ARE CLAIMS FOR TORTIOUS DAMAGES FOR BREACH OF THE ANTITRUST RULES ARBITRABLE IN THE EUROPEAN UNION? SOME REFLECTIONS ON THE CDC CASE IN THE COURT OF JUSTICE

Renato Nazzini

Keywords: Competition Law, Arbitration, Private Enforcement, Cartel Damages Claims, Arbitrability

Abstract: This article discusses whether cartel damages claims are arbitrable under EU law. Although it is settled that most types of competition disputes are arbitrable in principle, the Opinion of the Advocate General and the ruling of the Court of Justice in Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC) raise the question as to whether cartel damages claims fall within arbitration clauses entered into at a time when the claimant did not have knowledge of the cartel. This article argues that the CDC case does not compel national courts to interpret the scope of arbitration clauses as excluding cartel damages claims. The outcome of each case will depend on the law applicable to the arbitration agreement and the precise words in the agreement itself and it is not a matter governed by EU law. It cannot be excluded that the principle of effectiveness of EU law may require national courts to disapply arbitration agreements on the facts of a particular case but the threshold is a high one. It would not be sufficient for the claimant to persuade the court that it would have been more advantageous for him to make its claim in court or that the claimant was not aware of the cartel at the time of entering 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 arbitral tribunals are well equipped to deal with a wide range of disputes, including tortious claims and claims involving issues of a technical or economic nature, it is difficult to conceive of circumstances in which this threshold may be met.

1. INTRODUCTION

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 choice of the arbitrators, procedural flexibility and neutrality of the forum. As such, it is considered favourably by most legal systems. Indeed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The New York Convention) has been ratified by 155 countries to date.

However, difficulties arise where a dispute concerns a matter of public importance. Critics argue that private and confidential arbitral...
tribunals may afford insufficient protection to the public interest, and can be used as a means for companies to circumvent national or international laws.\(^3\) As such, in most jurisdictions, certain types of dispute, for example relating to criminal law,\(^4\) child custody\(^5\) and insolvency matters,\(^6\) may be considered incapable of being settled by arbitration.\(^7\)

The question of whether competition disputes are arbirtrable in this sense was the subject of extensive debate in the past.\(^8\) The question 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. 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.\(^9\)

Nonetheless, there remain areas of uncertainty. For example, as a matter of construction, any dispute relating to a breach of competition rules must still fall within the particular arbitration clause. The rules on contractual construction continue to evolve and may differ between jurisdictions. Although a restrictive construction of the scope of an arbitration clause does not prevent the arbitrability of competition disputes in principle, it may be used to the same effect.

\(^3\) For a restatement of the orthodox position, see the judgment in the US case of *American Safety v McGuire* 391 F.2d 821 (US Ct of Apps (2nd Cir), 1968) where the court noted that ‘the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make […] antitrust claims […] inappropriate for arbitration.’

\(^4\) An arbitrator may still be able to rule on the private law consequences of a dispute involving matters of criminal law. For example see *The London Steamship Owners’ Mutual Insurance Association Ltd v The Kingdom of Spain and The French State* [2015] EWCA Civ 333, paras 77 – 82.

\(^5\) In England and Wales, see *Hyman v Hyman* [1929] AC 601. In the United States, opinions diverge. Against arbitrability see *Schechter v Schechter* 881 NY 2d 151 (NY App Div, 2009). In favour of arbitrability see *Fawzy v Fawzy* 199 NJ 456, 456 (NJ Sup Ct, 2009), where New Jersey joined Pennsylvania, Michigan, and Colorado in its determination that parents can submit child custody issues to arbitration.

\(^6\) The situation ultimately depends on the relevant state law and the type of insolvency issue in dispute. For an overview on the arbitrability of disputes involving insolvency matters see D Jones, ‘Insolvency and arbitration: an arbitral tribunal’s perspective’ [2012] 78(2) Arbitration 123, 127.


\(^9\) 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.’
Moreover, recent case law of the EU Court of Justice casts some doubt on the arbitrability of certain cartel claims. Indeed, the Advocate General’s opinion in the Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC) case,\(^\text{10}\) 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.\(^\text{11}\)

This article will discuss whether cartel damages claims are arbitrable under EU law. First, it begins by tracing the evolution of this debate to the present consensus in the United States and European Union. Secondly, it considers the debate on the arbitrability of disputes relating to Article 101(3), which has also been resolved in favour of arbitrability. Thirdly, it examines the arbitrability of tort claims as a matter of contractual construction. Fourthly, it addresses the uncertainty created in the wake of the recent CDC decision. Finally, conclusions are drawn.

