Kluwer Arbitration Blog

Apple v. EBizcuss.com: Agreeing A Forum For Your Antitrust Disputes

Aren Goldsmith, Rüdiger Harms, Paul Stuart (Cleary Gottlieb Steen & Hamilton LLP) · Tuesday, December 25th, 2018

In a recent judgment providing a preliminary ruling in the case, *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018) ("***EBizcuss.com***"), the Court of Justice of the European Union ("***CJEU***") affirmed that jurisdiction clauses subject to EU law may be enforced by Member State courts in the context of actions for damages for abuse of dominance based on Article 102 TFEU.

As part of its judgment, the CJEU rejected any requirement that the jurisdiction clause make explicit reference to disputes relating to liability incurred as a result of an infringement of competition law. The CJEU thereby confined its earlier judgment in *CDC v. Akzo Nobel et al.* (C-352/13, May 21, 2015) ("***CDC***"), which had held that such an explicit reference was a prerequisite for applying a jurisdiction clause to cartel-related claims based on violations of Article 101 TFEU. *CDC* turned on the CJEU's view that cartel-based claims would not have been foreseen by the parties at the time of contracting and thus could not be found to have been included within the scope of the jurisdictional agreement, unless explicitly identified. [*see* here; R. Harms/J. Sanner/J. Schmidt, EuZW 2015, pp. 584-592]. The CJEU reasoned in *EBizcuss.com* that claims alleging abuse of dominance based on Article 102 TFEU, unlike cartel-damages claims based on Article 101 TFEU, may be foreseeable to parties at the time of contracting.

Case Law In The EU Member State Courts Interpreting *CDC* In Connection With Agreements To Arbitrate

The judgment in *EBizcuss.com* did not address agreements to arbitrate and as such has no formal significance for questions of arbitral jurisdiction. Whereas the CJEU has jurisdiction to resolve questions of EU law related to the scope of jurisdictional agreements subject to the Brussels Regulation and its Recast, it is questionable whether the CJEU has jurisdiction to resolve questions related to the interpretation of agreements to arbitrate, which are subject to national law.

Nonetheless, following the CJEU's ruling in *CDC*, national courts in various EU Member States have been asked to consider the relevance of the CJEU's case law related to jurisdiction clauses when deciding whether agreements to arbitrate drafted in general terms should be enforced to refer cartel-based damages claims to arbitration. These Member State courts have reached different

conclusions, which may be relevant where a party is considering invoking or has invoked an agreement to arbitrate in relation to claims based on EU competition law before EU Member State courts. The CJEU's most recent decision will likely enter into discussion as part of this emerging case law.

The first decision to consider *CDC* in relation to the interpretation of the scope of an agreement to arbitrate involved an action seeking damages based on an infringement of Article 81 of the (old) EC Treaty (now Article 101 TFEU). In a 2015 decision that does not contain detailed reasoning, the Court of Appeal of Amsterdam concluded that there was no "good reason" to depart from the rule in *CDC* when interpreting an agreement to arbitrate drafted in general terms. [*see Kemira Chemicals Oy v. CDC*, Case No. 200.156.295/01 (July 21, 2015, Court of Appeal Amsterdam), para. 2.16.] The Court of Appeal did not consider in its decision the distinctions that exist between arbitration law and EU law related to jurisdiction clauses.

A second decision emerged from the English High Court in February 2017. In its judgment in *Microsoft Mobile OY (Ltd) v Sony Europe Limited & Ors* [2017] EWHC 374 (Ch), the High Court was called upon to determine, in the context of an action alleging liability pursuant to Article 101 TFEU, an objection based on EU law to the enforcement of an arbitration agreement. Specifically, while the defendant contended that the claim for damages under Article 101 TFEU was precluded by the parties' agreement to arbitrate in their underlying supply agreement, the claimant contended that that agreement did not reach the claim because it did not refer expressly to disputes concerning liability incurred as a result of a competition law infringement.

The High Court first found that the relevant agreement to arbitrate reached the competition damages claim, relying on the inclusion in the contract of a specific obligation to negotiate pricing in good faith. The English court observed that this obligation would in principle have been breached if pricing was distorted by the existence of a price-fixing cartel. As such, there was a contractual claim falling within the arbitration agreement and the parties could be expected to have intended any tortious claim relating to the same matters to be resolved in the same forum as the corresponding contractual claim. The fact that the claimant asserted a purely statutory tort claim and did not rely upon a contractual breach as the basis for its claims did not alter the court's analysis, since the claimant could have alleged contractual claims. To allow otherwise would have allowed the claimant to circumvent the agreement to arbitrate simply by choosing a tortious rather than contractual cause of action.

