2d at 826–27.

[40] *See Currency Conversion*, 265 F. Supp. 2d at 402–03. Some courts have also permitted other third-party beneficiaries of an agreement containing an arbitration provision to rely on that provision. *See, e.g., Universal Service Fund*, 300 F. Supp. 2d at 1140.

[41] *See* Volt Information Scis., Inc. v. Bd. of Trustees of Leland Stanford Univ., 489 U.S. 468, 475 (1989) (general state law principles of contract interpretation apply to interpretation of arbitration agreements).

[42] *See* Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175–76. *But see Ting*, 319 F.3d 1126, 1151–52 (9th Cir. 2002) (confidentiality provision rendered arbitration provision substantively unconscionable).