Updates
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Arbitrated Merger Disputes: Worth the Tradeoffs?

The U.S. Department of Justice (DOJ) recently prevailed in its challenge of Novelis' proposed merger with Aleris Corporation. The challenge involved a first-of-its kind use of arbitration under the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 *et seq*.

Corporate defendants often find that arbitration provides a faster, less expensive, and less public forum than litigating in state or federal courts, and that an arbitrator familiar with a specialized subject area is more likely to arrive at a well-reasoned decision than the judge of a court of general jurisdiction.

In this case, to expedite resolution of the dispute, the parties agreed to (1) commence arbitration within 120 days of the complaint, (2) limit the arbitration to a single issue (relevant market) and the hearing itself to no more than 21 days, (3) require the arbitrator to issue its opinion within 14 days of the hearing, and (4) limit the arbitrator's opinion to no more than 5 pages.

Despite this agreement, the time savings were modest when compared to the average length of recently litigated mergers in federal court. The DOJ's complaint was filed on September 4, 2019. The arbitrator issued his opinion on March 9, 2020—187 days later. By comparison, the number of days between the filing of the complaint and initial decision by a federal judge in some recent DOJ merger challenges was as follows:

Table 1: Recent Mergers Litigated in Federal District Court

Parties	Total Days	Complaint Filed	Opinion Filed
Sabre - FareLogix	217+	08.20.2019	Not yet issued
AT&T - Time Warner	204	11.20.2017	06.12.2018
EnergySolutions - WCS	238	11.16.2016	07.12.2017
Anthem - Cigna	215	07.21.2016	02.21.2017
Aetna - Humana	186	07.21.2016	01.23.2017

The average for the cases listed above was 212 days. Arbitration in the Novelis/Aleris case was faster than this average, but only by 25 days. The reason this case did not move any faster was because fact and expert discovery proceeded as usual in federal court. Arbitration would not allow the defendants to issue document requests and deposition testimony from third parties. The main difference was that instead of holding a trial in federal court before a district court judge, the parties held an arbitration before an arbitrator.

It is also unclear whether arbitration was less expensive for Novelis because it agreed to pay the DOJ's attorneys' fees and other expenses, including its experts' fees, if Novelis lost.

Implications

Arbitrating a merger case allows parties to appoint an arbitrator with antitrust experience and provides a more confidential means of resolving the dispute. But at least in this case, the time savings were modest and it is unclear whether Novelis saved money. Novelis also agreed to limit the arbitration to one issue (market

definition), giving up the chance to argue other issues as well. The DOJ is understandably pleased with the outcome of this first-ever merger arbitration, but merging parties in future deals should think hard about the competing considerations before agreeing to arbitration.

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