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Arbitrability of Cartel Damages Claims: Eu and English Law Compared – and English Law Clearly Wins!

This article examines whether cartel damages claims sounding in tort are arbitrable by comparing EU and English law. It argues that, in principle, both under EU law and under English law the answer is in the affirmative, provided that the claim falls within the terms of the arbitration agreement, construed under the law applicable to it. The contrary view, based on the case law of the Court of Justice on exclusive jurisdiction clauses, is not tenable. In theory, under EU law, a national court has a duty to disapply an arbitration agreement if its enforcement makes the exercise of the right to damages impossible or excessively difficult. In practice, however, given that arbitration is a well-tested procedure for the resolution of both contractual and tortious claims, it is difficult to conceive of circumstances in which this would be the case.

Il presente articolo tratta della possibilità di riferire ad arbitri controversie extracontrattuali concernenti il risarcimento di danni causati da un cartello, attraverso un'analisi comparatistica del diritto dell'Unione europea e del diritto inglese. In linea di principio, in entrambi i sistemi giuridici studiati, le predette controversie possono essere decise dagli arbitri a condizione che rientrino nell'ambito di una convezione di arbitrato, da interpretare secondo la legge ad essa applicabile. L'opinione contraria, che si fonda sulla giurisprudenza della Corte di giustizia in materia di clausole attributive di giurisdizione esclusiva, non è giustificata. In teoria, ai sensi del diritto dell'Unione europea, il giudice nazionale avrebbe l'obbligo di disapplicare una convenzione arbitrale che deferisce agli arbitri controversie risarcitorie extracontrattuali per danni causati da un cartello se l'applicazione della convezione arbitrale rendesse, nel caso di specie, l'esercizio del diritto al risarcimento impossibile o eccessivamente difficile. Tuttavia, in pratica, data la comprovata efficacia dell'arbitrato come strumento di risoluzione di controversie sia contrattuali che extracontrattuali, è difficile immaginare circostanze in cui tale obbligo debba essere in concreto invocato.

1. Introduction

This article discusses whether and, if so, in what circumstances, cartel damages claims can be arbitrated by comparing EU and English law. International arbitration plays a central role in resolving disputes in the international business community. It is often considered speedier

and more cost-effective than litigation. It gives the parties a similarly final and enforceable award to litigation, but with considerable advantages in terms of the choice of the arbitrators, procedural flexibility and neutrality of the forum. As such, it is considered favourably by most legal systems.[1]

The question of whether competition disputes are arbitrable was the subject of extensive debate in the past.[2] In recent decades, however, jurisdictions in the United States and Europe have now made it clear that, at least in principle, competition disputes are capable of settlement by arbitration.[3] This issue has significant practical implications given that, under Article V(2) of the New York Convention, recognition and enforcement of an award may be denied when the competent court in the country where recognition and enforcement are sought finds that the subject matter of the dispute is not capable of settlement by arbitration. However, uncertainty and complexity persist. Case law of the EU Court of Justice cast some doubt on the arbitrability of certain cartel claims. The Advocate General's opinion in the *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC)* case[4] lends some weight to the suggestion that such claims are unlikely to be within the scope of an arbitration clause as a matter of EU law. Although the Court of Justice did not rule on whether the damages claims were covered by arbitration agreements, it did decide that an exclusive jurisdiction clause does not cover damages claims for breach of Article 101(1) TFEU unless such claims are explicitly referred to in the clause. The Amsterdam Court of Appeal extended this ruling also to arbitration agreements.[5] In England, Peter Smith J, in the Chancery Division of the High Court of England and Wales, came to the opposite conclusion that the arbitrability of cartel damages claims was a matter for the law applicable to the arbitration agreement and that EU law could only require the disapplication of an otherwise valid and effective arbitration clause if the arbitration of the dispute would run counter to the effectiveness of EU law.[6]

This article is structured as follows. Firstly, it sets the scene by reviewing the state of the art on the general theme of arbitrability of competition disputes under EU law and, secondly, on the related theme of arbitrability of tortious claims. Thirdly, it analyses the *CDC* case of the EU Court of Justice and, fourthly, the way in which the same Court distinguished *CDC* in the subsequent *Apple v eBizcuss.com* case. Fifthly, the possible implications of the *CDC* case under

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[1] Indeed the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('New York Convention') has been ratified by 160 countries to date.

[2] For an analysis of this debate, and generally on competition law and arbitration, see R Nazzini, *Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies* (OUP, 2004) 325–347 and R Nazzini, *Competition Enforcement and Procedure* (OUP, 2nd ed, 2016, forthcoming) ch 9. See also J Werner, 'Application of Competition Laws by Arbitrators — The Step Too Far' (1995) 12(1) *Journal of International Arbitration* 23; H Gharavi, 'EC Competition Law and the Proper Scope of Arbitration' (1997) 63(1) *Arbitration* 59; L Radicati di Brozolo, 'Antitrust: a paradigm of the relations between mandatory rules and arbitration — a fresh look at the 'second look'' (2004) 7(1) *International Arbitration Law Review* 23.

[3] The modern position was summarised in *Mitsubishi v Soler* 473 US 614, 105 S Ct 3346 (1985), 638, where the court stated '[i]f [arbitral tribunals] are to take a central place in the international legal order, national courts will need to shake off the old judicial hostility to arbitration'.

[4] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC)* ECLI: EU:C:2015:335.

[5] *Kemira Chemicals Oy v CDC Project 13 SA* ECLI: NL:GHAMS:2015:3006 (21 July 2015, Gerechtshof Amsterdam).

[6] *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch).

EU law are discussed. Sixthly, the approach of the English courts is examined. Finally, conclusions are drawn.

