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ANTITRUST TRADE AND PRACTICE

Expert Analysis

DOJ Merger Enforcement Arbitration: A Sign of Things To Come?

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In March 2020, the Antitrust Division of the Department of Justice successfully secured the divestiture by Novelis of Aleris Corporation's North American aluminum production facilities in *U.S. v. Novelis et al.* with an unorthodox enforcement tool: arbitration. The decision marked the first time in history that a U.S. antitrust authority had brought a merger enforcement action using arbitration authorized by the Administrative Dispute Resolution Act of 1996 (5 U.S.C. §571 et seq.). Assistant Attorney General Makan Delrahim subsequently explained that "[i]n the right circumstances, the antitrust agencies can harness the strengths of arbitration and help ensure that the American public benefits from a speedy and sound resolution of Sherman Act and Clayton Act claims." Dept. of Justice, Antitrust Div., "Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation" (March 9, 2020). In addition, the DOJ published updated guidance on the use of arbitration, suggesting that the Division may be looking to employ this novel tool more regularly. In light of these developments, practitioners should understand how arbitration was used in *Novelis* and how the Division is likely to use it in the future.

The Novelis Arbitration

On July 26, 2018, Novelis Inc. agreed to acquire Aleris Corporation for $2.6 billion. See Complaint at 8, *U.S. v. Novelis and Aleris*, No: 1:19-cv-02033-CAB (N.D. Ohio, March 9, 2020) (*U.S. v. Novelis*). Novelis and Aleris were two of four manufacturers of aluminum automobile body sheets (ABS) in the United States, with Novelis alone accounting for approximately 60% of domestic production while Aleris was a new entrant to the U.S. market. Id. at 10. When the DOJ filed a complaint on Sept. 4, 2019 seeking to block the acquisition, the parties already reached an agreement to refer the matter to binding arbitration if certain of the government's competitive concerns were not satisfied within a set time. See Dept. of Justice, Antitrust Div., "Justice Department Wins Historic Arbitration of a Merger Dispute." Fact discovery then proceeded in the district court before an adjudication on the merits was referred to the arbitrator selected by the parties (Kevin Arquit, former FTC General Counsel and Director of the Bureau of Competition). Id.

As agreed by the parties, the sole matter at issue in the arbitration was whether the production and sale of aluminum ABS within the United States constituted a relevant product market. See Arbitration Decision, *U.S. v. Novelis and Aleris*, No: 1:19-cv-02033-CAB (N.D. Ohio, March 9, 2020) (redacted public version). According

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to the arbitrator's decision, aluminum ABS is a lighter weight, rust resistant, costlier alternative to the steel automobile body sheeting traditionally used by car manufacturers. Id. While manufacturers began using aluminum ABS in the 1990s, real growth in demand came after 2011 in response to regulations demanding stricter fuel efficiency. Id. The growth of lightweight aluminum ABS has driven the development of lighter steel alternatives, but demand for aluminum ABS is expected to continue growing in the coming years. Id.

Car manufacturers generally decide and specify what material will be used for various vehicle parts years in advance of production based on a combination of estimated price and performance. Id. Actual prices for components are only determined later at the procurement phase of production when contracts are put out to bid. Id. The DOJ contended that the relevant market was determined at the point of bidding and was therefore limited to aluminum ABS, while defendants alternatively pointed towards competition between materials at the point of design. Id.

In a five-page decision (as limited by the arbitration agreement), the arbitrator found that aluminum ABS was, in fact, the appropriate product market. Ordinary course documents demonstrated that price competition occurred at the procurement stage where substitution to alternatives to ABS was extremely rare, and where competition between Aleris and Novelis was well documented. Id. at 3. While vehicles are designed with prevailing prices in mind, when confronted with higher procurement prices or aluminum ABS shortages manufacturers have absorbed higher prices and gone to extreme measures, including flying in aluminum ABS from abroad, rather than substitute to cheaper steel alternatives. Id. Internal Novelis documents further describe Aleris as the only provider with excess capacity to meet increasing demand for future U.S. contracts, and recognize an independent Aleris would likely undermine Novelis's pricing. Id. In light of this direct competition, and observing the high barriers to entry into the production of specialized aluminum products, the arbitrator found for the government and Novelis was ordered to divest Aleris's U.S. aluminum ABS manufacturing capacity, per the parties arbitration agreement. Id. at 5.

