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DOJ's First Antitrust Arbitration is Unlikely Its Last

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March 13, 2020 – On Monday, March 9, 2020, the Department of Justice, Antitrust Division announced that it had prevailed in its first-ever arbitration of a merger issue, in *United States v. Novelis Inc. et al.*[1] The parties (Novelis Inc. and Aleris Corp.) had announced the merger in July 2018, and received U.S. approval to close the acquisition prior to completing the arbitration, subject to a requirement to divest the overlap facility if the Division prevailed in the arbitral proceeding.[2]

After filing a complaint in the federal district court for the Northern District of Ohio, the Division agreed with the merging parties to submit to confidential, binding arbitration the narrow but dispositive issue of market definition.[3] The Division agreed that if it lost, it would move to dismiss the complaint; Novelis agreed that in the interim, it would continue good faith negotiations with a divestiture purchaser in the event it lost.[4]

In seeking the arbitration, the Division proceeded under the Administrative Dispute Resolution Act of 1996 and its implementing regulations,[5] which permit federal agencies to use arbitration to resolve disputes upon consent of all parties, and which additionally permit a party to agree to submit only certain issues in the controversy to arbitration.[6] The *Novelis* arbitration considered only a single issue, as the Division and the merging parties concurred "their dispute could be reduced to a single dispositive issue: whether aluminum autobody sheet ["(ABS)"] constitutes a relevant product market."[7] The Division had alleged that the merger would combine two of only four suppliers of aluminum ABS in North America.[8] If the product market were instead defined to also encompass steel ABS, the number of competing supplies would be significantly greater and effect on competition commensurately less.

The arbitration result, in favor of the Division, was announced by press release following a confidential, 10-day hearing in the Division's private auditorium, featuring testimony by eleven fact witnesses and three expert witnesses. The sole arbitrator was Kevin Arquit, a former director of the Bureau of Competition at the Federal Trade Commission.[9] By agreement, a five-page arbitral decision is expected on March 13, 2020, but there are no indications yet as to whether the decision will become public in the course of the district court's Tunney Act review of the final settlement.[10]

Whether, and in what circumstances, this Division success leads to additional matters referred to arbitration remains to be seen. Antitrust Assistant Attorney General Makan Delrahim, in announcing that the Novelis/Aleris merger would be the inaugural arbitrated merger, identified three criteria the Department will consider in deciding to arbitrate: (1) extent of efficiency gains through the use of arbitration; (2) existence of a clearly defined issue for referral to the arbitrator; and (3) whether "arbitration [would] result in a lost opportunity to create valuable legal precedent."[11]

As to the second factor, that the parties all concurred that the definition of a relevant product market was the "single dispositive issue," as noted above. As to the first factor, efficiency, the arbitral decision was rendered on March 9, 2020, six months to the day after the Division had filed, in federal court, an explanation of the plan to refer the matter to arbitration.[12] This six-month timeline does not indicate that arbitration is necessarily significantly swifter than the timeline for litigating a preliminary injunction. Fiscally, however, the Division's win also gave it the benefit of an agreed fee-shifting provision that obligates Novelis to reimburse the United States for its attorneys' fees and experts' fees, and the arbitral costs.[13]

The third factor suggested by Delrahim—ability to create valuable legal precedent—may have actually counseled against arbitration, but few merger parties are likely to oppose an arbitration proposal from the Division on such grounds. According to the Division's allegations, the automotive industry has historically relied on steel for automotive bodies, which is still used in the majority of vehicles, but the industry is increasingly adopting aluminum instead, despite its higher cost, as the lighter weight alternative.[14] Moreover, the disruptive entrant Aleris was able to successfully, and recently, enter the North American market by establishing facilities in the U.S. in 2016.[15] A precedential decision on merger analysis and entry in dynamic markets could provide a useful guide—indeed, the Division's implementing regulations for its arbitration authority cite instances where "[d]evelopment of the law is important" as a factor disfavoring arbitration.[16]

Keeping with the spirit of Delrahim's three-factor test, we note that there are at least as many questions outstanding as to the use of arbitrations in mergers. What leverage does the Division have to encourage merging parties to accept arbitration, as all parties must consent? Here, the Division appears to have offered the incentive of being able to close the transaction prior to the issuance of an arbitral decision, a guarantee that the entire acquisition would not be challenged, and an arbitral timeline that might provide more certainty as to when a decision would issue, which could additionally aid negotiations with a divestiture buyer. The arbitrator's clear expertise in competition matters may have been an additional factor favoring the selection of a designated decision-maker over a generalist federal judge. How public will future arbitrations be—will the confidentiality typical of arbitrations prove more alluring to merging parties than a proceeding in a public courthouse, subject to sealing? How will the increased use of arbitration affect the development of antitrust precedent, as arbitral decisions both "may not be used as precedent or otherwise be considered in any factually unrelated decision," and also are not subject to any substantive appeals?[17] And fourth question: will the FTC follow suit in referring mergers to arbitration?[18]

[1] Dep't of Justice, Antitrust Div., "Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation," (Mar. 9, 2020), https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute.