2. Arbitrability of Competition Disputes under EU Law

It is now firmly established that competition law issues are arbitrable in the EU.[7] Although the Court of Justice has not dealt with this question explicitly, this conclusion may be inferred from several rulings that EU law recognizes the arbitrability of competition disputes. For example, in *Nordsee v Reederei Mond*, the ECJ was asked the question of whether an arbitral tribunal, faced with an issue of competition law, was entitled to apply to the Court of Justice for a preliminary ruling under Article 267 TFEU.[8] The Court held that an arbitral tribunal was not a 'court' for the purposes of this Article, however no objection was made to the intrinsic power of the tribunal to consider competition issues.[9] Similarly, in the subsequent *Eco Swiss* decision, the Court of Justice made a preliminary ruling that Article 101 TFEU must be regarded as public policy within the meaning of the New York Convention when considering an application for the annulment of an arbitral award.[10] It has been rightly argued that these decisions would be meaningless 'if arbitrators are excluded in principle from ruling upon and enforcing competition law'.[11] Therefore, by inference, the arbitrability of EU competition disputes is clearly allowed, as a general principle, under EU law.

In England and Wales, it is generally accepted that competition disputes are arbitrable. In *ET Plus SA v Welter*, in relation to an alleged infringement Articles 101 and 102 TFEU, Gross J put the matter to rest when he stated that 'there is no realistic doubt that such "competition" or "antitrust" claims are arbitrable: the issue is whether they come within the scope of the arbitration clause, as a matter of its true construction'.[12] This is in line with previous cases where the arbitrability of competition disputes has simply been assumed with no objection raised.[13]

In France, the case of *Labinal v Mors* confirmed the arbitrability of such disputes as early as 1993. In that case, it was argued that a joint-venture agreement, containing an arbitration clause, was incompatible with Article 101 TFEU. The Court of Appeal of Paris, reversing a lower court decision, held that the presence of competition issues did not prohibit arbitrators from deciding the matter.[14] The arbitrability of competition disputes in France is now well established. A similar approach has been taken by the courts in other jurisdictions in Europe.

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[7] Nazzini, *Competition Enforcement and Procedure*, ch 9. In the United States, the arbitrability of competition claims was established by the Supreme Court in *Mitsubishi v Soler*, on which see Nazzini, *Competition Enforcement and Procedure*, ch 9; A Mourre, 'Arbitrability of Antitrust Law from the European and US Perspectives' in G Blanke and P Landolt (eds.), *EU and US Antitrust Arbitration* (Alphen aan den Rijn: Wolters Kluwer, 2011) 25.

[8] Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond HochseefischereiNordstern AG & Co KG* [1982] ECR 1095 (*Nordsee*).

[9] Ibid [14].

[10] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055 (*Eco Swiss)*, [39].

[11] Lord Mustill and S C Boyd QC (eds.), *Commercial Arbitration: 2001 Companion* (Butterworths, 2nd ed., 2001) 79–80.

[12] *ET Plus SA v Welter* [2006] 1 Lloyd's Rep 251, [51].

[13] *Bulk Oil v Sun International* [1986] 2 All ER 744.

[14] *Labinal v Mors* (1993) Rev Arb 645 (CA, Paris).

In Italy, the Court of Appeal of Milan explained that 'any doubts [as to the arbitrability of competition claims] are now superseded by the evolution of legal thinking, as well as by case law, both at the national and Community level'.[15] Most other jurisdictions in Europe have followed suit.[16]

3. Arbitrability of Tort Claims

Under EU law, any person who has been harmed by a cartel has the right to recover compensatory damages.[17] Generally, unless the charging of a cartel price is also a breach of an express or implied term in a contract between the claimant and the defendant, the cause of action arises in tort.[18]

If the issue arises in tort in respect of a contract between the parties which contained an arbitration clause, whether the dispute is arbitrable will depend on whether it falls within the arbitration clause properly construed.[19] This will in turn depend on the law applicable to the arbitration clause, and is ultimately a matter of contractual interpretation. Although this does not restrict the arbitrability of competition disputes in principle, a restrictive contractual construction may have a similar impact.

When interpreting the scope of an arbitration agreement, a substantial majority of jurisdictions provide for a 'pro-arbitration' presumption, whereby a clause should be interpreted expansively to include disputed claims, in cases of doubt.[20] Historically, English law made technical distinctions in the scope of arbitration clauses based on the precise wording of the agreement. Tort disputes were more likely to be covered by an arbitration agreement applicable to disputes 'arising out of' a contract than where the agreement was applicable to dispute 'arising under' a contract.[21] The House of Lords decision in *Fiona Trust v Privalov* marked a clear departure from this practice in 2007, in favour of a pro-arbitration approach.[22] In the words of Lord Hoffman, 'the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported

[15] *Istituto Biochimico Italiano v Madaus AG*, Milan Court of Appeal, 13 September 2002, (2003) 4 Dir Ind 346.

[16] Mourre, 'Arbitrability of Antitrust Law from the European and US Perspectives', 42–43. Until recently, a notable exception was in Lithuania, where the arbitration law prohibited the arbitration of disputes connected with competition issues. Competition disputes are now arbitrable following the introduction of the new edition of the Lithuanian Law on Commercial Arbitration Article 12 in 2012.

[17] Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 ('Damages Directive'), Art 3.

[18] In English law, see *South Australia Asset Management v Milk Marketing Board* [1984] AC 130; in German law, s 33(1) GWB provides for a claim for a cease and desist order and for a remedy, whereas s 33(3) GWB provides for a claim to damages; in French law, the cause of action arises under the general provision on tortious liability: Articles 1382 and 1383 of the French Civil Code; the same approach is adopted under Italian law: see Art 2043 of the Italian Civil Code.

[19] *ET Plus SA v Welter* [2006] 1 Lloyd's Rep 251, [41].

[20] G Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd ed., 2014) 1326.

[21] *Heyman v Darwins* [1942] AC 356, 385, 399.