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Arbitration and Specialist Decision-Makers

AAG Delrahim noted that *Novelis* demonstrated that arbitration "has the potential to be a powerful dispute resolution tool in the right circumstances," and that he "[looked] forward to applying the learning from this case to future matters." Dept. of Justice, Antitrust Div., "Justice Department Wins Historic Arbitration of a Merger Dispute." Delrahim described the result as "a victory for automakers and American consumers and taxpayers," noting that arbitration had proven to be an "effective procedure for the streamlined adjudication of a dispositive issue in a merger challenge." Id.

This was not the first time AAG Delrahim lauded the use of arbitration in an antitrust enforcement context. In remarks at the September 2019 George Washington University Law School's 7th Annual Bill Kovacic Antitrust Salon, Delrahim explained how "antitrust legal proceedings could be improved through alternative mechanisms …" by asking "whether antitrust legal outcomes would improve by improving the expertise of our decision-makers and how we could empower decision-makers with the necessary expertise." See Makan Delrahim, 'Special, So Special': Specialist Decision-Makers in, and the Efficient Disposition of, Antitrust Cases (Sept. 9, 2019). While acknowledging the potential cost savings and efficiency gains arbitration might afford, Delrahim focused his remarks on the technical and economic expertise that could be provided by specialized antitrust courts or arbitrators as compared to Article 3 generalist judges. Id. According to the AAG, "[c]omplex economics underlie many cutting-edge antitrust cases. Is the generalist judge or lay jury always the optimal decision-maker for these cases?" Id. When faced

with an abundance of information and contradictory expert analysis, he feared that "judges could be tempted to ignore certain economic evidence as indeterminate or simply decide the case based on the rest of the evidence." Id. Quoting a prominent antitrust litigator, he quipped that when "[y]ou have a PhD from Chicago saying 'tomato' and a PhD from Stanford saying 'tomahto' and both are equally qualified, and what's a judge supposed to do? The economists tend to cancel each other out." Id. Delarahim suggested that use of arbitration with experienced antitrust specialists acting as arbitrators could "bring greater accuracy and efficiency… and help ensure that the American public benefits from a speedy and sound resolution of Sherman Act and Clayton Act claims." Id.

The DOJ's Updated Arbitration Guidance

While *Novelis* and AAG Delrahim's comments no doubt gave notice of the DOJ's interest in arbitrating enforcement actions, regulated industries and practitioners were left with lingering questions on what this actually meant. In 1996, the Division had released initial guidance on the potential use of arbitration in response to the passage of the Administrative Dispute Resolution Act. See Dept. 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). For more than two decades preceding *Novelis*, however, those guidelines had never been applied to merger enforcement, leaving practitioners to wonder whether they were still guiding DOJ's thinking on case selection, arbitration procedure, and more. A partial answer came in November 2020, when the DOJ released Updated Guidance Regarding the Use of Arbitration and Case Selection Criteria. The document provides guidance on "the arbitration agreement, the decision whether to file a complaint in federal district court before the matter is referred to arbitration, selection, compensation and cost shifting, and the training of Antitrust Division staff on the use of arbitration," as well as the Division's lessons from *Novelis*. U.S. Dept. of Justice, Antitrust Division, *Updated Guidance Regarding the Use of Arbitration and Case Selection Criteria*, (Nov. 12, 2020).

> In the future, the Division may look to arbitration to solve particularly thorny or complex technical challenges without resorting to an Article 3 court.