The High Court then addressed the question of whether enforcement of the relevant agreement to arbitrate would be contrary to the requirements of EU law, which would have rendered the agreement inoperable and ineffective if found to be the case. In concluding that this was not the case, the English court considered at length the Opinion of Advocate General Jääskinen in *CDC*, whose arguments in that case were cited by the claimant in opposing arbitration before the High Court. Specifically, the court was referred to the Advocate General's argument that allowing arbitration would undermine EU law, including by causing the fragmentation of the relevant litigation. The High Court rejected this line of argumentation, noting that the opinion had not been followed by the CJEU, whose judgment did not in any event reach arbitration. Thus, the High Court held as a matter of English law that the arbitration agreement could reach the tortious claim for breach of Article 101 based on an alleged secret cartel.

Most recently, in a judgment dated September 13, 2017, the Regional Court of Dortmund agreed to apply agreements to arbitrate drafted in general terms to cartel-related damages claims based on an

infringement decision issued by the *Bundeskartellamt* (Federal Cartel Office). [*see* Landgericht Dortmund, Judgment of September 13, 2017 – 8 O 30/16 Kart]. The court observed that, as a matter of principle, arbitration agreements need to be interpreted broadly. Since parties usually do not intend to split claims based on contractual obligations (falling with the scope of an arbitration agreement) and based on statutory tort claims (to be litigated in court unless deemed to fall within the scope of an arbitration agreement), the court found that the arbitration clauses should be fully applied to the relevant competition-based claim.

While the case involved two German parties and was thus not subject to the then-Brussels Regulation, the court explicitly declined to follow the CJEU's position on foreseeability in relation to jurisdictional clauses, observing that claims of an unforeseeable nature (such as claims alleging fraud), which are unknown to one party at the time of contracting, may validly be submitted to arbitration under German law. The court questioned the proposition that the CJEU case law relating to jurisdiction clauses subject to EU law could be applied automatically to the interpretation of agreements to arbitrate, and further questioned the competence of the CJEU to interpret agreement to arbitrate in light of the fact that arbitration is expressly excluded from the scope of both the Brussels Regulation and the Brussels Recast. Finally, like the English High Court, the Regional Court of Dortmund rejected an argument that the principle of effectiveness of EU law would require a different conclusion.

Potential Relevance Of *Apple Sales International et al. v. EBizcuss.com* To Arbitration

The CJEU's most recent judgment provides helpful guidance in clarifying that the CJEU's earlier case law should not be construed as automatically precluding reliance on jurisdiction agreements worded in general terms whenever a dispute relates to infringements of EU competition law. The recent case law should have a similar moderating effect in relation to debates over the applicability of agreements to arbitrate drafted in broad terms, at least in relation to many disputes based on infringements of Article 102 TFEU.

The CJEU's decision to cabin its earlier case law in *CDC* was not a foregone conclusion. Prior to referring this question to the CJEU, France's Court of Cassation, in an earlier 2015 decision in the same matter, construed *CDC* as precluding application of the relevant jurisdiction clause to the distributor's claims based on an infringement of Article 102 TFEU. [*see Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 15 (citing the October 7, 2015 decision of the Court of Cassation).]

While the *EBizcuss.com* judgment appears to allow for greater contractual flexibility overall, the CJEU's apparent attachment to the decisional logic of the *CDC* case law, which turns on the foreseeability of specific types of claims, raises questions. Just as contracting parties rarely contemplate that their contractual relationship will be affected by a secret cartel, contracting parties rarely anticipate distortions resulting from abusive behaviors by a dominant undertaking. Parties often seek through the use of broad language to refer *all disputes* arising out of a commercial relationship to one forum for adjudication, and thereby avoid debates over what might or might not have been foreseen at the time of contracting.

The practical importance of the distinction that has been drawn by the CJEU will depend on parties' willingness to invoke agreements to arbitrate in relation to different types of claims

involving EU competition law. Whereas disputes related to abuse of dominance claims often are bilateral in nature, and thus may be addressed effectively through a single arbitration, cartel-damages actions in practice usually involve multiple parties and multiple contractual relationships. Multi-party actions may be more difficult to manage through arbitration clauses found in agreements that bind only a limited number of parties to the action. This limitation poses particular challenges in the context of damages actions based on EU competition law. On the other hand, certain features of international arbitration can be particularly appealing for complex disputes involving EU competition law. For further discussion of related issues, *see* here; A. Goldsmith, "Arbitration and EU Antitrust Follow-On Damages Actions," 34 ASA Bulletin 1 / 2016, pp. 10-40 (2016).]

Competition-based claims and defenses are asserted regularly in the context of complex commercial arbitrations in Europe. Thus, parties considering the use of arbitration for disputes involving European business interests would be well advised to follow the case law discussed in this post and to consider its ramifications both at the time of contracting and when any dispute involving violations (confirmed or alleged) of EU competition law breaks out.

The views expressed herein are those of the authors and should not be construed as necessarily reflecting those of their firm or of any of its clients.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Tuesday, December 25th, 2018 at 6:24 am and is filed under Antitrust arbitration, Arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.