[22] *Fiona Trust v Privalov* [2007] 4 All ER 951 (HL).

to enter to be decided by the same tribunal'.[23] In the wake of this case, such distinctions are of less importance in the UK, and tortious disputes between the contracting parties are likely to be within the scope of a typically drafted arbitration agreement.[24]

The approach in France is similar and French courts do not hesitate to adopt a pro-arbitration approach to the interpretation of arbitration clauses. Tort claims may fall within the scope of an arbitration clause even if the clause focuses on contractual claims. Recently, several decisions, especially of the Paris Court of Appeal, have demonstrated this wide acceptance of the jurisdiction of arbitral tribunals. In 2008, the Paris Court of Appeal ruled that an arbitral tribunal had jurisdiction to grant remedies on the ground of damage to the reputation of a company, whereas the arbitration clause was limited to the interpretation, the performance and the consequences of the contract.[25] Consequently, the arbitral tribunal was entitled to decide a tort claim even though the arbitration clause concerned contractual claims. The French *Cour de cassation* confirmed this approach in a 2015 case, stating that the broad nature of the terms of the arbitration clause reflected the parties' desire to submit all disputes arising from the contract to arbitration, without confining themselves to the qualification as contractual or tortious, even if the clause was framed as referring to the validity, interpretation, performance and termination of the contract.[26] In addition, the jurisdiction of arbitral tribunal to hear tort claims is not limited to the extent that such claims are "parallel" to contractual claims. Indeed, in a 2012 case, the Paris Court of Appeal held that an arbitral tribunal had jurisdiction to hear tort claims (unfair competition claims and counterfeit claims), even if no breach of contract was alleged, holding that even if these claims were of a tortious nature, an arbitration clause relating to any dispute arising out of or in connection with the contract is applicable to tort claims as long as they are connected with the contract.[27] Consequently, a tort claim resulting from a contractual relationship between the parties will most of the time fall within the scope of the arbitration clause.

In the United States, the form of words of the arbitration clause play a more significant role in determining whether a tortious claim may be brought under the clause. As a result, tort claims may be found to fall outside the scope of the clause. Despite several lower courts adopting an increasingly pro-arbitration approach in this context, several decisions have created significant uncertainty.[28] In *Cape Flattery Ltd v Titan Maritime LLC*, the 9th Circuit Court of

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[23] Ibid [13].

[24] In the *Airbus SAS v Generali Italia Spa* case ([2019] EWCA Civ 805), Lord Justice Males reached a similar conclusion with respect to a jurisdiction clause granting exclusive jurisdiction to English Courts. In this case, the clause provided that "*The parties hereto irrevocably agree that the courts of England shall have exclusive jurisdiction to settle any disputes arising out of or in connection with this Agreement or any non-contractual obligations connected with it*". Consequently, it was held that such a clause encompassed "*any non-contractual obligations connected with the [contract], including any dispute connected with a substantive claim under the warranties contained in the Purchase Agreement*" ([76]).

[25] Paris Court of Appeal, 17 January 2008, No. 06/06750

[26] Cass. Civ. 1ere, 21 October 2015, No. 14-25.080 "La généralité des termes de la clause compromissoire traduisait la volonté des parties de soumettre à l'arbitrage tous les litiges découlant du contrat sans s'arrêter à la qualification contractuelle ou délictuelle de l'action engagée"

[27] Paris Court of Appeal, 14 March 2012, No. 11-12354

[28] For a pro-arbitration approach see *Dialysis Access Ctr, LLC v RMS Lifeline Inc* 638 F 3d 367 (US Ct of Apps (1st Cir), 2011), 380–381.

Appeals held that the arbitration clause, which referred to 'any dispute arising under this agreement' was not applicable to a claim in tort rather than contract.[29] While this decision has been the subject of academic criticism,[30] such an approach cannot be ignored and does means that careful drafting is required in order to ensure tort disputes will be within the scope of the arbitral agreement.

Where the arbitration clause is sufficiently wide in English law, the arbitrability of tort claims, including competition claims, has long been considered as established. In *ET Plus SA v Welter*, Gross J observed that that reference to disputes involving the 'performance or the interpretation' of the contract did not exclude competition law claims, provided they were sufficiently connected to the non-performance of the contract.[31] However, the arbitrability of cartel damages claims has been brought into question by the Opinion of the Advocate General and the judgment of the Court of Justice in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC)*.[32]

4. The *CDC* Case

In *CDC*, the Landgericht Dortmund (Germany) asked the Court of Justice for a preliminary ruling on the question as to whether the principle of effectiveness of EU competition law allowed account to be taken of arbitration and jurisdiction clauses contained in contracts for the supply of goods, where this has the effect of excluding the jurisdiction of a court having jurisdiction under Articles 5(3) and 6(1) of the Brussels I Regulation in relation to all the defendants or all or some of the claims brought.[33] The reference was made in an action for damages brought by the claimant against a number of defendants whom the Commission had found to have engaged in a cartel concerning hydrogen peroxide and perborate.[34]

The Advocate General concluded that the effectiveness of Article 101 TFEU does not, in itself and as a general principle, preclude the implementation of arbitration clauses in the context of an action for damages for breaches of that Article. However, it would be contrary to the effectiveness of the prohibition of anti-competitive agreements to allow a defendant to rely on an arbitration clause to exclude the jurisdiction of a national court under the Brussels I Regulation when the party against whom that clause is relied upon was, at the time of entering into the contract containing the arbitration clause, unaware of the unlawful agreement in question and of its unlawful nature and could not have foreseen that the arbitration clause would apply to a claim for damages in tort based on such an agreement.[35]

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[29] *Cape Flattery Ltd v Titan Maritime LLC* 647 F 3d 914 (US Ct of Apps (9th Cir), 2011), 922–24; Also see the Supreme Court decision in *Granite Rock Co v Int'l Bhd of Teamster* 130 S Ct 2847 (2010), 2862.

[30] Born, above n 20, 1353.

[31] *ET Plus SA v Welter* [2006] 1 Lloyd's Rep 251, [51].

[32] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC)* ECLI: EU:C:2015:335.

[33] Ibid [14].

[34] Case COMP/F/C.38.620 *Hydrogen Peroxide and perborate* [2006] OJ L353/54.