2. Arbitrability in United States

It is widely agreed that the turning point in the debate on arbitrability was the decision by the US Supreme Court in Mitsubishi v Soler in 1985.\(^\text{12}\) In that case, the Court reversed the approach that had prevailed for nearly half a century, which precluded the arbitration of antitrust claims.\(^\text{13}\) The Supreme Court held that statutory claims under the Clayton Act\(^\text{14}\) are arbitrable as the statute does not prohibit waiver of judicial forum. The Court noted that by agreeing to arbitrate, the parties are not waiving their substantive rights under the Sherman Act, but merely trading “the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”.\(^\text{15}\) Nothing in the Sherman Act could be interpreted as prohibiting this.\(^\text{16}\)

Although the Court rejected the idea that arbitration of antitrust disputes would endanger the effective application of antitrust law, the Court emphasised that the arbitrators were still obliged to apply antitrust law and that there remained a possibility for the courts to take a

---

\(^{10}\) Case C-352/13 Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC) ECLI:EU:C:2015:335.


\(^{13}\) American Safety v McGuire.

\(^{14}\) 15 USC § 15.

\(^{15}\) Mitsubishi v Soler, 628.

\(^{16}\) There has been subsequent discussion of whether arbitration is permitted where it prevents particular remedies or procedures under the Act from being used: American Express Co v Italian Colors Restaurant 133 S Ct 2304 (2013).
‘second look’ at the award to ensure it was not contrary to public policy. This has become known as the ‘second look’ doctrine. The precise scope of this review is the subject of further debate and is discussed below.

3. Arbitrability under EU Law

It is now firmly established that competition law issues are also arbitrable in Europe. Although the Court of Justice has not dealt with this question explicitly, it may be inferred from several rulings that EU law recognizes the arbitrability of competition disputes. For example, in Nordsee v Reederi 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. 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. 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 annulment of an arbitral award. It has been argued that these decisions would be meaningless ‘if arbitrators are excluded in principle from ruling upon and enforcing competition law.’ Therefore, by inference, the arbitrability of EU competition disputes is accepted in the European context.

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.’ This is in line with previous cases where the arbitrability of competition disputes has simply been assumed with no objection raised.

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

---

18 Nazzini, Competition Enforcement and Procedure, ch 9.
20 ibid, para 14.
24 Bulk Oil v Sun International [1986] 2 All ER 744.
presence of competition issues did not prohibit arbitrators from deciding the matter.\textsuperscript{25} 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. 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.’\textsuperscript{26} Most other jurisdictions in Europe have followed suit.\textsuperscript{27}

4. THE HISTORICAL DEBATE ON ARBITRABILITY OF ARTICLE 101(3)

Some additional concerns have been raised with regard to the arbitrability of Article 101(3) TFEU, although this too is now settled. Prior to the entry into force of the modernisation regime on May 1 2004, the granting of individual exemptions under Article 101(3) was an exclusive prerogative of the Commission.\textsuperscript{28}

The modernisation regime widened the jurisdiction of the national courts so that they could now rule on whether the conditions under Article 101(3) were satisfied in an individual case, no prior decision of the Commission being required. The Regulation, however, was silent with regard to the position of arbitral tribunals, as they are not considered as national courts under EU law.\textsuperscript{29}

When the modernisation regime was introduced, there was a divergence of views on this matter.\textsuperscript{30} One concern was that the absence of a reference to arbitral tribunals in Regulation 1/2003 had the effect of prohibiting the direct applicability of Article 101(3) in this context.\textsuperscript{31} Another objection was that the application of Article 101(3) required analysis of complex factual and economic issues which arbitral tribunals were not equipped for, given that they do not benefit from the cooperation laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003).

\begin{itemize}
\item \textsuperscript{25}Labinal v Mors (1993) Rev Arb 645 (CA, Paris)
\item \textsuperscript{26}Istituto Biochimico Italiano v Madaus AG, Milan Court of Appeal, 13 September 2002, (2003) 4 Dir Ind 346.
\item \textsuperscript{27}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.
\item \textsuperscript{28}Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition
\item \textsuperscript{29}Case 102/81 Nordiso, para 14.
\item \textsuperscript{31}P Landolt, Modernised EC Competition Law in International Arbitration (The Hague: Wolters Kluwer, 2006) 101- 103.
\end{itemize}
mechanisms under Regulation 1/2003. With regard to the first objection, commentators have noted that the EU had not so far legislated on arbitrability and it would have been strange to include such a reference in Regulation 1/2003. Furthermore, by rendering the rights and obligations under Article 101 directly enforceable in national courts, it then becomes a question of national law rather than EU law whether an arbitral tribunal had jurisdiction. Given the support for arbitrability in the various Member State courts, there is no reason to distinguish the approach to Article 101(3) from other provisions in Article 101 and 102.

The objection that competition disputes are too complex has similarly been debunked by critics. Firstly, in practice, it is clear that arbitral tribunals generally have equal if not greater expertise than courts to deal with such issues. Secondly, as discussed below, a flexible framework can allow arbitral tribunals to benefit from the assistance of competition authorities that courts have recourse to under the provisions for cooperation in Regulation 1/2003. Furthermore, the flexible nature of arbitration means that action can be taken to ensure issues under Article 101(3) are correctly addressed, for example by appointing arbitrators with sufficient expertise in competition law and using appropriate experts during the assessment and presentation of evidence. For these reasons, it is now widely agreed that disputes arising under Article 101(3) are equally capable of being settled by arbitration as any other competition issue.

