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# Arbitrating Antitrust Follow-on Damages Claims: A European Perspective (Part 2)

Aren Goldsmith (Cleary Gottlieb Steen & Hamilton LLP) · Wednesday, September 23rd, 2015

This is the second part of a post related to arbitration and antitrust follow-on damages claims in Europe. **Part 1**, which addressed problems of jurisdiction *ratione materiae* that arise in relation to follow-on damages claims, is accessible here.

**Part 2** of this commentary addresses additional challenges and opportunities that warrant attention when the possibility of arbitrating follow-on claims is considered. As explained below, even where an agreement to arbitrate can be interpreted as covering follow-on damages claims, additional obstacles arise due to the multi-party and multi-contract nature of follow-on actions.

*Additional Obstacles and Possible Solutions*

Even assuming resolution of the problem of jurisdiction *ratione materiae* in relation to follow-on claims, parties interested in submitting follow-on disputes to arbitration may face additional obstacles.

*First*, most follow-on damages actions in Europe today implicate a large number of actors. Even if an agreement to arbitrate can be identified in relation to a certain portion of the damages alleged against a single member of a cartel, for example under a supply agreement, it will rarely be possible to extend that agreement to all of the additional actors implicated in the follow-on litigation. A cartel supplier may not wish to invoke its agreement to arbitrate with one of its direct purchasers, where any decision in its favor against that purchaser will have uncertain preclusive effect outside of the arbitration.

For example, an arbitral award may have limited effect in the context of contribution claims by fellow cartel members (if they cannot be joined to the arbitration proceeding) for damages paid to other direct and indirect purchasers of the cartel. An argument could be made pursuant to the EU Damages Directive that amounts paid pursuant to an arbitral award should be considered when national courts adjudicate contribution claims. In particular, based upon the description of arbitration as a form of "consensual dispute resolution" at Recital 48 to the EU Damages Directive (which addresses "once-and-for-all settlement"), an arbitral award could be described as a

form of "prior consensual settlement" within the terms of Article 19(4) of the EU Damages Directive (which requires national courts to consider such "settlements" when deciding contribution claims). However, the meaning and impact of these provisions of the EU Damages Directive is far from clear. Indeed, few would consider an arbitral award to be a form of "consensual settlement".

Another problem that the cartelist in the example cited above would face would be the prospect of ongoing liability to the direct purchaser which participated in the arbitration proceeding. Such a risk results from Article 19(3) of the EU Damages Directive, which holds infringers liable for the portion of damages not covered by the "consensual settlement", where "non-settling co-infringers" are unable to make the purchaser whole for losses suffered. This is again subject to the uncertainty described above in relation to the unusual terminology used by the EU Damages Directive.

*Second*, follow-on actions often implicate a large number of contractual relationships. Thus, even assuming agreements to arbitrate exist and can be enforced in relation to the relevant claims and parties, it will likely be difficult to bring all claims relevant to a follow-on action before one arbitral tribunal. That is because existing tools for the consolidation of arbitrations are restrictive, and generally require evidence of explicit or implicit consent among the contracting parties that any dispute arising out of two or more contracts should be heard in the same proceeding. Where agreements contain clauses calling for arbitration under different institutional rules or with different seats, for example, consolidation generally will not be possible. Given the large number of contracts that may be implicated in any follow-on action, this means that parties may only be able to refer a small portion of any follow-on dispute to arbitration.

The most feasible option today for commercial parties interested in using arbitration in the follow-on context would appear to be to negotiate agreements to submit existing follow-on disputes to arbitration via *ex post* agreement. However, where a dispute has already arisen, this may be difficult. Prospective follow-on claimants may require incentives to agree to give up what may appear to be more favorable, higher publicity and less expensive (in many cases) national court forums.

While any *ex post* agreement will need to be sufficiently appealing to claimants and respondents to incentivize claimants to abandon court jurisdictions otherwise available to them, sufficient interest may exist in certain cases. For example, where the dispute involves parties that have ongoing business relationships to protect, parties may find confidential arbitration proceedings to be more compatible with their broader business interests than public court proceedings. The ability to agree to confidentiality protections may be very appealing not just to parties involved in an ongoing relationship, but also to parties that might otherwise be required to disclose sensitive business information in public proceedings. This concern can affect both respondents and claimants, since follow-on claimants are often subject to passing-on defenses (alleging that over-charges have been charged down the supply chain), requiring the disclosure of sensitive business information regarding sales and customers. Equally, parties may be attracted to the ability through arbitration to submit their dispute to an arbitral tribunal with the appropriate qualifications and resources (such as tribunal-appointed experts) to adjudicate the complex quantitative questions that arise in follow-on actions, which involve sophisticated econometric

evidence. Both sides of a follow-on dispute may also appreciate the ability to avail themselves in arbitration of adversarial procedures, such as cross-examination, to test the opposing side's evidence. Such procedures will not be available in all jurisdictions in Europe where an action might otherwise be brought.

The foregoing list of examples is non-exhaustive. In any given case, it will be necessary for the parties to compare available court venues to arbitration and determine what makes the most sense on a case-by-case basis. At a minimum, parties should think of the possibility of arbitration and whether it might be mutually appealing in any given follow-on case. To the extent that industry groups are convinced as a general matter that arbitration is preferable for follow-on litigation to court proceedings in Europe, they may wish to explore the possibility of drafting standard terms and conditions that could be used on an industry-wide basis to facilitate the submission of follow-on actions to arbitration (at least for direct purchaser claims). For instance, terms and conditions could incorporate by reference arbitration pursuant to a new procedural framework enabling the effective administration of consolidated, multi-party (business-to-business) follow-on actions in a European setting. Creative minds could certainly envision the provisions that would be needed to make such a regime possible.

*Looking Beyond the Parties*

Ultimately, the best hope for arbitration in the follow-on setting in Europe may lie with antitrust enforcement authorities. Though there is no indication that the European Commission would be open to such an approach at this time, the most obvious way to overcome the procedural obstacles identified above in relation to *ex ante* agreements to arbitrate, would be if the Commission were to incentivize parties to agree to global, one-stop international arbitration as a tool for private enforcement in Europe.

For example, if the Commission were to offer settlement packages involving significant reductions of fines in exchange for the agreement of infringers to consent, on an *erga omnes* basis, to arbitrate any claims submitted by a putative victim of the infringement, and put in place an appropriate procedural apparatus enabling the consolidation of such claims, it would be possible to bring follow-on actions into a single or limited number of arbitral proceedings. The only way to make such a framework appealing, however, would be to offer infringers significant discounts or the suspension of the fines that they would otherwise face.

Again, at the present time, there is reason to be skeptical that the Commission would be open to any such possibility, particularly so soon after the adoption of the EU Damages Directive. That said, just as the Commission's attitude toward commercial arbitration has evolved with time in the merger remedies context (where *erga omnes* undertakings to arbitrate have become more common and have given rise to one known ICC arbitration), a similar evolution might eventually be possible with time in the follow-on damages context. The recent adoption in the United Kingdom of a special regime for voluntary private redress schemes, which involve reductions in fines in exchange for the establishment of redress mechanisms, may encourage further openness to the use of alternative dispute resolution in the follow-on setting.

Serious policy analysis would be needed to support any discussion with the Commission regarding the advisability of developing rules to encourage the use of arbitration in the follow-on setting as a tool of private enforcement. Such analysis would be worthwhile because it is far from obvious that the current system, which makes arbitration difficult and potentially unattractive for follow-on actions, is optimal.

*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.*

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