[35] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC)* ECLI: EU:C:2015:335, Opinion of Advocate General Jääskinen, [132].

The Advocate General relied on two grounds for his conclusion. Firstly, he relied on the principle of effectiveness of the prohibition of anti-competitive agreements under Article 101 TFEU in support of his conclusion.[36] An arbitration agreement would make the exercise of the right to damages 'more difficult' in a cartel context because of the multiplicity of claimants and defendants and the situation where the cartel may be implemented through numerous contracts possibly with different legal entities within the same corporate group.[37] A certain lack of trust in arbitration is also apparent from the comment that an arbitration may have its seat outside the EU so that the likelihood of the EU competition rules not being applied is higher when jurisdiction on a cartel damages claim is conferred on arbitrators rather than on the courts of a Member State.[38] This line of reasoning is, at least in theory, consistent with EU law. If arbitration were to render the exercise of the right to damages not 'more difficult',[39] as the Advocate General suggested, but 'excessively difficult' or 'impossible',[40] then the principle of effectiveness of EU law would prevail over the national rules that recognize party autonomy in the choice of arbitration as a method of dispute resolution. The difficult question would then arise as to whether the principle of effectiveness of EU law would prevail over the Member States' obligations under Article II of the New York Convention. However, the conflict could be resolved simply by interpreting an arbitration clause along the lines suggested by the Advocate General so that an arbitration clause in a contract, unless the parties have expressly agreed otherwise, does not cover a non-contractual claim for damages arising out of a cartel between one contractual party and third parties.

Secondly, the Advocate General relied, by analogy, on the principle that Article 23(1) of the Brussels I Regulation, now restated in Article 25(1) of the Brussels I Regulation (Recast), provides that the parties may agree that a court or courts of a Member State are to have jurisdiction with respect to disputes that have arisen or may arise 'in connection with a particular legal relationship'. A dispute concerning a claim for damages for a cartel would not, according to the Advocate General, be in connection with the legal relationship in respect of which the arbitration agreement was entered into.[41] This interpretation appears to be wrong as a matter of law. The scope and construction of arbitration clauses are governed by national law. Whatever the correct interpretation of Article 23(1) of the Brussels I Regulation and its equivalent in the Brussels I Regulation (Recast) may be under EU law, this has nothing to do with the interpretation of arbitration clauses under national law. If the scope of exclusive jurisdiction clauses under EU law is construed restrictively, it does not follow that this should be so for arbitration clauses under national law.

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[36] Ibid [133].
[37] Ibid [126].
[38] Ibid [100].
[39] Ibid [125].
[40] Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] I-06297; Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA,* and *Nicolò Tricarico, Pasqualina Murgolo v Assitalia SpA* [2006] I-06619 (*Manfredi*); Case C-126/97 *Eco Swiss*.
[41] Case C-352/13 *CDC*, Opinion of Advocate General Jääskinen, [129].

The Court of Justice, with a rather sibylline explanation, did not rule on the applicability of arbitration agreements.[42] However, it did rule that exclusive jurisdiction clauses governed by Article 23(1) of the Brussels I Regulation and contained in the supply contracts between the claimants and the defendants could not cover claims in tort for breach of competition law unless competition disputes were expressly covered by the clause.[43] Following the reasoning of the Advocate General on this point, the Court held that jurisdiction clauses could only cover disputes resulting from the particular legal relationship in respect of which the clause was entered into. This requirement was intended to avoid a party being taken by surprise if a jurisdiction clause were to apply to disputes with the other party but concerning a legal relationship other than that based on the contract containing the clause. An undertaking entering into a jurisdiction clause in a supply contract unaware that the other party was engaged in a cartel could not reasonably foresee the occurrence of a dispute in tort arising from such a cartel. It could, therefore, not be bound by the jurisdiction clause.[44] It is important to note that the Court of Justice did not rule that exclusive jurisdiction clauses did not apply to cartel damages claims because this would undermine the effectiveness of EU competition law.[45] The Court, perhaps unsurprisingly given that the exclusive jurisdiction clauses in question were those governed by Article 23(1) of the Brussels I Regulation, thus conferring jurisdiction on the courts of a Member State, expressly excluded that this was the case.[46]

5. Cartel and non-cartel claims distinguished: *eBizcuss.com*

In the *Apple v eBizcuss.com* case, the Court of Justice limited its earlier judgment in the *CDC* case to cartel damages claims only.[47] In *Apple v. eBizcuss.com*, Apple Sales International had concluded a contract with eBizcuss. The contract included a clause providing for the jurisdiction of the Irish courts. In 2012, eBizcuss brought proceedings against Apple Sales International, Apple Inc (USA) and Apple Retail (France) before the Paris Commercial Court for

[42] Case C-352/13 *CDC*, [58]: 'it must be made clear that, with regard to certain terms derogating from otherwise applicable rules allegedly contained in the contracts at issue but which do not fall within the scope of application of Regulation No 44/2001, the Court does not have sufficient information at its disposal in order to provide a useful answer to the referring court'.

[43] Ibid [67]–[72].

[44] Ibid [68]–[70].

[45] The Court reached this conclusion with regards to an arbitration clause included in Bilateral Investment Treaty (BIT) executed between Slovakia and the Netherlands in a recent judgement *Slovak Republic v Achmea BV* (Case C-284/16, EU:C:2018:158). The Court found that by concluding the BIT, Slovakia and the Netherlands 'established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law'. On the other hand, the Court of Justice ruled in its Opinion 1/17 (Full Court, 30 April 2019) that the creation of an investment tribunal to settle disputes between host States and foreign investors under the Comprehensive Economic and Trade Agreement (CETA), concluded between Canada and the EU, does not threaten the full effectiveness of EU law. Since this tribunal stand outside the EU judicial system, the Court considered that it will have to confine itself to the examination of EU law as a matter of fact, to the exclusion of any interpretation of that law (see [76]). Following the Opinion of Advocate General Bot (Opinion 1-17, delivered 29 January 2019, [214]-[219]), the Court of Justice also concluded that this is highly improbable that this tribunal will undermine the effectiveness of EU law, and in particular of EU competition law, since these regulations are binding for CETA tribunal (see [86]).

