ARBITRATION CLAUSES AND ANTITRUST DAMAGES IN THE EU: WHERE ARE WE NOW?

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I. INTRODUCTION

On November 26, 2014, Directive 2014/104/EU on antitrust damages actions ("the Directive") was signed into law. While the Directive focuses primarily on judicial redress, it also encourages claimants to resort to alternative dispute resolution mechanisms, including arbitration, when seeking antitrust damages. Of particular interest is recital 48 of the Directive, which provides that:

Achieving a ‘once and for all’ settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as [...] arbitration [...]. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.

This was a welcome development, given that arbitration could offer, under certain circumstances, a number of advantages over civil litigation: confidentiality, quicker resolution of the case, better enforceability of awards, increased flexibility, the ability for parties to select arbitrators, etc.

However, the Directive did not address one threshold aspect relating to the arbitration route, namely: may claimants rely on arbitration clauses — contained in commercial contracts that they would have entered into with defendants — to bring antitrust damage claims against them? The question is not an easy one, given:

- The *prima facie* dichotomy between antitrust damage claims and arbitration clauses: the former are civil torts in nature, while the latter are typically included in commercial contracts and may only be applied in relation to contractual breaches; and

- That the application of an arbitration clause presents the risk of causing the fragmentation of the claim before multiple forums, thus making it more difficult for claimant(s) to recover their alleged loss from multiple cartelists (duplication of proceedings, inflated legal costs, risk of irreconcilable awards and judgments, etc.). This will typically be the case when the claimant files a cartel damage claim against multiple defendants located in several jurisdictions, some of which being subject to arbitration clauses in their contracts, while others not.
Over the past five years, the case law on this issue has evolved significantly and has progressively become more arbitration-friendly — although not without conditions and limitations. In short, the key parameter for applying an arbitration clause to an antitrust damage claim appears to be dictated by the foreseeability criterion, i.e. is it foreseeable for the parties to the commercial contract that the arbitration clause would apply in the context of an antitrust damage claim?

This contribution outlines the evolution of this case law and provides a roadmap for assessing whether an antitrust damage claim fits within the perimeter of a contractual arbitration clause.

II. THE EARLY DAYS: THE NARROW INTERPRETATION OF ARBITRATION CLAUSES

A. The CDC Judgment

The X judgement, from the European Court of Justice (“CoJ”), is the first ruling of relevance to the issue — albeit in the context of jurisdictional rather than arbitration clauses. By way of reminder, jurisdictional clauses are subject to Regulation 1215/2012, which recently recast Regulation 44/2011 on jurisdiction in civil and commercial matters (also known as Brussels 1 Regulation). The Recast Regulation states the general rule that the jurisdiction for bringing a civil or commercial claim is the court where the defendant is domiciled. However, in certain cases, applicants may deviate from this general rule and file their application in a different jurisdiction, notably where the parties have entered into a jurisdictional clause designating another court to settle any disputes that have arisen or that may arise in connection with a particular legal relationship (article 25).

In CDC, the Landgericht Dortmund (Germany) requested the CoJ, *inter alia*, to determine whether, under EU law, jurisdiction clauses inserted in supply contracts concluded between the defendants and the victims applied to a cartel damage claim. The CoJ replied that:

- A jurisdiction clause may only apply to disputes arising in connection with the contractual relationship at hand. This is “to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum”; in other words, to ensure foreseeability.
  - In the case at hand, this principle meant that a jurisdictional clause that merely refers in an abstract and unqualified way to all disputes arising from a contractual relationship is not capable of covering a dispute relating to the tortious liability of one party resulting from its participation in an unlawful cartel.
  - By contrast, a jurisdictional clause that specifically and explicitly refers to disputes relating to the participation of one of the parties to a cartel will indeed be applicable to a cartel damage claim.
- The fact that the application of the jurisdictional clause may cause the fragmentation of the claim before multiple forums does not conflict with the requirement of effective enforcement of the cartel prohibition. This is because, first, the substantive law applicable to the dispute may not justify denying effect to a jurisdiction clause. EU competition law does not allow departure from this rule. Second, the national court initially seized of the dispute must give effect to any jurisdictional clause that satisfies the requirements of the Recast Regulation because it must be considered that the system of legal remedies in the Member State designated by the clause is sufficient to protect the claimant’s rights.

