The CJEU's decision in CDC v Akzo Nobel et al: A Blessing or a Curse for Arbitrating Cartel Damage Claims?

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On 21 May 2015, the CJEU rendered a landmark decision regarding questions of jurisdiction under the Brussels I Regulation (recast as Regulation 1215/2012, previously Regulation 44/2001) in the case of cartel damage proceedings. We may be grappling with this decision for a long time albeit it does not explicitly address arbitration. The CJEU's judgment brings into question the established approach of dealing with tortious acts under contractual arbitration agreements.

The decision

The preliminary ruling procedure initiated by the Regional Court of Dortmund (Germany) in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV et al* (C-352/13), follows a decision by the European Commission of 3 May 2006. The Commission found that several companies supplying hydrogen peroxide and sodium perborate had participated in a cartel contrary to EU competition rules and imposed fines on those companies. In March 2009, CDC brought an action for damages before the Regional Court of Dortmund against six cartel members. CDC is a litigation vehicle to which a number of companies transferred their rights to claim damages suffered in connection with that cartel. Despite those companies being seated in various EU member states, CDC argued that the German courts had jurisdiction to rule in respect of all defendants.

The defendants contested jurisdiction relying on, among other things, jurisdiction and arbitration clauses included in some of their contracts for the supply of goods. As a result, the Regional Court of Dortmund, inter alia, asked the CJEU whether it was allowed to take account of these clauses in light of the requirement for effective enforcement of Article 81 EC / Article 101 TFEU and Article 53 EEA Agreement.

In his opinion of 11 December 2014, the Advocate General Niilo Jääskinen suggested interpreting Article 101 TFEU to preclude *"the implementation of arbitration and/or jurisdiction clauses […] whose content had been agreed when the party against whom that clause is relied upon was unaware of the cartel agreement in question and of its unlawful nature."* To support this view, he relied specifically on the classification of cartel agreements as torts, the lack of foreseeability of cartel damages and the need to effectively implement Article 101 TFEU as public policy.

Contrary to the Advocate General, the CJEU did not address arbitration. Yet, regarding jurisdiction

clauses, it held that, while the court seised of a matter is, in principle, bound by a jurisdiction clause, it must ascertain carefully whether the parties "did, in fact, derogate". The CJEU pointed out that jurisdiction clauses only cover cartel damage disputes if the victim has specifically consented thereto:

> "the referring court must, in particular, regard a clause which abstractly refers to all disputes arising from contractual relationships as not extending to a dispute relating to the tortious liability that one party allegedly incurred as a result of the other's participation in an unlawful cartel.
> Given that the undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause and that that undertaking had no knowledge of the unlawful cartel at that time, such litigation cannot be regarded as stemming from a contractual relationship. Such a clause would not therefore have validly derogated from the referring court's jurisdiction." (Judgment C-352/13, paras. 69, 70)

Broadly phrased, jurisdiction clauses are thus no longer sufficient when it comes to cartel damage claims.

Implications for arbitrating cartel damage claims

On its face, the CJEU's decision does not affect arbitration. The arbitration exception of the Brussels I Regulation (Art. 1 para. 2 lit. d) could explain the silence on the question raised by the German court, were it not for the fact that EU law and the CJEU do play a role where arbitration agreements and material EU law intersect.

The relationship between national courts and EU law is governed by the overarching principle of effective implementation of EU law. In *Eco Swiss* (C-126/97), the CJEU held that national courts must annul an arbitration award under their respective national law if they consider the award to violate what is now Article 101 TFEU. In the present case, Advocate General Jääskinen argued that private enforcement of cartel damages should be *"by analogy"* covered by this consideration.

We can thus only speculate why the CJEU neither explicitly confirmed nor denied the applicability of its reasoning to arbitration clauses. It could either mean that it (i) wants national courts to interpret arbitration clauses in line with its guidelines for jurisdiction clauses without having to address them specifically, (ii) intends to leave the door open for future limits on the interpretation of arbitration agreements in cartel damage disputes or (iii) disagrees with the Advocate General. The last can only be hoped. It is regrettable that the court did not use the opportunity to clearly state that questions of the interpretation of arbitration agreements fall outside of its jurisdiction.

As a result, the decision will have an adverse effect on arbitrating cartel damage claims. The party invoking the arbitration agreement faces the risk that the other party will contest the panel's jurisdiction. Due to the CJEU's judgment, the threat that a failure to annul arbitration awards rendered in respect of cartel damages, or to prevent its enforcement, may constitute a failure to comply with paramount EU law hangs in the air. National courts may be pre-emptively obedient and broadly (over-)interpret the present judgment when dealing with arbitration clauses. Arbitrators may be swayed by this threat when ruling on their own jurisdiction.