[46] Ibid [62]–[63].

[47]Case C-595/17 *Apple Sales International v. MJA, acting as liquidator of Ebizcuss.com* ECLI:EU:C:2018:854.

acts of unfair competition and abuse of a dominant position on the basis of French Law and of Article 102 TFEU.
By judgment of 26 September 2013, that Commercial Court upheld the objection of lack of jurisdiction raised by Apple Sales International on the ground that the jurisdiction clause conferred jurisdiction on the Irish courts. Eventually, the case came before the *Cour de cassation*, which decided to stay the proceedings and to refer the matter to the Court of Justice for a preliminary ruling to determine whether Article 23 of Regulation No 44/2001 must be interpreted as allowing a national court before which an action for damages has been brought on the basis of Article 102 TFEU to apply a jurisdiction clause in the contract, including in cases where that clause does not expressly refer to disputes relating to an infringement of competition law.
The Court of Justice ruled that Article 23 of Brussels I Regulation must be interpreted as meaning that the application, in the context of Article 102 TFEU, of a jurisdiction clause within the contract is not excluded on the sole ground that that clause does not expressly refer to competition disputes. The Court distinguished the *CDC* case on the following bases: (1) contrary to cartels under Article 101 TFEU that are in principle not directly linked to the contractual relationship, anti-competitive conduct under Article 102 TFEU can materialise in contractual relations;[48] and (2) while unlawful cartels are most of the time unforeseeable, allegations of abuse of a dominant position based on Article 102 TFEU could be expected by the parties at the time of conclusion of the contract.[49] Both grounds for distinguishing *CDC* are unpersuasive.
It is not correct to say that a cartel is not directly linked to the contractual relationship with a customer that is charged an allegedly supra-competitive price. The charging of a supra-competitive price is the means by which a cartel is implemented. No undertaking would enter into a cartel other than with the aim of charging supra-competitive prices to its customers. It is true that as a matter of EU law the charging of a supra-competitive price is not a necessary element of a cartel, which is a so-called object restriction, that is, a restriction of competition that is prohibited regardless of its likely or actual anti-competitive effects. But the rules under which a cartel is prohibited under EU law do not mean that the cartel price, which causes harm to a customer, is not directly linked with the contractual relationship. It plainly is. The price is generally the most important term in a contract. In the words of the Court itself, therefore, a cartel 'can materialise in contractual relations […] and by means of contractual terms'. It is impossible to understand the difference between a supra-competitive price or abusive contractual terms in a contract with a dominant undertaking and a supra-competitive price in a contract with a cartel member. The only material difference is that a cartel price presupposes an agreement with third parties before being transposed into a contract with a customer, whereas a dominant undertaking can exercise market power unilaterally. But it is impossible to understand how this can make a difference to the interpretation of dispute resolution clauses. The Advocate General in *eBizcuss* did touch upon this point, opining that in *CDC* the

[48] Case C-595/17, *Apple v eBizcuss.com*, [28].
[49] Case C-595/17, *Apple v eBizcuss.com*, [29].

solution adopted by the Court had 'the advantage of avoiding the compensation proceedings being split up between several fora/courts, as would have resulted from a broad interpretation of the scope of the jurisdiction clauses contained in contracts'.[50] But this argument amounts to saying that if, *ex post*, it is more efficient or advantageous for a party to litigate rather than arbitrate or any time a claim can be made against a third party as well, as jointly and severally liable tortfeasor, guarantor, assignee, not bound by the arbitration clause, and in all other infinite permutations in which a claim against a third party may be combined with a claim against a contractual party, an arbitration clause does not apply. However, this would render arbitration agreements unenforceable in many circumstances and, more importantly, at the behest of the claimant. There are endless settings in which an arbitrable claim against one party may be combined with a non-arbitrable claim against another party. A claimant may even do so simply to avoid arbitrating, even if the non-arbitrable claim is clearly unfounded. In English law, it has long been established that the mere fact that a claim may be brought against a number of defendants, some of whom may not be bound by the arbitration clause, does not make the clause unenforceable. In *Ashot Egiazaryan, Vitaly Gogokhiya v OJSC OEK Finance*, Burton J strongly rejected the suggestion that no conspiracy claim can be covered by an arbitration clause, because a conspiracy always needs more than one party. He added that 'the fact that there may be outstanding claims against other parties arising out of the same facts is not an objection to the bringing of a claim which falls within the terms of an arbitration clause'.[51] This point may now be doubted in light of the judgment of Rix LJ in *Ryanair v Esso*, a case concerning a non-exclusive jurisdiction clause. In that case, Rix LJ, with whom Patten and Tomlinson LJJ agreed, said: 'I think that rational businessmen would be surprised to be told that a non-exclusive jurisdiction clause bound or entitled the parties to that sale to litigate in a contractually agreed forum an entirely non-contractual claim for breach of statutory duty pursuant to Article 101, the essence of which depended on proof of unlawful arrangements between the seller and third parties with whom the buyer had no relationship whatsoever, and the gravamen of which was a matter which probably affected many other potential claimants, with whom such a buyer might very well wish to link itself'.[52] However, *Ryanair v Esso* is not a case concerning arbitration agreements and, therefore, does not contradict and even less implicitly overrule *Egiazaryan*. Furthermore, His Lordship's observation does not appear to be part of the ratio of the case. The ratio is that, for a tortious claim to be covered by an arbitration clause in a contract, the tortious claims must be closely connected with a parallel or concomitant contractual claim which is at least arguable.[53] In the comment above, Rix LJ was simply distinguishing *Fiona Trust* on the facts.

Neither is the proposition that an abuse of dominance cannot 'be regarded as surprising' for the customer any more plausible. Very often the issue of dominance itself is controversial and

[50] Case C-595/17, *Apple v eBizcuss.com*, Opinion of Advocate General Wahl [63].

