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Antitrust Arbitration: How German Courts Are Supporting the Pro-Arbitration Trend Launched in the Microsoft Case

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During the last decade, antitrust arbitration has experienced some turbulent times. While many national courts decided against the arbitrability of competition disputes, a handful of them allowed for such proceedings to take place before an arbitral tribunal. Recently, the U.S. Department of Justice has relied on arbitration to resolve an antitrust dispute in the United States v. Novelis Inc. et al. Case. In Europe, the trend of enforcing arbitration clauses for the resolution of antitrust matters was launched in Microsoft Mobile OY v. Sony Europe Ltd. et al. case, EWHC 374 (Ch) (2017) ("the Microsoft Case"). This blog post talks about the German stance on the matter.

In the Judgement 8 O 30/16, decided by the Regional Court of Dortmund ("the Court") on 13 September 2017 ("the Judgement"), the plaintiff's action was deemed inadmissible because the Court considered that the arbitration agreements concluded between the parties cover claims for cartel damages, and thus these claims should be brought before an arbitral tribunal.

The plaintiff was a joint venture set up to implement a railway construction project, whereas the defendant offered the full range of track superstructure materials the plaintiff needed for the realisation of its undertaking. Back in 2003, the plaintiff placed an order with the defendant for the supply of brand-new rails, and the creation of a continuous railway track. Concerning this order, the parties concluded an arbitration agreement, according to which "*all disputes arising from the order […] shall be settled by a court of arbitration in accordance with the Arbitration Regulation for the Construction Industry*". In connection with the second order, the parties also agreed to the jurisdiction of an arbitration court in a very broad clause covering "*all disputes arising in connection with the subcontractor agreement*".

Concerning the above-mentioned transactions, the plaintiff raised two claims:

1. demanding a declaration that the defendant is liable for compensation for all damages plus interest which were incurred to the plaintiff on the basis of cartel agreements and/or anti-competitive agreements by the defendant in tenders within the meaning of Section 298 German Criminal Code in connection with the contracts granted by the plaintiff to the defendant in the years 2001 to 2011 for the supply of permanent way materials,
2. and also requesting that the defendant is obliged to indemnify the plaintiff for the costs of the extrajudicial legal prosecution plus interest.

The plaintiff claimed that the arbitration agreements did not cover claims for damages under cartel law such as those asserted in the present case. On the other hand, the defendant objected to the jurisdiction of the Court due to the existence of the arbitration agreements.

The Court discussed and addressed several points pertinent to private enforcement of antitrust damages in arbitration – the issue of arbitrability, the scope of the arbitration clause, and the foreseeability of antitrust claims – which we will address in this blog post in turn.

The Arbitrability of Antitrust Matters

The Court considered both aforementioned agreements to arbitrate as valid according to Sections 1029 and 1030 of the German Code of Civil Procedure, and adjudicated that they cover disputes under cartel law for compensation for damages because cartel infringements and resulting claims for damages are generally arbitrable under German law. It has been consistently established under German court practice that priority must be given to a broad interpretation owing to the pro-arbitration approach. This applies both to narrow and broad arbitration clauses.

To better understand the significance of this decision, it is worthwhile taking a look at the historical development of the arbitrability of antitrust matters at international level.

In the landmark case Mitsubishi Motors v. Soler, 473 US 614 (1985), discussed in an earlier post, the US Supreme Court laid the groundwork for antitrust arbitration by declaring antitrust claims as arbitrable, if they are "*encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction*". Up to this moment, the arbitrability of competition disputes was widely considered an exclusive matter reserved to state courts. In its decision, the US Supreme Court argued that the pro-arbitration approach and promoting the development of American business and trade speak in favour of a change of paradigm, which could be implemented by allowing arbitral tribunals to rule on antitrust claims.

More than a decade later, the Eco Swiss China Time Ltd. V. Benetton International NV case, C-126/97 (1999), dealt with the question whether arbitral tribunals are obliged to apply European Community ("EC") competition law *ex officio* in cases where no competition law claims were asserted by the parties, considering that under Dutch law an arbitral award exceeding the limits of the parties' mandate could be set aside. Unsurprisingly, the ECJ gave priority to EC competition law due to its significance for the functioning of the internal market.[1)]

The Microsoft Case, addressed in a previous blog post, marks a further essential step in the development of antitrust arbitration. In its decision of 28 February 2017, the English High Court stayed the court proceedings on antitrust damages commenced by Microsoft, giving effect to an arbitration clause concluded between the parties despite the risk of fragmentation of claims. The High Court also emphasised the considerable connection between contractual and tort claims.

The case decided by the Regional Court of Dortmund reaffirms the basic assumptions made in all three decisions with one exception. Starting with the Mitsubishi Case, the German Court also unequivocally confirmed the arbitrability of antitrust claims. However, the Court did not specifically address the question if the arbitral tribunal has the right to decide on antitrust matters *ex officio.* A comparison with the Microsoft Case shows that the claim before the German court

was also dismissed because effect was given to the arbitration clause, and treating contractual and tort claims differently was to a large extent considered unnecessary.

