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# DOJ Dusts Off Arbitration Option For Mergers After 20 Years

By **Matthew Perlman**

*Law360 (September 16, 2019, 6:50 PM EDT)* -- The U.S. Department of Justice invoked a power that it's had since the mid-1990s but never used before, when it agreed earlier this month to arbitrate a key issue in its challenge of a $2.6 billion aluminum deal. The process could provide real benefits for merging parties, but it remains to be seen how often the authority will, or should, be used.

Sending a key issue to arbitration rather than subjecting it to litigation in federal court could save merging parties time and cut costs to taxpayers, but it also raises important questions about who should have the final say on a merger and in what forum. It also opens the door to due process concerns, if the DOJ isn't clear about when merging parties will be offered the chance to arbitrate.

**Arbitrated Merger Challenge**

The DOJ filed suit on Sept. 4 to block aluminum giant Novelis Inc.'s planned purchase of Aleris Corp. over concerns about aluminum used by automakers. But in announcing the challenge, the agency said it had agreed with the companies to allow an arbitrator to decide what the relevant market should be, rather than taking that aspect of the case to court.

When the government seeks to block a transaction, it must identify a particular market that would be harmed by the deal's allegedly anti-competitive impact. The definition of the market is often hotly contested by merging companies, both during negotiations with the agency ahead of a challenge and then during litigation itself.

In the aluminum case, Novelis and Aleris contend that they compete with suppliers of steel for automotive parts, as well as suppliers of aluminum. The DOJ, on the other hand, alleges that there's a distinct market for aluminum, because it's used to make vehicles lighter and safer compared to those made with steel parts.

Instead of hashing out the disputed market in litigation, the agency and the companies agreed to let an arbitrator decide, with the DOJ's antitrust division invoking its authority under the Administrative Dispute Resolution Act of 1996 for the first time. Speaking about the case at a conference in Washington, D.C., on Sept. 9, the DOJ's antitrust chief, Makan Delrahim, said the process, "has been called truly groundbreaking."

"This new process could prove to be a model for future enforcement actions, where appropriate, to

bring greater certainty for merging parties and to preserve taxpayer resources while staying true to our enforcement mission," Delrahim said.

He pitched the arbitration procedure as a way to save costs and speed the merger review process, and also as a way to get important antitrust questions out of the hands of federal district court judges, who generally have no specialty in the practice area. Choosing an arbitrator with antitrust experience or economic training, Delrahim said, could help lead to "greater accuracy and efficiency."

But the move also raises questions about how much the government is giving up in the aluminum case. If the companies prevail in arbitration, the Justice Department has agreed to abandon its challenge, while if the government wins, the companies will have to offer a fix for the DOJ's concerns.

Stephen Calkins, a professor at Wayne State University Law School and a former Federal Trade Commission general counsel, told Law360 that it's surprising to see the DOJ hang its whole case on the market definition issue. He said that, even if it had lost its argument about the scope of the market in court, the DOJ could still have made a case about the deal's broader impact.

He also noted that the government has a pretty good track record of getting deals blocked when its challenges are fully litigated in court — at least on horizontal transactions between direct competitors — and that the DOJ seems to be content with winning a settlement in the Novelis case, even if it prevails. Keeping the case out of court, he added, also raises public interest concerns.

"It's giving up a lot," Calkins said of the arbitration agreement. "The United States government has an interest in having precedent established and the law verified, and all the things that are what a court system is about."

**The Aluminum Deal**

The DOJ filed a notice in Ohio federal court outlining the arbitration process for its challenge of the Novelis-Aleris deal on Sept. 9, including a term sheet agreed to by the parties. According to those terms, the DOJ is required to hand over the documents it collected from third parties during its merger investigation, and the sides can exchange document requests and subpoenas related to the market definition issue.

Meanwhile, Novelis and Aleris are required to continue negotiating with an unnamed buyer over the sale of assets that would need to be divested for a DOJ settlement, and to provide the agency with weekly updates on their progress. The term sheet also suggests that the DOJ and the companies have already agreed on the general scope of what a divestiture would entail, though specifics were redacted.

