Arbitrating Antitrust Follow-on Damages Claims: A European Perspective (Part 1)

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Aren Goldsmith (Cleary Gottlieb Steen & Hamilton LLP)

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This post, which will be presented in two parts, proposes to pick-up on a subject addressed in an earlier commentary posted by R. Bellinghausen and J. Grothaus regarding the CJEU's decision in CDC v. Akzo Nobel et al [*See* Judgment C-352/13].

As highlighted in the earlier post, the CJEU's recent decision raises a number of questions regarding the possibility, under European law, of submitting antitrust follow-on damages claims to arbitration under existing, or *ex ante*, agreements to arbitrate. **Part 1** of this post offers a few additional thoughts regarding the problem of jurisdiction *ratione materiae* in the follow-on setting, which was the primary subject of the earlier post. The post also notes some recent case law addressing this issue.

Part 2 of this commentary, to be posted separately, will address additional challenges and opportunities that warrant attention when the possibility of arbitrating follow-on claims is considered.

CDC v. Akzo Nobel et al. and the Problem of Consent Ratione Materiae

The first obstacle that must be cleared before follow-on damages claim may be referred to arbitration under an *ex ante* agreement to arbitrate, is the question of whether European courts will view such claims as falling within the scope, *ratione materiae*, of agreements to arbitrate found in contracts implicated in follow-on actions.

In *CDC v. Akzo Nobel et al.*, the CJEU concluded that parties should not be found to have agreed to include cartel-based follow-on damages claims within the scope of broadly worded jurisdiction clauses, unless the parties specifically agreed to include such claims within the scope of their agreement. The CJEU's reasoning turned on the unknown and unforeseeable nature of cartel-based follow-on claims. For the CJEU, "a clause which abstractly refers to all disputes arising from a contractual relationship" cannot be interpreted as "extending to a dispute relating to the tortious liability that one party allegedly incurred a as result of the other's participation in an unlawful cartel." [Judgment C-352/13, paras. 69-70].

If the CJEU's reasoning were extended by analogy to the interpretation of agreements to arbitrate, the result would be to create a new outer limit under EU law in relation to the interpretation of consent in agreements to arbitrate. Such a position under EU law would be at odds with principles of curial law in many European jurisdictions today, pursuant to which broadly worded agreements to arbitrate may be held to cover tort claims related to a contractual relationship. How EU courts and arbitral tribunals seated in the EU will understand the CJEU's decision, including whether they will consider that the

CJEU's judgment should be applied when interpreting arbitration agreements, is therefore a significant open question in Europe today.

Regrettably, since the time of the earlier post, one court in a key jurisdiction for antitrust follow-on litigation in Europe, the Netherlands, has come down on what is submitted to be the wrong side of this issue. Specifically, in a decision dated 21 July 2015, the Amsterdam Court of Appeals extended the CJEU's reasoning to the interpretation of agreements to arbitrate, upholding a 2014 decision of the Amsterdam District Court, which had refused to dismiss cartel damages follow-on claims, despite the fact that such claims were based on contracts containing broadly worded agreements to arbitrate. According to the Amsterdam Court of Appeals, there was no reason to depart from the CJEU's interpretive approach to jurisdiction clauses when confronted with the same question in relation to arbitration agreements.

In declining to enforce agreements to arbitrate in the follow-on setting, the decision of the Amsterdam Court of Appeals tracks decisions taken by two first instance courts in the Netherlands [*see* Case No. C/13/500953/HAZA 11-2560, CDC PROJECT 13 SA (CDC/AkzoNobel c.s.), District Court of Amsterdam (June 4, 2014) (upheld by the Amsterdam Court of Appeals), translation available here; *East West Trading BV v. United Technologies Corp. and Others*, District Court of Central Netherlands (November 27, 2013)], and one decision by a district court in Helsinki, Finland. It is understood that the court in Dortmund, Germany, which referred the questions addressed by the CJEU in *CDC v. Akzo Nobel et al*, is receiving briefing from the parties as to the threshold issues before it.

As the previous post argued persuasively, there is no reason to assume, *a priori*, that parties referring to arbitration all commercial disputes arising out of their contractual relationship, intend to exclude antitrust follow-on damages claims. To the extent that follow-on claims allege damages based upon the overpayment for products acquired pursuant to a contract (which is typical in cartel-based follow-on actions in Europe today), such claims relate to and arise, at least in part, out of the performance of the parties' contractual relationship. Depending upon the applicable law, parties may assert tort claims based upon the violation of statutory obligations or contractual claims related, for example, to the inducement to contract on terms that would not have been agreed if the cartel had been disclosed. In order to assess whether arbitration has been agreed in any given case, it is necessary to analyze the relationship between the claims asserted and the agreement to arbitrate specific to the parties' relationship.

The fact that follow-on claims are based upon conduct that is not foreseen or expected at the time of contracting does not change this analysis. Generally, the purpose of a broad agreement to arbitrate is to refer to arbitration any type of claim connected to a specific legal relationship, irrespective of whether any future claim can be anticipated at the time of contracting. It is for this reason that arbitration agreements are often found to reach other types of non-contractual claims involving prohibited conduct not foreseen at the time of contracting.

Finally, when performing the relevant analysis, it will also be important to consider whether agreements to arbitrate should be interpreted in the same fashion as jurisdiction clauses. While different jurisdictions take varying approaches to this question, there are principled reasons justifying more favorable treatment for arbitration agreements, including obligations arising out of the New York Convention.

The effectiveness of broadly worded agreements to arbitrate in relation to follow-on damages claims will likely remain subject to uncertainty in Europe, at least until the CJEU's position in relation to agreements to arbitrate is clarified. By contrast, in the United States, where follow-on actions have long formed a familiar part of the litigation landscape, courts have frequently proved willing to refer follow-on claims to arbitration under standard clauses [See e.g. *JLM Industries, Inc. v. Stolt-Nielsen SA*,

387 F.3d 163 (2d Cir. 2004)]. It would be unfortunate if European courts developed a less accommodating approach to arbitration agreements in the follow-on setting than their sister jurisdictions overseas.

In view of the issues described above, parties seeking to ensure the effectiveness of their agreements to arbitrate for follow-on claims arising in a European setting may need to specifically address follow-on damages claims in their agreements to arbitrate, or at least indicate that agreements to arbitrate reach claims of a tortious nature.

The author is a Senior Attorney with Cleary Gottlieb Steen & Hamilton LLP, based in Paris, France. The views expressed herein are those of the author alone.