No one-size-fits-all approach with a view to arbitration clauses

Yet, there are good reasons for national courts not to apply a one-size-fits-all approach with a view to arbitration clauses. While the CJEU's demand to explicitly reference cartel damage claims in

jurisdiction clauses is in itself not convincing, it should in no case be adopted when it comes to arbitration clauses.

Such an approach would undermine established international practice to accept concurring claims based on tort under broadly phrased arbitration agreements. For example, under German law, arbitration agreements concluded with a view to contractual claims are considered to also cover competing tortious claims arising from the same facts (*cf. German Federal Supreme Court, judgment of 24 November 1964 – VI ZR 187/63*). Similarly, the Greek Supreme Court held that where the same facts simultaneously amount to a breach of contract and a tortious act, the latter fall within the scope of an arbitration clause that refers to *"[a]ll differences arising in relation to the present contract"* (*Greek Supreme Court judgment no 506/2010*). Regarding an arbitration agreement referencing *"all disputes arising out of a contract"*, the Austrian Supreme Court deemed the agreement applicable *"as long as the (concretely) damaging behaviour and a breach of contract are, in the narrowest sense, one event"* (*cf. Austrian Supreme Court – 4 Ob80/08f, 26 August 2008*). The English High Court deemed an arbitration clause for *"all disputes from time to time arising out of this contract"* to encompass claims in tort (*cf. Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1994] 1 Lloyd's Rep. 168, 174 (QB)), *cf. also X Ltd v Y Ltd* [2005] EWHC 769 (TCC). While not strictly relevant to the CJEU's sphere of influence, this approach has also been taken elsewhere (e.g. in the landmark decision of the Alberta Court of Appeal in *Kaverit Steel Crane Ltd v Kone Corporation*, 87 DLR 4th 129, or by the U.S. Court of Appeals for the Eleventh Circuit in *Telecom Italia, SpA v Wholesale Telecom Corp.*, 248 F.3d 1109 [11th Cir. 2001]).

Taking all of this into account, the question of whether a specific broad arbitration agreement covers subsequent tortious acts depends on its particular wording, how closely the tortious act is related to the contractual relationship and the relevant jurisdiction. By contrast, adopting the Advocate General's view would mean a sledgehammer approach: due to a lack of foreseeability, such arbitration would not be regarded as stemming from a contractual relationship.

Yet, tortious acts are more often than not unforeseeable – and it often makes sense to arbitrate disputes if they arise in the context of a contract with a broad arbitration agreement. Such arbitration agreements signal the parties' intent to submit future disputes to arbitration as long as there is a connection with the contractual agreement. The most prominent examples are allegations of fraud. Likewise, cartel damage claims brought by direct customers often require close scrutiny of the contractual relationship when it comes to the question of whether a contract for the sale of goods is affected by a cartel, or the victim has been overcharged. This perspective seems lost on the Advocate General – and on the CJEU if interpreting its judgment extensively. Carefully balancing European public policy interests with arbitral doctrine is one thing, but steamrolling the latter with the former is an unacceptable outcome.

In particular, there is no reason to believe that arbitral tribunals do not effectively enforce EU cartel law when dealing with cartel damage claims. The Advocate General's notion of arbitration as an inferior mode of dispute resolution (cf. the opinion of AG Jääskinen of 11 December 2014, C-352/13, para. 126) is intolerable. Arbitral tribunals are perfectly capable of dealing effectively with cartel damage claims. They are well equipped to handle the multitude and complexity of damages issues that may arise from a horizontal cartel, whilst state courts are often overwhelmed by these multidimensional and multinational disputes which often drag on for years before even reaching an appellate stage. Arbitral tribunals are able to dedicate more time to a dispute and expertly scrutinise a large amount of highly complex evidence, parties have the ability to choose practitioners with competition law experience. Furthermore, arbitral tribunals will keep a close eye on the Commission's decision and hardly render awards that contradict its findings since they expect the national courts to carefully review any award with a view to public policy.

No spill-over effect on other disputes

In no case should the CJEU's decision create a stir beyond cartel damages and bring into question the delicately adjusted interpretative exercise heretofore practised by courts throughout Europe: by putting foreseeability front and centre, the CJEU may cause imaginative parties to advocate that the same standard should be applied to other tortious acts such as fraudulent behaviour, thereby inventing a "tort and fraud defence" against arbitration. This would be far from desirable. It can only be hoped that arbitral tribunals and national courts will prevent a spill-over effect of the CJEU's judgment on other disputes, but rather treat it as specific guidance for jurisdiction clauses regarding cartel damage claims only. It remains to be seen what approach courts will take. The Regional Court of Dortmund's upcoming decision on jurisdiction will be a first indicator of where the issue is headed.

In the meantime, arbitration practitioners and contracting parties may wish to consider to specifically reference future competition law disputes in their arbitration clauses.

Click here for the judgment.

* *Hannes Ingwersen assisted in preparing this blog post.*