[2] Novelis Inc., Quarterly Report (Form 10-Q) 42 (Feb. 11, 2020) (describing obligation to divest Aleris' Lewisport, Kentucky manufacturing plant if the merging parties lost the arbitration). The acquisition has not yet closed, as Novelis must first obtain approval from the European Commission as to the purchaser of a divested facility in Belgium. See Novelis Inc., "Novelis Receives Arbitration Decision," (Mar. 9, 2020), http://investors.novelis.com/2020-03-09-Novelis-Receives-Arbitration-Decision,

[3] Plaintiff United States' Explanation of Plan to Refer this Matter to Arbitration, United States v. Novelis Inc., No.: 1:19-cv-02033, ECF No. 11 (N.D. Ohio Sept. 9, 2019).

[4] Arbitration Term Sheet, ¶¶ 3, 4 United States v. Novelis Inc., No.: 1:19-cv-02033, ECF No. 11-1 (N.D. Ohio Sept. 9, 2019).

[5] See 5 U.S.C. § 571 et seq.; Dep't of Justice, Office of the Senior Counsel for Alternative Dispute Resolution, "Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution," 61 Fed. Reg. 36895 (July 15, 1996).

[6] See 5 U.S.C. § 575(a)(1). The Assistant Attorney General for Antitrust must additionally approve the submission of the matter to arbitration. Id., § 575(b).

[7] Plaintiff United States' Explanation of Plan to Refer this Matter to Arbitration, at 2, supra note 3.

[8] Complaint, ¶ 2, United States v. Novelis Inc., No.: 1:19-cv-02033, ECF No. 1 (N.D. Ohio Sept. 4, 2019).

[9] Dep't of Justice, Antitrust Div., "Justice Department Concludes Historic Arbitration of a Merger Dispute: Arbitration Will Resolve the Issue of Product Market Definition in the Novelis-Aleris Merger," supra note 1.

[10] See Arbitration Term Sheet, Exhibit A, supra note 4. See also 5 U.S.C. § 580(a)(1) (requiring "a brief, informal discussion of the factual and legal basis for the [arbitral] award," unless the agency's implementing regulations provide otherwise, which the Division's do not).

[11] Makan Delrahim, "'Special, So Special': Specialist Decision-Makers in, and the Efficient Disposition of, Antitrust Cases," (Sept. 9, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-7th-bill-kovacic-antitrust. This three-factor test diverges, in brevity and scope, from the factors cited in the Antitrust Division's implementing regulations. See Fed. Reg. 36895, 36698 (July 15, 1996) (identifying 18 factors that favor arbitration and 6 that disfavor arbitration of antitrust matters). When the Division announced these implementing regulations, it further noted that the majority of merger investigations "w[ould] not be good candidates for ADR" as they "face time constraints that make the use of ADR impossible." Id.

[12] Plaintiff United States' Explanation of Plan to Refer this Matter to Arbitration, supra note 3.

[13] See Arbitration Term Sheet, Exhibit A, supra note 4. Under the one way fee-shifting provision, the Division was not obliged to reimburse costs if Novelis prevailed. See id.

[14] Complaint, ¶ 7, supra note 8.

[15] Id., ¶ 16.

[16] See 61 Fed. Reg. at 36698. However, this same multi-factor test also notes that an "uncertain outcome at the time of trial based on the law [or] the facts" favors arbitration, as does "the likelihood of prevailing on appeal should the United States lose at trial." Id.

[17] 5 U.S.C. § 580(d).

[18]

The FTC has yet to adopt implementing regulations under the Administrative Dispute Resolution Act of 1996. See Fed. Trade Comm'n, "Administrative Interpretations, General Policy Statements, and Enforcement Policy Statements," 59 Fed. Reg. [page unknown], 94-3086 (Feb. 11, 1994) (circulating for comment proposed 16 C.F.R. § 14.18, which provided an alternative dispute resolution policy, but which was never finalized as a regulation).

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