B. The Impact of CDC on the Interpretation of Arbitration Clauses

In CDC, the CoJ based its answers on the Brussels I Regulation, which is not applicable to arbitration clauses. However, the judgment had a ripple effect on the analysis of arbitration clauses, as national courts started applying the CDC case law by analogy, i.e. for an arbitration clause to apply to an antitrust claim, it must make express reference to such claims.

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For instance, in *Kemira*,³ the Court of Appeals of Amsterdam examined a follow-on damage claim relating to a cartel on the market for sodium chlorate. The defendant, Kemira, argued against the jurisdiction of the Amsterdam court, on the basis that the supply contracts it had entered into with the claimants included an arbitration clause. The Court of Appeals of Amsterdam rejected Kemira’s argument, noting that the clause only referred to contractual disputes and did not encompass competition law violations. The Court further noted that there was “no good reason” to depart from the *CDC* case law when interpreting an arbitration clause drafted in general terms.

Similarly, the District Court of Rotterdam⁴ ruled out the application of an arbitration clause in the context of an antitrust damage claim based on the EC decision in the elevator cartel case.⁵ Referring to *CDC*, the Court noted that the clause applied to “every dispute arising between the parties”; hence, the claimants could not reasonably foresee that antitrust damage claims would fall within the scope of the clause. However, contrary to the CoJ in *CDC*, the Court also found that, even if such claims were to fall within the scope of the clause, the arbitration clause would have to be set aside, due to the risk of fragmentation of the claim. This was because application of the arbitration clause would force the claimants to verify, for each elevator, whether claims should be brought before a judge or before an arbitrator, which would in practice make it much more difficult for a claimant to recover their loss.

In sum, this initial line of case law applied the findings of the CoJ in *CDC* and interpreted it in a rather restrictive and formalistic manner: absent very specific wording in the arbitration clause itself referring to antitrust violations, arbitration clauses should not cover antitrust damages claims. This approach was arguably departing from the spirit of the Directive, which aimed at promoting arbitration as a means of settling antitrust claims. But this jurisprudence was also more protective for claimants: by limiting the application of arbitration clauses to antitrust claims, it limited the risk of fragmentation of the claim and therefore promoted the effective protection of the claimants’ rights.

### III. TOWARDS A BROADER APPLICATION OF ARBITRATION CLAUSES

The issue of arbitration clauses came back to the fore in February 2017, when the High Court of Justice adopted its judgment in the *Microsoft* case.⁶ This judgment came as a surprise to many as, it — seemingly — put a stop to the *CDC* jurisprudence that required arbitration clauses to make explicit reference to antitrust claims.

The judgment came on the back of Microsoft Mobile, a manufacturer and distributor of mobile phones containing lithium ion batteries ("Li-ion Batteries") and the successor to Nokia as of 2013, filing a damage claim against six manufacturers of these batteries, who had allegedly engaged in cartel activity between August 1999 and May 2011. Microsoft Mobile filed its claim before the Courts of England and Wales. This was possible only because one of the defendants, Sony, had a subsidiary established in the UK (the remaining defendants being established in Asia). Put differently, Sony’s UK subsidiary was the anchor defendant: absent the presence of this UK entity, the Courts of England and Wales would not have had jurisdiction over the case.⁷

Sony challenged the jurisdiction of the Courts of England and Wales on the basis that an arbitration clause subsisted between it and Nokia, and was unaffected by the assignment to Microsoft Mobile. According to Sony, Microsoft’s claim fell within the scope of that arbitration clause. Microsoft, on the other hand, argued that (1) the claim did not fall in the scope of the arbitration clause, notably because the latter did not make express reference to antitrust claims, along the lines of the *CDC* case law, and (2) even if it did, it should not be applied because it would result in a fragmentation of the claim, which in turn would impede the effective protection of rights derived from competition law.

In response to these claims, the High Court found that:

- First, the starting point of the analysis should be that the parties, as rational businesspersons, must be able to foresee that the arbitration clause may apply to an antitrust damage claim.

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⁵ Commission decision of February 21, 2007 in case COMP/38.823, PO/Elevators and escalators.
⁶ *Microsoft Mobile OY (Ltd) v. Sony Europe Limited & Ors* [2017]EWHC 374 (Ch).
⁷ The High Court examined and eventually rejected alternative jurisdictional gateways aimed at showing that the High Court had jurisdiction over the five other defendants established in Asia.
Second, in order to determine whether parties to the contract are able to foresee that an antitrust claim falls within the scope of an arbitration clause, one must show that the claim arises out of the contractual relationship entered into between the parties. This will be the case where the tortious claims advanced by the claimant (that is, the damage caused by the breach of competition law) is sufficiently closely related to any potential pleadable contractual claims so as to render rational businessmen likely to have intended such a dispute to be decided through arbitration.

