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DOJ Issues New Guidance on Its Use of Arbitration

By Leiv Blad Jr., Jeffrey Blumenfeld, Zarema A. Jaramillo, Jonathan L. Lewis, Jack Sidorov, Meg Slachetka, and Allison M. Vissichelli

What You Need To Know:

- **Arbitration can quickly and efficiently resolve disputes with the Antitrust Division.**
- **Arbitration is appropriate if the disputed questions are clear and if the parties decide the potential remedies in advance.**
- **The Antitrust Division used arbitration once this year; it is not yet clear how often it will propose arbitration.**

Last week, the Antitrust Division (Division) of the U.S. Department of Justice (Department or DOJ) issued a memorandum providing further guidance to Division attorneys and the public on the use of arbitration in civil enforcement matters. This guidance stemmed from a closely watched challenge to aluminum giant Novelis Inc.'s planned acquisition of Ohio aluminum company Aleris Corp. last year.

The Department initially filed suit in the Northern District of Ohio to block the merger. The most significant disputed legal issue was the relevant market definition; not unusually for an antitrust case, market definition would be dispositive. After filing suit, and (presumably) after discussion with both companies, the Division announced that it had agreed with the companies to go to binding arbitration on the market definition issue.

The Novelis challenge was the first time the Division has used authority it has had since 1996 to arbitrate such disputes under the Administrative Dispute Resolution Act. Antitrust Division Assistant Attorney General Makan Delrahim called the arbitration "groundbreaking" and claimed that arbitration would promote certainty for merging parties and conserve resources both for merging parties and for the DOJ. Some commenters have posited that an arbitrator with a background in merger challenges or economics may be better suited to evaluate these complex issues than a federal judge without such a background.

In last week's memorandum, the Division said that it will only invoke arbitration in appropriate circumstances, including when the parties agree there are clear questions to be submitted to an arbitrator, and when the parties can decide the scope of possible remedies in advance.

However, the Division also noted some downsides of arbitration compared to litigation: An arbitrated outcome does not create precedent, as litigation does, and arbitration does not provide public guidance about the Department's enforcement priorities. The Division also cautioned that litigation will be necessary when there is significant public interest is at stake in a given dispute.

In the Noelis arbitration, the arbitrator sided with the Division in March of this year, finding that aluminum auto body sheet is a relevant product

market. As a result and as the Division and the parties had agreed in advance in order to complete the acquisition, Noelis was required to sell all of Aleris' North American aluminum auto body sheet operations to preserve competition in the relevant market.

The Noelis matter demonstrates that in the right case, arbitration can save significant time and money for merging parties. Nevertheless, the Noelis matter was somewhat unusual, as the company had agreed with the Division on what divestitures it would make if it lost the arbitration. It remains an open question how often that kind of agreement will be possible and, in any event, how willing the Division and the parties will be to go this route in the future. Still, for a company willing to make the hard call on remedy, arbitration can be a relatively quick and efficient way to resolve a matter.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

LEIV BLAD JR.
Partner
Co-Chair, Antitrust & Trade Regulation
T: 202.753.3820
lblad@lowenstein.com

JEFFREY BLUMENFELD
Partner
Co-Chair, Antitrust & Trade Regulation
T: 202.753.3810
jblumenfeld@lowenstein.com

ZAREMA A. JARAMILLO
Partner
T: 202.753.3830
zjaramillo@lowenstein.com

JONATHAN L. LEWIS
Partner
T: 202.753.3824
jlewis@lowenstein.com

JACK SIDOROV
Senior Counsel
T: 202.753.3799
jsidorov@lowenstein.com

MEG SLACHETKA
Counsel
T: 212.419.5856
mslachetka@lowenstein.com

ALLISON M. VISSICHELLI
Associate
T: 202.753.3812
avissichelli@lowenstein.com