



# US antitrust agency prevails in landmark arbitration

Ben Remaly and Sebastian Perry

10 March 2020

UPDATED: The US Department of Justice's antitrust division has prevailed in a "first of its kind" arbitration concerning its challenge to a US\$2.6 billion merger of aluminium manufacturers Novelis and Aleris.

The DOJ [announced](#) on 9 March that a sole arbitrator had accepted its contention that aluminium auto body sheets (ABS) constituted a relevant product market. Novelis and Aleris had argued that such a market definition failed to account for the competition they face from steel used in automobiles.

A redacted version of the award is [available here](#). It was issued by **Kevin Arquit**, co-chair of the antitrust group at Kasowitz Benson Torres in New York and a former director of the Federal Trade Commission's bureau of competition.

As a consequence of the ruling, Novelis will have to divest Aleris' North American aluminium ABS operations and reimburse the agency for the costs of the arbitration.

It marks the Antitrust Division's [first-ever](#) use of arbitration to resolve an antitrust lawsuit. The agency used its authority under the [Administrative Dispute Resolution Act of 1996](#), which empowers US federal agencies to use arbitration when the parties consent and the balance of public interest factors favour arbitration.

The hearing, which was hosted by the Antitrust Division, spanned 10 days before Arquit. Novelis was represented by Latham & Watkins and Fangda Partners, while Aleris used Fried Frank.

Novelis, a Canadian corporation headquartered in Atlanta and owned by India's Hindalco Industries, announced in July that it had agreed to acquire Ohio-based Aleris. Two months later, the DOJ filed a civil lawsuit in the Northern District of Ohio to challenge the merger, saying it would substantially lessen competition in the market for aluminium used in manufacturing vehicles.

The parties then agreed to resolve the issue of product market definition [through arbitration](#), concurring that this would be dispositive of the lawsuit.

In his award, Arquit found that Novelis and Aleris “rely on facts that speak to reasonable interchangeability [between aluminium and steel ABS], but their position takes the thirty-thousand-foot view.”

The arbitrator found that aluminium and steel are only competitive at the design phase, but that after automobile manufacturers have finished their designs they are “almost always locked-in” to the metal they have chosen.

“Evidence of switching during the procurement phase (or after) is, at best, limited,” he added.

Documents suggested that Novelis feared “a lower price effect” if a new market entrant purchased Aleris, the arbitrator found. Arquit said he could not rely on the testimony from expert economists – Analysis Group’s **James Levinsohn** for the DOJ and Charles River Associates’ **Kevin Murphy** for the merging parties – because he found that quantitative data used to be “insufficiently verifiable”.

Had Arquit sided with the merging companies on the product market, the DOJ would have been obligated to clear the deal outright.

The companies had agreed to hold their automotive businesses separate pending the outcome of the dispute. The terms of the arbitration agreement allowed Novelis and Aleris to close the remaining aspects of the merger, but the companies are awaiting EU approval for the sale of a production plant in Belgium.

Novelis chief executive Steve Fisher said the arbitrator’s decision “ignores the reality of the automotive body sheet market and the competition we have faced against steel for years”.

“Aluminum remains the material of choice for our customers, and we are going to continue to provide them with the innovative, lightweight and sustainable solutions they demand,” Fisher said in a statement.

“This first-of-its-kind arbitration proved to be an effective procedure for the streamlined adjudication of a dispositive issue in a merger challenge,” Delrahim said in a [statement](#) this week.

Delrahim has said the DOJ will factor in cost savings, time efficiency, the question in dispute and the potential for losing an opportunity to create precedent when deciding whether to move to arbitration.

Arbitration could improve the expertise of decision-makers and save taxpayers money, Delrahim said in September.

But Stephen Calkins, a professor at Wayne State University Law School, in a September statement [called](#) the use of arbitration “unnecessary”. He tells GAR’s sister publication *Global Competition Review* that the whole matter had an “air of secret justice”.

Calkins said he is pleased by Arquit's ruling, but "cautiously" so because there is no public record to draw a well-informed view on the merits of the case. He acknowledged that the matter saved the DOJ litigation costs, but said not a lot of time was saved in proceedings that ended up taking six months.

"The dramatically more public, complicated and challenging state challenge to [T-Mobile/Sprint](#) took only eight months," Calkins said, adding that the FTC's [failed attempt](#) at blocking Evonik's purchase of PeroxyChem lasted about six months.

"District court challenges to mergers simply do not take long, from complaint to decision," Calkins said.

The DOJ did not respond to a request for comment on the agency's rationale for having the proceedings held confidentially.

The DOJ said it will file a proposed final judgment before the Ohio district court. The Tunney Act requires a federal judge to approve all merger settlements involving the DOJ.

*An earlier version of this article appeared in Global Competition Review. It has been updated since it was first published to include a link to Arquit's award and a summary of his findings.*

#### Tribunal

- Sole arbitrator **Kevin Arquit**

#### Counsel to the Department of Justice

- Antitrust Division

**Makan Delrahim, Kathleen O'Neill, Craig Conrath, Patricia Brink, Julia Schiller, John Read, Stephanie Fleming, Samer Musallam, Lowell Stern, Blake Rushforth, Bashiri Wilson, Angela Tin, James Foster, Siddarth Dadhich, Thomas Dematteo and Ethan Stevenson** in Washington, DC

#### Counsel to Novelis

- Latham & Watkins

Partners **Amanda Reeves** and **Farrell Malone** in Washington, DC; **Daniel Wall** in San Francisco; **Lawrence Buterman** in New York; **Sven Volcker** and **Hector Armengod** in Brussels

- Fangda Partners

#### Counsel to Aleris

- Fried Frank Harris Shriver & Jacobson

**Nathaniel Asker, Stephen Juris and Aleksandr Livshits** in New York and **Tobias Caspary** in London