The Scope of Arbitration Clauses

Furthermore, the Court dealt with the issue of whether the arbitration clauses in this case cover competition law matters. The issue was addressed at two levels: First, were the clauses narrow or broad and to what extent that mattered, and secondly, are the claims of tortious nature in general covered by such clauses. The answers are intertwined and co-dependent to an extent. The issue of narrow and broad arbitration clauses stems from the wording of an arbitration clause, especially the juxtaposition between the phrases "*claims arising out of the contract*" and "*claims in connection to the contract*" respectively. The Court opted for the *in favorem* approach, which governs both narrow and broad clauses, and invoked previous cases that confirmed that "*preference is to be given to the interpretation that leads to the validity and applicability of the arbitration clause and thus paves the way for arbitration"* (Judgement, para. 20). Furthermore, the Court concluded that the scope of application of arbitration agreements is not limited to contractual claims. Unjust enrichment claims due to the invalidity of the contract are also recognised as "*claims arising from the contract*", and even fall within the scope of narrow arbitration clauses. Considering that claims for damages under cartel law based on Section 33 Subsection 3 of the Federal Act against Restraints of Competition (old version, now Section 33a) are of a tortious nature, they should be treated as ordinary tort claims. It is recognised in German practice that even where a narrow arbitration clause was concluded, tort claims fall within its scope if the conduct in dispute is identical with a breach of contract. Whether these two actions are identical, could be determined by comparing the life circumstances surrounding the cartel infringement and the acquisition process in dispute, or the act of which the defendant is accused. The Court further argued that the plaintiff should not be able to avoid the application of the arbitration clause by basing its claim on tort law instead of on the underlying contract.

It is clear from the Court's reasoning that despite the thus far prevailing stance of European courts not to enforce arbitration clauses under similar circumstances,[2)] the Court sided with the English court's decision in the Microsoft Case. This is a welcoming development having in mind party autonomy, but it might as well raise a further question in regards to the adequacy of "regular" arbitration procedures for the resolution of competition law matters, especially since the EU Damages Directive has identified the minimum procedural and substantive standard to be applicable before national courts.

The Foreseeability of Claims

Finally, the Court dealt with the ECJ's decision in the Cartel Damage Claims Case,[3)] introduced by the plaintiff, in which the ECJ held that for a jurisdiction clause to apply to antitrust damage claims, it must have been foreseeable at the time of the conclusion of the clause that such claims would also be covered by it. The ECJ concludes that claims for damages under cartel law should thus only be covered by such jurisdiction clauses which also relate to disputes arising from liability due to a violation of competition law.

The Court tackled this argument directly and persuasively by stating that the lack of foreseeability at the time of the conclusion of the arbitration agreement is not a convincing criterion for exclusion

> "*because even in the case of other breaches of contract, e.g., fraudulent misrepresentation or even an initial objective impossibility – which, however, would easily lead to claims under the contract – the respective circumstance is certainly not known to one of the parties at the time of conclusion of the contract and the arbitration agreement.*" (Judgement, para. 35)

Furthermore, the Court argued that the decision of the ECJ only applies to jurisdiction agreements, and its results could not be automatically transferred to arbitration agreements; thus, excluding the ECJ decision as an authority in this case. It is worth highlighting here that the English court in the Microsoft Case came to a similar conclusion by stating that there is "*nothing in the decision of the [ECJ] to require […] to displace the effect of the arbitration clause as something inimical to EU law.*" (Judgement in the Microsoft Case, para. 81). These two decisions rendered by the English and the German court provide a solid ground for national courts to disregard the application of the ECJ judgement on arbitration clauses in the future and an incentive for the ECJ to directly address the enforceability of arbitration clauses in competition law matters.

References

?1 Common Market Law Review 37, 459-478, 2000.

?2 See, e.g., decisions in *District Court of Helsinki, in CDC Hydrogen Peroxide Cartel Damage Claims SA v. Kemira Oyj, interlocutory judgement 36492, 4 July 2013, case number L 11/16750; District Court of Amsterdam, in CDC Project 13 SA v. Akzo Nobel N.V. and Others, 4 June 2014, ECLI:NL:RBAMS:2014:3190; Amsterdam Court of Appeal, in Kemira Chemicals Oy v. CDC Project 13 SA, 21 July 2015, ECLI:NL:GHAMS:2015:3006; District Court of Rotterdam, in Stichting De Glazen Lift v. Kone B.V. and Others, 5 May 2016, ECLI:NL:RBROT:2016:4164; District Court of Rotterdam, in Stichting Elevator Cartel Claim v. Kone B.V. and Others, 23 October 2019, ECLI:NL:RBROT:2019:8230.*

?3 C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and Others*.

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