- The High Court reviewed the supply contract between Nokia and Sony containing the arbitration clause and found that it included an express duty of good faith when negotiating changes in prices. According to the High Court, “it is very difficult to see how a party to [the contract], like D1/Sony Europe, could knowingly engage in cartelist behaviour of the sort alleged by Microsoft Mobile without at the same time breaching [the express duty of good faith included in the contract].”

- The High Court further highlighted that it did not matter that Microsoft had not pleaded the contractual claim. The claim only needed to be pleadable, so that rational businesspersons could expect the application of the arbitration clause.

- Therefore, in that case, the claim did fall within the scope of the arbitration clause.

Third and finally, the High Court examined Microsoft Mobile’s argument that, even though applicable, the arbitration clause should be set aside to avoid the fragmentation of the claim across various jurisdictions.

- In this regard, the High Court agreed with Microsoft Mobile that the application of the clause would indeed cause fragmentation, not least because Microsoft Mobile would lose its anchor defendant before the Courts of England and Wales and would therefore have to bring its claims against the other defendants in different forums.

- However, the High Court found that such fragmentation should not lead to the non-application of the arbitration clause. The High Court reached this conclusion based on the CDC judgment, where the CoJ rejected a similar claim (see supra).

Therefore, the High Court found that the arbitration clause incorporated in Sony’s supply contract with Nokia was applicable — even though the clause did not explicitly refer to antitrust damage claims. The High Court therefore stayed the proceedings against Sony in favor of arbitration. This, in turn resulted in the collapse of the case before the Courts of England and Wales, since Microsoft Mobile had lost its anchor defendant — which provides a textbook example of how the application of an arbitration clause may lead to antitrust claim fragmentation.

A few months later, the Regional Court of Dortmund reached a similar conclusion in relation to a damage claim relating to the rail cartel case. 8 In that case, the German Court noted that, under well-settled case law in Germany, preference should be given to an interpretation that leads to the validity and application of arbitration clauses and, hence, such clauses should be interpreted broadly. Specifically, the German Court reached the conclusion that since the antitrust claim by the plaintiff, which is tortious in nature, coincided with a breach of contract, the arbitration clause should be applied. The German Court explicitly rejected the application of the CDC case law, by distinguishing it on the ground that CDC did not deal with an arbitration clause. In sum, the German court reached a similar conclusion as Microsoft.

These cases are in stark contrast with the CDC line of case law, as they do not require that arbitration clauses make express reference to antitrust claims. Instead, these cases go beyond the wording of the clause and examine whether the antitrust claim coincides with a potential contractual claim by looking at the contractual relationship as a whole. In practice, this approach is more arbitration friendly, as it is likely to lead to more antitrust claims falling within the scope of arbitration clauses. This is good news for businesses willing to arbitrate antitrust claims; less so for potential claimants, who face an increased risk of fragmentation of the claim and therefore a higher barrier to overcome to be compensated for their cartel losses.

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8 Landgericht Dortmund, judgment of September 13, 2017 – 8 O 30/16 Kart. This judgment is currently under appeal.
IV. BRIDGING THE GAP BETWEEN CDC AND MICROSOFT: THE APPLE SALES INTERNATIONAL JUDGMENT

Last but not least: on October 24, 2018, the CoJ adopted its judgment in the Apple Sales International case.9 Here again, the judgment addresses jurisdictional clauses, not arbitration clauses. However, the Apple Sales International judgment not only furthers the thinking on arbitration clauses, it also arguably reconciles the CDC and the Microsoft lines of case law.

The case originated in 2012, when one of Apple’s authorized distributors in France, eBizcuss, accused Apple of unfairly abusing its dominant position as of 2009, in particular by favoring its own distribution network over its third-party resellers. Specifically, eBizcuss argued, inter alia, that third party resellers regularly suffered supply shortages that did not affect Apple’s own distribution network. As a result, eBizcuss brought proceedings before the French Courts — a point that Apple criticized, since the distribution contract provided that “[the] agreement and the corresponding relationship between the parties shall be governed and construed in accordance with the laws of the Republic of Ireland and the parties shall submit to the jurisdiction of the courts of the Republic of Ireland.” (emphasis added)

After five years of judicial procedure, the French Supreme Court (Cour de Cassation) referred the case to the CoJ. The referral focused on the following question: may a jurisdiction clause apply to an action for damages brought on the basis of Article 102 TFEU, even though such clause does not expressly refer to disputes relating to antitrust violations?