The Guidance begins by noting that alternative dispute resolution techniques like arbitration "have the potential to eliminate unnecessary civil litigation, shorten the time that it takes to resolve civil disputes, and achieve better case resolutions with the expenditure of fewer taxpayer resources." Id. at 1. Division policy will be to "encourage" the use of ADR where it may "shorten the time necessary to resolve a dispute, reduce the taxpayer resources used to resolve a dispute, or otherwise improve the outcome for the United States." Id. This echoes the language of the original 1996 guidelines. See 61 Fed. Reg. 36895 at 36896. However, the 1996 guidelines explicitly stated that "[b]ecause of the time constraints imposed by the H-S-R Act and the exigencies of the merger review process in general, ADR techniques will likely be difficult to apply during the course of merger investigations." Id. Were there any doubt about future merger arbitrations following *Novelis*, the conspicuous absence of similar language from the updated 2020 Guidance is telling. The updated Guidance further echoed Delrahim's comments around expert fact finders, noting that "[a]rbitration also allows the parties to select an arbitrator with relevant expertise, such as in antitrust law or economics, which may allow the parties to streamline their advocacy or eliminate unnecessary expert testimony." See *Updated Guidance* at 1-2.

The Guidance then outlines the selection criteria the division will employ for using arbitration. While acknowledging that arbitration requires the consent of both parties, the Guidance provides several factors weighing in favor of and several factors weighing against the decision to arbitrate. Id. at 2. Arbitration is favored for matters in which an arbitrator would be more

efficient or where the expense of bringing suit is overly burdensome in comparison to the consumer benefit, cases in which the issues are clear and can be agreed upon by the parties, where issues are factually or technically complex and would be benefited by an expert factfinder, where litigating in federal court could result in unacceptable delay, or where parties have a particular need to control the scope of relief. Id. at 2-3. Conversely, the "lost opportunity to create valuable legal precedent" and where "[t]he public's interest in the matter is of such significance that resolution by a federal judge in an open forum is necessary," both mitigate against arbitration. Id. at 3. Several factors weighing in favor of arbitration are repeated from the 1996 Guidelines, including conservation of resources and technical or factual complexity. 61 Fed. Reg. 36895 at 36898. However, the 1996 Guidelines seem to contemplate arbitration being used primarily in settlement discussions, and include factors missing from present guidance including when there are numerous parties, divergence of interest among the aggrieved parties, absent stakeholders, an ongoing relationship between the DOJ and the parties, and a hostile decision maker in the form of an unsympathetic judge. Id.

The Guidance next addresses the Division's approach to the arbitration agreement itself. The Guidance notes that the ADR Act requires all parties to consent and that the agreement must be in writing, must specify a maximum award, may by agreement only submit certain issues to arbitration, and that other conditions limiting the range of possible outcomes may be included as well. See *Updated Guidance* at 3 citing 5 U.S.C. §575(a). The agreements should also address confidentiality of evidence and the proceedings, though "[a]t a minimum, it is the policy and the strong preference of the Division that the arbitrator's decision be made public." Id. at 4. The Guidance explicitly notes that a complaint may be filed in federal court as part of the arbitration process to facilitate court oversight of discovery and any disputes that arise therein—a process utilized in the *Novelis* case—but it does not explicitly mandate the procedure. Id. While the ADA provides that the arbitrator can be "any … individual who is acceptable to the parties," (5 U.S.C. §573(a)) the Guidance suggests the DOJ will have a strong preference towards "an antitrust specialist or former judge, either with economics training or with extensive experience handling complex antitrust cases." See *Updated Guidance* at 4. For a second time in the brief five-page document, the guidance notes that "such an arbitrator could bring an understanding of economic issues and testimony, which should provide for greater accuracy and efficiency, such as the elimination of unnecessary expert testimony." Id. Division attorneys are also instructed to consider the appropriateness of a cost shifting framework wherein private litigants pay the arbitration fees. Id. at 5.

Conclusion

In the 23 years following the passage of the Alternative Dispute Resolution Act of 1996, no U.S. regulator sought to use arbitration in a merger enforcement action despite its technical possibility. The *Novelis* decision and the Updated Guidance suggest that time may be coming to an end. In the future, the Division may look to arbitration to solve particularly thorny or complex technical challenges without resorting to an Article 3 court. While the incoming change of administration may reverse this new course, practitioners should be aware of the procedure and be ready to discuss the pros and cons of arbitration with their clients and the DOJ in future merger reviews.