[51] *Egiazaryan v OSJC OEK Finance*, [31]. Claims in the tort of conspiracy have been found to fall within an arbitration clause in, e.g., *Fortress Value v Blue Skye* and *Mabey and Johnson Ltd v Danos* .

[52] *Ryanair v Esso* [2013] EWCA Civ 1450 ('*Ryanair v Esso*'), [46].

[53] *Ryanair v Esso* [21], [27]–[41], [44].

unclear, as whether an undertaking is dominant or not depends on complex market analysis. Even less clear-cut may be an abuse of a dominant position. To establish an abuse of a dominant position it is often necessary to rely on substantial information that is confidential to the dominant undertaking and only a competition authority, in the exercise of its powers of investigation, can obtain. It is even possible that a supplier is not dominant at all when the contract is concluded and becomes dominant during the course of the contractual relationship. Does it mean that, in this case, an arbitration clause in the contract would not cover a claim for damages for abuse of a dominant position?

The Court's attempt to distinguish *CDC* in *eBizcuss.com* is, in fact, clear proof that the former case is wrongly decided. There is no principled way of distinguishing a cartel damages claim from a claim for other breaches of competition law. If *CDC* is right, then whether a competition claim falls within an exclusive jurisdiction clause would depend on a case-by-case analysis of foreseeability. The Court in *eBizcuss.com* rightly refused to draw this conclusion and, relied, instead, on a general distinction between cartel damages claims and other competition claims. By doing so it showed how flimsy, subjective and fundamentally flawed are the tests of link to the contractual relationship and foreseeability applied in *CDC*. These tests are wrong when applied to jurisdiction clauses. *A fortiori*, they are when courts, such as the Court of Appeal of Amsterdam, purport to apply them to arbitration clauses, which – luckily one is tempted to add - are not even governed by EU law.

6. Can the *CDC* Ruling be Extended to the Construction of Arbitration Agreements?

Given that the Court of Justice did not rule on the applicability of arbitration clauses in actions for damages for breach of competition law, the question arises as to whether the judgment in *CDC* has any implications for the construction of arbitration clauses. The better view is clearly that it does not for the simple reason that the ruling of the Court on jurisdiction clauses is based on the interpretation of Article 23(1) of the Brussels I Regulation. This has nothing to say about the application, scope and construction of arbitration clauses, which are governed entirely by national law.[54] The ruling cannot be extended to arbitration clauses, whether by analogy or by applying the same general principles because the situations are different and governed by different legal rules, of different source and with different content. This conclusion might have been different if the Court had relied on the principle of effectiveness of EU competition law to exclude the application of exclusive jurisdiction clauses to cartel damages claims. Given that the principle of effectiveness of EU law may require the disapplication of national law, it may have been possible to argue that, if exclusive jurisdiction clauses were to be limited in their application, then so should arbitration clauses. This is not to say that it would have been well founded but at least there would have been a legal basis for such an argument. Currently, there is nothing in the judgment that could support any inference that, under EU law, the scope of arbitration clauses should be limited with respect to cartel damages claims.

[54] On the law applicable to the arbitration agreement, see R Nazzini, 'The Law Governing the Arbitration Agreement: A Transational Solution?' [2016] 65 *International and Comparative Law Quarterly* 3, 681.

Even if the matter is not directly affected by the case law of the Court of Justice, it is an open question whether national courts may be inclined to interpret arbitration clauses as excluding cartel damages claims. The judgment of the Amsterdam Court of Appeal in *Kemira* clearly goes in that direction. First, the Court applied the *CDC* case to jurisdiction clauses holding that, since such clauses were drafted in the abstract with reference to a contractual relationship, 'the disadvantaged undertaking was not aware of the illicit cartel agreements and thereby the dispute was not reasonably foreseeable when it agreed to the clause, as such the dispute cannot be regarded as having its origin in the agreed contractual relationship'.[55] This, it might be argued, is a straightforward application of *CDC*. Whether that case was rightly decided or not, it was not open to a national court to conclude otherwise as a matter of law. However, the Amsterdam Court of Appeal went on to apply the same principle to arbitration clauses, holding that 'there is no ground to rule differently on the arbitration clauses. The disadvantaged undertakings cannot be regarded as having agreed to the arbitration clauses in relation to claims that would arise due to the infringement of competition rules'.[56] This approach is troubling. Firstly, the Court simply applied the *CDC* case to arbitration clauses, which is wrong as a matter of EU law. Secondly, the Court disapplied arbitration clauses without any reference to the law applicable to them and their construction. This appears to be contrary to basic conflict of laws principles. Finally, the Court reached such an astonishing conclusion without any reasoning at all. Therefore, and whatever Dutch law may have been on this issue, *Kemira* does not appear to be a sound precedent to be followed in the European Union.

7. English law approach to arbitrability of cartel claims

The current trend in international arbitration seems to be in the opposite direction in that arbitration clauses are given as wide a meaning as possible. English law provides an excellent example of a balanced approach in a non-EU, arbitration-friendly jurisdiction.

In *Fiona Trust & Holding Corpn v Yuri Privalov*, the House of Lords held that an arbitration clause that referred to arbitration all disputes 'arising under' a charterparty covered disputes concerning whether the charterparty was procured by bribery. The question is always one of objective construction of the arbitration clause in light of its purpose. Lord Hoffmann, with whom the other members of the Court agreed, described the purpose of the arbitration clause as that of ensuring that disputes to which a legal relationship between the parties may give rise are decided by a tribunal which they have chosen.[57] He went on to say that there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another. The rational and objective intention of the parties to an arbitration clause is to have all disputes arising out of the legal relationship to which the clause relates decided

[55] *Kemira Chemicals Oy v CDC Project 13 SA* ECLI: NL:GHAMS:2015:3006 (21 July 2015, Gerechtshof Amsterdam), [2.14].
[56] Ibid [2.16].
[57] *Fiona Trust v Privalov* [2007] 4 All ER 951 (HL), [6].

by the same tribunal. As a consequence, one would need to find very clear language before deciding that they must have had such an intention.[58]

In light of *Fiona Trust*, the test to be applied to determining whether a cartel damages claim is arbitral is two-fold: (a) firstly, it needs to be decided whether the cartel damages claim arises out of the relationship to which the clause relates; (b) if it does, then the claim would fall outside the clause only if the parties have excluded it by very clear language. The relevant limb of the test is the first as the second is unlikely to arise in practice and, if it does, should not be too difficult to apply.