In its judgment, the CoJ reiterated a simple, foundational rule: a jurisdiction clause may only apply to disputes which have arisen or which may arise in connection with a given contract. This is to avoid a party being taken by surprise — a principle already asserted in CDC and applied in Microsoft (see supra). While the principle is clear, the CoJ nonetheless emphasized that its application may give rise to contrasting outcomes:

• A cartel will typically not materialize in the context of a contractual relationship. This is what happened in CDC: the alleged anticompetitive conduct was a cartel; hence, it had no connection with the contractual relationship embedding an abstract jurisdictional clause. In addition, the claimant had no prior knowledge of the unlawful cartel and could not reasonably foresee such litigation when it agreed to the jurisdiction clause. Therefore, in the absence of an explicit reference to antitrust violations in the jurisdictional clause, the alleged anti-competitive cartel is not directly linked to the contractual relationship between the parties to the dispute and, accordingly, an abstract jurisdiction clause is not applicable to the antitrust damage claim.

• By contrast, an abuse of a dominant position may materialize in the context of a contractual relationship between a supplier and a distributor. This was the case in Apple Sales International, which involved an alleged abuse in the context of a supplier/distributor relationship (by way of reminder, eBizcuss alleged that Apple would favor its own distribution network over its third-party resellers). In such cases, the CoJ concluded that the application of a jurisdiction clause that explicitly refers to the “corresponding relationship” between the parties “cannot be regarded as surprising one of the parties” — even if the clause does not explicitly refer to competition infringements.

Importantly, the above does not mean that jurisdictional clauses have a different reach depending on whether the damage claim relates to a cartel infringement (as in CDC) or an abuse of dominance (as in Apple Sales International). Instead, and as explicitly stated in AG Wahl’s conclusions, what matters is whether the conduct that triggers the dispute materializes in the contractual relationship to which the jurisdiction clause applies — in which case the jurisdiction clause should in all likelihood apply to the dispute. Further, it is not clear how the CoJ would have ruled on the matter if the jurisdiction clause did not include the phrase “corresponding relationship,” which arguably opened the door for a wide interpretation of the clause.

It is too early to tell whether this judgment will have an impact on the assessment of arbitration clauses. But our best guess is that it will: by focusing on the requirement of foreseeability, which was at the core of the above national courts cases dealing with arbitration clauses, and by drawing the consequences of this requirement, the Apple judgment lays down a compelling roadmap for assessing whether an arbitration clause covers antitrust damage claims.

V. FINAL TAKE AWAY FOR BUSINESSES CONSIDERING ARBITRATING ANTITRUST CLAIMS

Based on the above, a number of leading private enforcement friendly Member States (or soon to be former Member States, in the case of the UK) have open the door to allowing the resolution of civil antitrust disputes through arbitration. But even arbitration friendly courts must ensure legal certainty. Therefore, they will only apply arbitration clauses to competition law claims provided that the latter fall within the perimeter of the contractual relationship, so that the application of the clause takes no party by surprise.

Practically speaking, this means that a party arguing in favor of the application of an arbitration clause will face a hurdle, namely: showing the existence of a sufficient nexus between the antitrust infringement and the contract. This nexus may take various forms. As of today, they have taken one of these three forms:

- The contractual arbitration clause makes explicit reference to antitrust claims, à la CDC.
- The breach of competition law necessarily results in a breach of contract, à la Microsoft.
- The breach of competition law stems from the contract and the corresponding contractual relationship, à la Apple.

Adding to this evidentiary challenge, pro-arbitration parties are likely to face, at least for now, a fragmented judicial practice across the EU. While the UK and Germany seem to have adopted an arbitration friendly approach, other jurisdictions have been more restrictive (the Netherlands) or have yet to take a position on the issue.

Bearing in mind these practical hurdles, a last practical tip for businesses would be to consider the issue of arbitration of potential antitrust claims early on, that is, when negotiating a contract and drafting arbitration clauses. To date, this seems to be the most efficient solution to ensure that arbitration tribunals are competent to review any potential antitrust claim.
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