# Kluwer Arbitration Blog

## U.S. Department of Justice Uses Arbitration to Challenge Merger

Roger Alford (General Editor) (Notre Dame Law School) · Sunday, September 15th, 2019

It is a pleasure to return as General Editor of the Kluwer Arbitration blog after two years serving as Deputy Assistant Attorney General for the Antitrust Division of the Department of Justice (the "DOJ"). For those interested in learning about my experience at the DOJ, a brief summary is available here. My congratulations and thanks to Crina Baltag (Editor) and the associate and assistant editors for their strong stewardship of the blog in my absence.

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Upon my return to the arbitration world, I wanted to share with the international arbitration community an interesting development pertaining to arbitration of antitrust disputes. We normally think of the nexus between arbitration and antitrust in the context of a private arbitration that includes an antitrust claim or counterclaim. Yet earlier this month, for the first time in history, the U.S. Department of Justice's Antitrust Division has agreed to use arbitration to challenge a merger.

According to a recent press release, the DOJ determined that a proposed merger between the Canadian company, Novelis Inc., and the Indian company, Aleris Corporation, (the "Parties") threatened competition because it would combine two of only four North American producers of aluminum body sheet, the material used in cars to make them lighter, more fuel-efficient, safer and more durable. The typical path for the DOJ when it determines that a proposed merger is anticompetitive is to sue in federal court to block the merger.

In the case of *United States v. Novelis*, however, the DOJ took a novel approach of using arbitration to challenge the merger. On September 4, 2019 it filed a complaint in federal court challenging the merger, but then announced on the same day that it would submit to arbitration the issue of product market definition. Assistant Attorney General Makan Delrahim explained that "The arbitration would allow the Antitrust Division to resolve the dispositive issue of market definition in this case efficiently and effectively, saving taxpayer resources. Alternative dispute resolution is an important tool that the Antitrust Division can and will use, in appropriate circumstances, to maximize its enforcement resources to protect American consumers".

The authority for a federal government agency to invoke arbitration comes from a statute that, I would surmise, is unfamiliar to most of us in the arbitration world. It is the Administrative Dispute Resolution Act of 1996, together with the Antitrust Division's implementing regulations. That statute authorizes federal agencies to use arbitration when the parties consent and the balance of

public interest factors favor arbitration. According to the regulations, the DOJ will use arbitration "in those civil cases where time permits and there is a reasonable likelihood that ADR would shorten the time necessary to resolve a dispute or otherwise improve the outcome for the United States".

On September 9, 2019, the DOJ submitted a filing and arbitration agreement with the court that explained the rationale for filing a complaint in federal court and then pursuing the issue of product market definition in arbitration. Essentially, the filing of a complaint permits the DOJ and the Parties to pursue traditional discovery techniques under federal law. Specifically, pursuant to an agreement between the DOJ and the Parties, the DOJ and the Parties filed a proposed case management order so the Parties could obtain all documents obtained by the Division from third parties and to permit the Parties and the Division to issue subpoenas and request documents from third parties upon entry of the stipulation by the court.

According to the filing, following the completion of fact discovery, the DOJ and the Parties have agreed to file a joint motion to stay the litigation and refer the matter to binding arbitration. Pursuant to the agreement, the arbitrator then will determine the product market definition. If the arbitrator determines that the relevant market is broader than aluminum, the Division will exercise its prosecutorial discretion and dismiss the complaint, permitting the merger to close. If, on the other hand, the arbitrator determines that relevant market is aluminum, then the merging Parties agree to divest the portion of the assets that raises competitive concerns to a buyer acceptable to the DOJ. This settlement would be subject to judicial review under the Tunney Act, which requires any proposed consent judgment to be filed in federal court for public notice and comment to determine if the judgment is in the public interest.

In a recent speech, AAG Delrahim raised the question whether a generalist judge or lay jury is always the optimal decision-maker for cutting-edge antitrust cases involving complex economics. Delrahim noted that arbitration allows a neutral third party to decide important or dispositive issues without the expense of a trial. "In particular, an arbitration could be an antitrust specialist or former judge, either with economics training or with extensive experience handling complex antitrust cases…. In the right circumstances, the antitrust agencies can harness the strength of arbitration and help ensure that the American public benefits from a speedy and sound resolution of Sherman Act and Clayton claims…. Both merger and conduct cases may be ripe for arbitration".

Delrahim concluded the speech by noting that the Antitrust Division will explore arbitration in the future if (1) doing so could save significant time and money, (2) if the disputed question is clear and can be agreed upon by the parties, and (3) if arbitration would not result in a lost opportunity to create valuable legal precedent.

This development raises the possibility that the nexus between antitrust and arbitration will expand beyond private party disputes. The *Novelis* case may signal a trend of antitrust authorities like the DOJ's Antitrust Division resorting to arbitration instead of litigation to block a merger, challenge anticompetitive agreements, or thwart unlawful monopolistic behavior.

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