Under the first limb of the test, there are certain factors that are unlikely to be relevant under English law. Firstly, the mere fact that the claimant was not aware of the cartel at the time of entering into the clause is clearly not relevant to exclude a cartel damages claim from the scope of an arbitration agreement. In rejecting the argument that the shipowners were unaware that the charterparty was procured by bribery at the time when it was entered into, Lord Hope said in *Fiona Trust* that 'the purpose of the clause is to provide for the determination of disputes of all kinds, whether or not they were foreseen at the time when the contract was entered into'.[59]

Secondly, it is not relevant that the claim may be brought against a number of defendants, some of whom may not be bound by the arbitration clause. In *Ashot Egiazaryan, Vitaly Gogokhiya v OJSC OEK Finance*, Burton J strongly rejected the suggestion that no conspiracy claim can be covered by an arbitration clause, because a conspiracy always needs more than one party. He added that 'the fact that there may be outstanding claims against other parties arising out of the same facts is not an objection to the bringing of a claim which falls within the terms of an arbitration clause'.[60] This point may now be doubted in light of the judgment of Rix LJ in *Ryanair v Esso*, a case concerning a non-exclusive jurisdiction clause. In that case, Rix LJ, with whom Patten and Tomlinson LJJ agreed, said: 'I think that rational businessmen would be surprised to be told that a non-exclusive jurisdiction clause bound or entitled the parties to that sale to litigate in a contractually agreed forum an entirely non-contractual claim for breach of statutory duty pursuant to article 101, the essence of which depended on proof of unlawful arrangements between the seller and third parties with whom the buyer had no relationship whatsoever, and the gravamen of which was a matter which probably affected many other potential claimants, with whom such a buyer might very well wish to link itself'.[61] However, His Lordship's observation does not appear to be part of the ratio of the case. The ratio is that, for a tortious claim to be covered by an arbitration clause in a contract, the tortious claims must be closely connected with a parallel or concomitant contractual claim

[58] Ibid [7].

[59] Ibid [27].

[60] *Ashot Egiazaryan, Vitaly Gogokhiya v OJSC OEK Finance, The City of Moscow* [2015] EWHC 3532 (Comm) ('*Egiazaryan*'), [31]. Claims in the tort of conspiracy have been found to fall within an arbitration clause in, e.g., *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2012] EWHC 1486 (Comm) ('*Fortress Value*') and *Mabey and Johnson Ltd v Danos* [2007] EWHC 1094 (Ch) ('*Mabey and Johnson v Danos*').

[61] *Ryanair v Esso* [2013] EWCA Civ 1450 ('*Ryanair v Esso*'), [46].

which is at least arguable.[62] In the comment above, Rix LJ was simply distinguishing *Fiona Trust* on the facts. If the comment were part of the ratio, it is respectfully submitted that it would be clearly wrong as a valid and effective arbitration clause cannot be disapplied, as a matter of English law, simply because the claimant would wish to join other claimants in suing the same defendant or because the claimant would wish to bring related claims against defendants who are not bound by the same arbitration clause. Such situations may very often arise in arbitration and if they were sufficient to disapply arbitration clauses, this would effectively be the end of arbitration. This was clearly not what Rix LJ had in mind when making the comment in question.

Finally, it is clear that the mere fact that the claim sounds in tort rather than in contract does not mean that it cannot be brought within an appropriately worded arbitration clause. This has been long established in English law.[63] Article II(1) of the New York Convention explicitly states that the dispute referred to arbitration does not need to be contractual.[64]

The key element of the test is thus purely one of the objective intention of the parties. Does the cartel claim arise out of the relationship to which the arbitration clause relates? It is clear that not all tort claims committed by one party to a contract against another can be brought within an arbitration clause in a contract which provides for all disputes arising out of the contract to be referred to arbitration. The tort must arise out of the contractual relationship between the parties but not, of course, in the strict sense that the cause of action must be a contractual one. When does a tort arise out of a contractual relationship between the parties? Generally, for a claim in tort to be brought within an arbitration clause in a contract the claim must have a 'sufficiently close connection' with the transaction.[65] In *Ryanair v Esso*, the Court of Appeal held that a non-exclusive jurisdiction clause would apply to a tortious claim only if the claimant could assert against the defendant an 'arguable',[66] 'parallel',[67] 'closely analogous',[68] or 'concomitant'[69] contractual claim with which the claim in tort is closely connected. On the facts, Article IVV of the contract between the parties provided that 'if at any time a price or fee provided in this Agreement shall not conform to the applicable laws, regulations or orders of a government or other competent authority, appropriate price or fee adjustments will be made'. This term was held not to apply to cartel prices so that there was no arguable contractual claim with which a claim in tort could be closely connected.[70]

In *Microsoft Mobile v Sony Europe*, Peter Smith J dealt with the applicability of an arbitration clause in a long-term supply contract to a cartel damages claim in tort. His Lordship confirmed

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[62] Ibid [21], [27]–[41], [44].
[63] *Egiazaryan*, [30]; *Fortress Value*; *Mabey and Johnson v Danos*; *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560.
[64] New York Convention, Art II(1).
[65] *Woolf v Collis Removal Service* [1948] 1 KB 11 (CA) 18–19; *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1994] 1 Lloyd's Rep 168 (CA)*; Empresa Exportadora De Azucar (CUBAZUCAR) v Industria Azucarera Nacional SA (IANSA) (The Playa Larga and Marble Islands)* [1983] 2 Lloyd's Rep 171.
[66] *Ryanair v Esso*, [21].
[67] Ibid [44].
[68] Ibid.
[69] Ibid [12] (referring to Ryanair's argument).
[70] Ibid [27]–[41].

