Client Alert | Antitrust/Competition

To Litigate, or to Arbitrate: DOJ Reveals Shiny New Tool in Merger Toolbox

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DOJ Antitrust Division successfully uses private-style arbitration for first time to block a merger, and force a divestiture as a condition to closing.[1] DOJ's novel use of arbitration to resolve liability in a merger case has serious implications for parties going toe-to-toe with the government in future challenges.

DOJ and Parties Send Single-Issue to Arbitrator to Decide Fate of Aluminum Deal

The arbitration arose as a novel way to resolve DOJ's objections to a merger of two aluminum-rolled product suppliers. Novelis, a world leader in aluminum rolling and recycling, announced in July 2018 that it had signed an agreement to acquire another global supplier of aluminum-rolled products, for $2.6 billion.[2] DOJ conducted an investigation, subsequently concluding that the transaction would harm competition in the North American market for aluminum auto body sheet (ABS) products in violation of Section 7 of the Sherman Act.[3]

In this case, unlike in other merger challenges, DOJ negotiated a strategy never used before to resolve its concerns. Rather than committing to litigate the merger, DOJ instead agreed with the parties to refer the matter to binding arbitration, if the parties could not timely resolve the alleged anticompetitive issues.[4] The key issue was a disagreement between DOJ and the parties about how to define the product market.

Product market definition can make or break an enforcement challenge, as it identifies the line of commerce in which the merger's competitive concerns arise. Product market definition determines who the participants are in the market, what the levels of concentration are, and can impact entry and efficiencies analyses. Here, the dispute was whether price competition included suppliers at the procurement or design phase of ABS production. DOJ argued that price competition for aluminum ABS would be harmed at the procurement stage. The parties, on the other hand, argued that product market definition should be defined more broadly to include competition for acquisition of aluminum ABS at both the procurement stage *and* the design stage.

The parties were unable to resolve their dispute within the timeframe they had originally negotiated under the Administrative Dispute Resolution Act. Subsequently, on the same day that DOJ filed a civil antitrust suit, DOJ also filed an "Explanation of Plan to Refer this Matter to Arbitration."

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1 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.

2 *Novelis to Acquire Downstream Aluminum Producer*, (July 26, 2018), *available at* http://investors.novelis.com.

3 Complaint, *US v. Novelis, Inc., et al*, Case No. 1:19-cv-02033 (N.D. Oh. Sept. 4, 2019), *available at* https://www.justice.gov/atr/case-document/file/1199461/download.

4 Plaintiff United States' Explanation of Plan to Refer this Matter to Arbitration, *US v. Novelis, Inc., et al*, Case No. 1:19-cv-02033 (N.D. Oh. Sept. 9, 2019), *available at* https://www.justice.gov/atr/case-document/file/1200821/download.

The Path for a Private Party to Arbitration in a Merger Challenge

The Administrative Dispute Resolution Act of 1996 (5 U.S.C. § 571 et seq.) provides government agencies the authority to use binding arbitration to resolve a matter, as long as the agency has issued specific guidelines on the use of binding arbitration.[5] DOJ issued specific guidelines in 1996, but has never used its arbitration authority until this matter. The FTC also has the authority to refer antitrust disputes to arbitration, but has never done so.

Using the Novelis matter as a guidepost, the first step for private parties to arbitrate with DOJ is that both sides must enter into an arbitration agreement in writing, specifying either (1) the issue in controversy to be resolved, or (2) the range of possible outcomes the arbitrator can award. The Assistant Attorney General for Antitrust must then authorize the agreement, as he/she has the authority to enter into a settlement. The parties and DOJ must then negotiate an arbitration term sheet. One of the key terms in the term sheet is the selection of an arbitrator.

In Novelis, DOJ and the parties agreed in the term sheet that they would "use their best efforts to identify a mutually agreeable single Arbitrator." They agreed up-front on a procedure in case they failed to identify a single arbitrator: the parties would select a panel of three neutral arbitrators.[6]

The parties also stipulated to other terms as well, such as what action to take subsequent to the arbitrator's final decision. The parties stipulated that if DOJ won on product market definition, DOJ would move to file a proposed Final Judgment and the parties would have to divest certain facilities; however, if the parties won on product market definition, DOJ would dismiss its Complaint.

Arbitration as a Useful Tool for DOJ

The arbitrator ultimately chosen by the parties is a member of the antitrust bar and is a former director of the FTC's Bureau of Competition. He sided with DOJ, determining that that the product market should encompass ABS at the procurement phase. As a result, pursuant to the parties' arbitration agreement, Novelis had to divest the target's entire aluminum ABS operations in North America. Also pursuant to the agreement, Novelis had to reimburse DOJ for its fees and costs in connection with the arbitration.

With such a favorable and efficient result, DOJ can be expected to turn to its new tool in future merger challenges. This would seem particularly true where a case can be solved through a "single dispositive issue" like product market definition, but could also be utilized in more complex cases. Assistant Attorney General Makan Delrahim has remarked publicly that "arbitration has the potential to be a powerful dispute resolution tool in the right circumstances" and that he "look[ed] forward to applying the learning from this case to future matters."[7] He has also noted that arbitration may be an efficient way to save taxpayer money.

To Arbitrate or Not to Arbitrate: Pros and Cons for Parties Facing Litigation

From an efficiency standpoint, arbitration can be an attractive way to streamline adjudication of narrow issues. When a merger is headed towards litigation, parties must brace themselves for weeks-long trials, submissions consisting of thousands of pages of exhibits, and a substantial number of fact witnesses, all managed by a federal judge with a busy docket of other cases and often little or no experience with antitrust law. Unlike litigations, arbitrations have relaxed evidentiary rules, and are not constrained by formal procedures or rules of evidence. Agreeing to an arbitration has the potential to substantially lessen litigation costs and lead parties to a more speedy resolution, as well as offer more certainty on timing. Arbitration also offers the benefit of a neutral third party with extensive subject matter experience trying the case.

However, having a specialist arbitrator rule in lieu of a generalist judge (who is independent of the antitrust agencies) poses risk. As in Novelis, the DOJ is likely to push for a former government official to arbitrate.

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5 5 U.S.C. § 575(c).

6 Term Sheet, *In re Arbitration of United States v. Novelis, Inc., et. al,* (Aug. 29, 2019), *available at* https://www.justice.gov/atr/case-document/file/1200806/download.

7 DEP'T OF JUSTICE, *Justice Department Wins Historic Arbitration Merger Dispute*, (Mar. 9, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute.

These individuals, having been in government themselves, are more likely to be sympathetic, perhaps deferential, to the government. Moreover, submitting to binding arbitration does not allow the parties to appeal the decision—their final fate is more or less at the hands of the arbitrator. Arbitration may also unwittingly open the door to disclosure of the parties' confidential information. Finally, as opposed to a litigation, parties may not receive the benefits of a full hearing, where they may have a chance to prevail on a multitude of issues in various stages of the litigation.

Whatever route parties choose to follow when engaging a dispute with DOJ, they should consult with antitrust counsel for the most efficient solution for their unique situation.

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