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Antitrust Arbitration in Europe (Part II): The Scope and Effect of Arbitration Clauses (Microsoft Case)

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My previous blog post on this topic dealt with two issues stemming from the juxtaposition between the current arbitration legal framework and necessary due process requirements which are specifically developed for antitrust damages proceedings: (1) the necessary regulation of complex arbitration specifically designed for antitrust damages matters, and (2) the need to address information asymmetry in antitrust arbitration proceedings (through the introduction of discovery). This post is, on the other hand, focused on the scope and effect of arbitration clauses in antitrust damages matters. The recent English High Court decision of 28 February 2017, (Microsoft Mobile OY (Ltd) v Sony Europe Limited et al., [2017] EWHC 374 (Ch)) ("Microsoft case"), depicts a development of a new transnational phenomenon – antitrust arbitration. In the Microsoft case, the High Court made the decision to stay the present court proceedings on antitrust damages claims commenced by Microsoft Mobile Oy (Ltd) ("Microsoft"), to give effect to an arbitration clause agreed upon between the parties.

Microsoft, a company established under the laws of Finland, is a manufacturer and distributor of mobile telephone handsets, which contain lithium ion batteries ("Li-ion Batteries"). Microsoft brought the proceedings in its own right and as assignee of the rights of Nokia and its relevant subsidiaries, and claimed damages for losses caused by allegedly anti-competitive conduct in relation to the sale to Nokia and/or to Microsoft Mobile of Li-ion Batteries ("Cartel"). The Cartel, according to Microsoft, was allegedly formed by four companies established in three different jurisdictions: Sony Europe Limited (England and Wales), Sony Corporation (Japan), and LG Chem Limited and Samsung SDI Co Limited (South Korea) ("Defendants"). Microsoft held Defendants or any of them *jointly and severally liable* for the loss and damage which manifested itself in higher prices paid by Nokia and/or Microsoft Mobile for Li-ion Batteries and additional costs, incurred by financing the overcharge suffered by them.

Microsoft contended the jurisdiction of the English High Court based on Article 4 of the Brussels I Regulation (Recast), as Sony Europe, the first defendant, had domicile in England and Wales. The other Defendants are companies domiciled in Japan and the Republic of Korea; hence, Microsoft needed permission to serve the claim out of the jurisdiction pursuant to Part 6.36 of the Civil Procedure Rules. This post is further focused on a *jurisdictional objection* made by Sony Europe, which sought a stay of the proceedings against it pursuant to section 9 of the Arbitration Act 1996 on the grounds that the dispute between Microsoft and Sony Europe is subject to a valid arbitration clause.

Sony Europe contended that an arbitration clause concluded between it and Nokia was unaffected by the assignment to Microsoft Mobile and continued to bind Microsoft Mobile. Interestingly, this was a common ground between the parties. However, they departed on whether the claims brought in these proceedings against Sony Europe *fall within the scope of that arbitration clause*.

This matter was already discussed to a certain extent in international practice. For example, Dutch and Finnish courts found, that broadly worded arbitration agreements *do not* encompass antitrust disputes.[1)] In 2015, the CJEU decided on a similar matter upon the reference for a preliminary ruling from the Landgericht Dortmund (Germany) in the case Cartel Damages Claims Hydrogen Peroxide SA v Akzo Nobel NV et al., which involved the defendants from the same cartel. According to the CJEU,

> "A jurisdiction clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship, which limits the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. […] In the light of that purpose, 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." (Paras 68 and 69 of the CJEU Judgement)

The CJEU limited its opinion solely to jurisdiction clauses, i.e. choice of law clauses, leaving "the effectiveness of broadly worded agreements to arbitrate in relation to follow-on damages claims […] subject to uncertainty in Europe".

The English High Court's decision in the Microsoft case proves this standpoint by stating the following:

> "In conclusion, whilst I accept that it is possible for the provisions of EU law to permit a court to sideline or declare ineffective an arbitration clause, there is nothing in the decision of the Court in CDC to mandate such a course. […] I appreciate that the Court did not consider arbitration clauses specifically. However, that fact cannot disguise the basic truth that the Court's approach to the risk of "fragmentation of claims" was fundamentally different to that of the Advocate General, and involved a wholesale rejection of his approach. I can see nothing in the decision of the Court to require me to displace the effect of the arbitration clause as something inimical to EU law. Accordingly, I reject Microsoft Mobile's contention that the arbitration clause should be set aside or disregarded on the grounds of EU law." (Para. 81 of the English High Court's decision)

As mentioned in my previous post, collective redress plays an important role in private antitrust damages actions, as antitrust damages proceedings involve multiple claimants on one side and (possibly) multiple respondents (competition law infringers) on the other side. It is visible from the above citation that the High Court was aware that referring Microsoft to arbitration would lead to

the *fragmentation of claims* as the claims against Sony Europe would need to be submitted in arbitration, without the joinder of other parties, and Microsoft would lose its anchor defendant in England and Wales. However, the question before the Court was, therefore, whether the lack of collective redress within arbitration render the arbitration clause ineffective or inoperable. According to the English High Court, the answer was clearly "no".

As to the relation between contractual and tort claims, which were explicitly distinguished by the CJEU in regards to jurisdiction clauses, the English High Court held that:

> "[…] the mere fact that a claim in contract has not been pleaded is, to my mind, irrelevant. Were the manner in which a case was actually pleaded to matter, instead of how a case could have been pleaded, it would be easy for a claimant to circumvent the scope of an arbitration or jurisdiction clause by selectively pleading or not pleading certain causes of action. It would be an extraordinary outcome were a claimant successfully to be able to contend that, because a contractual claim had not been pleaded, a "parallel" claim in tort arising out of exactly the same facts and with a scope defined by that contract fell outside the scope of such a provision. The proposition only has to be stated to be rejected." (Para. 72(ii) of the English High Court's decision)

Besides posing this argument, which aimed at the prevention of abuse through the construction of claims, the High Court also found the connection between contractual and tort claims in this case to be considerable because since, for example and among other reasons, the extent to which the negotiated price was above the "good faith" price will inevitably involve an examination of the dealings between the defendant and the various other cartelists. Consequently, the English Court found the antitrust damages claims against Sony Europe *to fall under the arbitration clause* and stayed the court proceedings against Sony Europe.

The High Court's decision is a detailed and interesting read which brings a new stance within the EU on the matters discussed within. As such, it cannot be covered in its entirety in this post. However, from what was mentioned here, a several conclusions for the arbitration community can be made. Firstly, the position of EU national courts as to the enforcement of arbitration clauses in cases of antitrust damages claims is not yet uniform. Clear opposite stances on these issues in different jurisdictions can influence the choice of an anchor defendant, depending on a desired jurisdictional result. More importantly, the arbitration community should figure out as soon as possible how to deal with those claims that will be referred to arbitration, just as they were in the Microsoft case. Whereas an arbitration clause may perfectly well stand at the beginning of arbitration, this does not answer the question whether due process rights of a claimant seeking antitrust damages will be adequately protected within arbitration proceedings. In other words, the enforcement of arbitration agreements does not guarantee an enforceable arbitral award, and this may eventually result with a non-suitability of arbitration for such claims.

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References

?1 Case No. C/13/500953/HAZA 11-2560, CDC Project 13 SA v Akzo Nobel NV *et al.*, District Court of Amsterdam (June 4, 2014) (upheld by the Amsterdam Court of Appeals); East West Trading BV v. United Technologies Corp. and Others, District Court of Central Netherlands (November 27, 2013); CDC Hydrogen Peroxide SA v Kemira Oyj, District Court in Helsinki, Finland (July 4, 2013).

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