that, absent extremely clear wording, a court would presume that the parties would have intended the same tribunal to deal with contractual disputes arising out of the relationship, as well as any 'parallel' claims in tort.[71] It was, therefore, necessary to consider whether the tortious claim is sufficiently closely related to any contractual claims arising out of the relationship, whether such contractual claims are pleaded or not.[72] If a contractual claim was pleadable against the defendant for breach of express contractual obligation to negotiate prices in good faith, then the arbitration clause would cover the tortious claim too.[73]

It may be doubted whether this approach, still much preferable than that in *Kemira*, is still too restrictive. In principle, it would seem that a claim that, because of an agreement or concerted practice with third parties, the seller has sold goods or provided services to the buyer at an inflated price has a sufficiently close connection with the contract whether or not the charging of a cartel price is also a breach of contract or closely connect with an analogous contractual claim. It may well be argued that the tort could not have been committed if the contract had not been entered into. Indeed, the contract is the means by which the unlawful agreement or concerted practice is implemented so as to cause harm. Generally, the price is an essential element of a contract and the charging of a cartel price is unlawful. On this analysis, any cartel damages claim relating to prices charged under a contract containing a sufficiently widely drafted arbitration clause should be covered by the clause. Still, the approach in *Ryanair v Esso* and *Microsoft v Sony Mobile* may emerge as a reasonable compromise between the two extremes of systematically disapplying arbitration clauses to cartel damages claims, on the one had, and considering an arbitration clause presumptively applicable to such claims without further inquiry (provided that the wording of the clause is wide enough).

The issue remains as to whether the principle of effectiveness of EU competition law makes a difference to this analysis. While the judgment in the *CDC* case has nothing to say on this, the Opinion of the Advocate General suggested that it may do. The test is whether the application of the arbitration clause would make the enforcement of the right to damages impossible or excessively difficult. In *Microsoft Mobile v Sony Europe*, Microsoft had argued that enforcing the arbitration clause would lead to 'fragmentation' because (a) other defendants could not be joined in arbitration and (b) the claimant would lose its 'anchor defendant' in England and Wales, so that it would not be able to claim against the other members of the cartel in that jurisdiction. Peter Smith J held that nothing in the *CDC* case compelled him to declare the arbitration clause ineffective.[74] His Lordship was clearly correct. The mere fact that, by entering into an arbitration agreement, a party may lose tactical advantages that it may have in litigation, however significant such advantages may be, cannot lead to the disapplication of valid and effective arbitration clauses. The principle of effectiveness of EU law would only require such a disapplication if it were established that pursuing a cartel damages claim for breach of EU law in arbitration would be impossible or excessively difficult. This is a very strict

[71] *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch), [45].
[72] Ibid [72].
[73] Ibid.
[74] Ibid [81].

test to meet and, in most but exceptional circumstances, it will not be met. Arbitration provides a means, alternative to litigation, to resolve disputes. There is no suggestion — and hundreds of years of experience support this argument — that to pursue a claim for damages in tort, rather than in contract, is impossible or excessively difficult, whether or not the tort is committed by several tortfeasors or against several claimants, who may not all be bound by the same arbitration clause or an arbitration clause at all.

8. Conclusion

Although it is settled that most types of competition disputes are arbitrable in principle, the debate continues in the realm of cartel damages claims. This article has shown that the *CDC* decision does not *require* national courts to interpret the scope of arbitration clauses as excluding cartel damages claims or to disapply them in light of the principle of effectiveness of EU law. The outcome of each case will depend on the law applicable to the arbitration agreement and the precise words in the agreement itself and is not a matter governed by EU law. The approach of the Amsterdam Court of Appeal in *Kemira*, which simply extended the reasoning in CDC to arbitration clauses, is, therefore, wrong as a matter of EU law and does not appear to conform to general principles of conflict of laws and international arbitration law.

English law adopts a far better approach, more in line with international arbitration principles and party autonomy. *Microsoft Mobile v Sony Europe* adopts the right approach to the construction of an arbitration clause: (a) firstly, the clause under review must be construed under its governing law; (b) secondly, it is necessary to determine whether the application of the arbitration clause to a cartel damages claim makes the exercise of the claimant's right to damages under EU law impossible or excessively difficult. Under the first limb of the analysis, *Microsoft Mobile v Sony Europe* held that an arbitration clause would cover a cartel damages claim only if such a claim is closely connected to an arguable contractual claim. It may be doubted whether this position is still too strict. It is certainly arguable that a claim in tort, whether the tort consists in the charging of an unlawful contract price, arises in connection or in relation to the contract, whether or not the claimant would also be able to plead a closely connected contractual claim. Still, *Microsoft Mobile v Sony Europe* is a much better precedent than *Kemira* in that it adopts the right approach under EU law and is consistent with general principles of conflict of laws and international arbitration law.

In the light of the Advocate General's opinion in *CDC*, it cannot be excluded that the principle of effectiveness of EU law may require, in exceptional circumstances, EU national courts to disapply an arbitration agreement which would otherwise cover a cartel damages claim if to make the claim in arbitration would render the exercise of rights conferred by EU law impossible or excessively difficult. This, however, is a question to be answered on a case-by-case basis and the threshold for the court to disapply the arbitration agreement is a very high one. It would not be sufficient for the claimant to persuade the court that it would have been more advantageous for the claimant to make its claim in court or that the claimant was not aware of the cartel when he entered into the arbitration agreement. The claimant must prove

that to arbitrate the claim would make the exercise of rights conferred by EU law impossible or excessively difficult. Given that arbitrators routinely decide damages claims, whether sounding in tort or in contract, and including claims involving issues of a technical or economic nature, or involving parties who are not bound by the same arbitration clause or by any arbitration clause at all, it is difficult to conceive of circumstances in which such a burden may ever be satisfied.

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