The companies and the DOJ will try to commence arbitration within 120 days of the companies filing their answer to the complaint, provided a settlement is not struck before. The arbitration is set to last no more than 21 days, with a decision due two weeks after the hearing ends, according to the notice.

Amanda Wait, a partner with Norton Rose Fulbright and a former FTC attorney, told Law360 that the structure of the agreement suggests that the companies are pretty far along in discussions with a potential buyer and the DOJ must be confident that a deal can get done, meaning the case may never actually reach an arbitrator.

"Really, everybody might have just needed a little bit more time," she said.

From the perspective of the merging parties, the arbitration process provides a fallback short of full litigation if they're unable to reach an agreement with the proposed buyer. Juan A. Arteaga, a partner with Crowell & Moring LLP and a former deputy assistant attorney general in the DOJ's antitrust division, told Law360 that the risk of fully litigating a merger challenge "often causes companies to either settle with the DOJ or abandon" a deal. In the aluminum case, the companies may have felt it worthwhile to limit the issues in dispute and keep the case from going to trial.

"While the devil is always in the details, one possible benefit of binding arbitration for companies is that it could potentially allow them to secure a favorable ruling on a dispositive issue in a much more timely and less costly manner than litigation," Arteaga said.

But narrowing the dispute to market definition also means the companies are giving up potential defenses to the deal that they would have been able to make in court. Wait said companies will have to consider their options before taking a similar tact.

"What parties are going to have to weigh is the expedited treatment, and maybe quicker resolution of things, versus maybe leaving some issues on the table that they might have won," she said.

Calkins said he doesn't see any advantage for the DOJ in agreeing to arbitration, especially considering how often the government succeeds in court, and that every defendant going forward will ask for the same deal, which could raise questions about due process.

"This is just better for defendants than normal litigation," Calkins said, noting that merging parties will ask why some transactions get the arbitration treatment while others don't.

**Arbitration Questions**

The DOJ has stressed that its arbitration process only makes sense in particular circumstances, and Delrahim laid out the main factors the agency will consider when deciding if particular situations warrant its use. He said enforcers will have to consider how much time and expense arbitration would save compared to the normal process and if there are distinct questions that the sides agree can be presented to the decision maker.

He said the agency will also consider whether arbitrating issues results in a lost opportunity to create important legal precedent.

Arteaga told Law360 that while he was at the agency, the DOJ often decided to litigate enforcement actions in court, specifically because the proceedings "provided important opportunities to develop key legal and enforcement principles, and helped inform and guide the public and business community about our enforcement priorities and positions."

Having a key issue in the aluminum case decided by an arbitrator means there will be no court precedent resulting from the case. What's more, it's not clear if any of the arbitration proceedings will be open to the public or what kind of reasoning for a decision the arbitrators will release. Wait noted that a potentially interesting issue in the aluminum case is that the DOJ refers to Aleris as a "new and disruptive rival," and said issues surrounding nascent competitors have been cropping up in merger reviews recently.

"It seems like that could have been a big issue in the case, but given the way that this is procedural likely to go, it might not come out," she said.

Calkins pointed to the Administrative Dispute Resolution Act and the Antitrust Division's regulation implementing the law, which he said note that the process is unlikely to be appropriate for merger reviews because of timing constraints. He also said a reason why the power has never been used before is that arbitration is all about bringing parties together to negotiate a compromise, which the government does all the time on its own.

"They don't need an outsider to come in and help to preside over a negotiation," Calkins said.

The term sheet for the aluminum deal spells out a process for selecting who will oversee the arbitration. The sides will first try to agree on a single person, and then if they can't, a three-member panel will be chosen from lists of prospective arbitrators. The options will likely consist of former government enforcers, retired judges, academics and practitioners, if they're to fit Delrahim's preference for a decision maker with antitrust chops.

Arteaga said the DOJ will likely not want to see defense attorneys chosen, and that the companies won't want to see former enforcers selected.

"I doubt either side would want to pick antitrust professors, because they tend to look at things too theoretically and oftentimes have not practiced law," Arteaga said, calling retired judges the most likely option.

--Editing by Nicole Bleier.