5. ARBITRARIBILITY OF TORT CLAIMS

If the remedy arises in tort in the absence of a pre-existing contractual relationship between the parties, it is highly unlikely that the issue will have to be determined by arbitration. Claims for damages by a competitor against colluding undertakings or against a dominant company will generally not be covered by an arbitration clause. However, it cannot be excluded that, after determination of the issue of liability, the parties agree to refer the issue of quantum to an arbitral tribunal. A number of arbitrators have amassed considerable competition law experience in recent years, and are likely to be able to deal with such issues more effectively than courts may do.

---

32 Regulation 1/2003 Art.15 and the Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC [2004] OJ C101/54, do not apply to arbitration.


34 ibid.

35 An analogous point was made by the Supreme Court in Mitsubishi v Soler, 614.


37 ibid.
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. 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. 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. 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. 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 to enter to be decided by the same tribunal.’ 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.

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. In Cape Flattery Ltd v Titan Maritime LLC, the 9th Circuit Court of 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. While this decision has been the subject of academic criticism, such an approach cannot be ignored and does mean that careful drafting is required in order to ensure tort disputes will be within the scope of the arbitral agreement.

42 ibid, para 13.
43 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.
44 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.
45 Born, 1353.
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. 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)*.

### 6. 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. 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.

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.

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. An arbitration agreement would make the exercise

---

46 *ET Plus SA v Welter (Comm)*, para 51.

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

48 ibid, para 14.


51 ibid, para 133.
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.\(^{52}\)

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.\(^{53}\)

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',\(^{54}\) as the Advocate General suggested, but 'excessively difficult' or 'impossible',\(^{55}\) 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.\(^{56}\) 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.

\(^{52}\) ibid, para 126.

\(^{53}\) ibid, para 100.

\(^{54}\) ibid, para 125.


\(^{56}\) Case C-352/13 CDC, Opinion of Advocate General Jääskinen, para 129.
The Court of Justice, with a rather sibylline explanation, did not rule on the applicability of arbitration agreements.\(^{57}\) 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.\(^{58}\) 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.\(^{59}\) 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. 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.\(^{60}\)

7. **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.\(^{61}\) The ruling cannot be extended to arbitration clauses, whether by analogy or by applying the same general principles because the situations are

\(^{57}\) Case C-352/13 CDC, para 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.’

\(^{58}\) ibid, paras 67-72.

\(^{59}\) ibid, paras 68-70.

\(^{60}\) ibid, paras 62 and 63.

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.

Even if the matter is not 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 current trend seems to be in the opposite direction in that arbitration clauses are given as wide a meaning as possible. In Fiona Trust & Holding Corp 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. 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 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.

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. In particular, it is not relevant to exclude a cartel damages claim from the scope of an arbitration agreement on the basis that the claimant was not aware of the cartel at the time of entering into the clause. In

62 Fiona Trust v Privalov, para 6.
63 Ibid, para 7.
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'. Nor is it 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'. 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.

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. 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. Clearly, the tort could not have been committed if the contract had not been entered into and indeed the contract is the means by

---

64 Ibid, para 27.
65 Ashot Egiazaryan, Vitaly Gogokhiya v OJSC OEK Finance, The City of Moscow [2015] EWHC 3532 (Comm) (Egiazaryan), para 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 Sky Special Opportunities Fund LP [2012] EWHC 1486 (Comm) (Fortress Value) and Mahey and Johnson Ltd v Danos [2007] EWHC 1094 (Ch).
66 Egiazaryan (Comm), para 30; Fortress Value (Comm); Mahey and Johnson v Danos (Ch); Re Polemis and Furness, Wilby & Co Ltd [1921] 3 KB 560.
67 New York Convention, Art II(1).
which the unlawful agreement or concerted practice is implemented so as to cause harm.

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. It is difficult to argue that it would be impossible to pursue a cartel damages claim in arbitration. The question is whether it would be excessively difficult. Excessively difficult does not mean inconvenient or more expensive. For example, the mere fact that the claimant cannot join in the same arbitration all the undertakings which are jointly and severally liable for the cartel should not suffice. The claimant does not lose the benefit of joint and several liability. Simply, it will have to sue the defendants in different fora. Equally, the circumstance that the claimant could not join other claimants, thereby saving costs, should not be sufficient to set aside an arbitration clause. These are normal consequences of entering into arbitration clauses and, insofar as the dispute is between businesses, to depart from these principle would be to undermine the use of arbitration as a method of resolving disputes in the commercial world. This does not mean that, on the facts on a particular case, a claimant cannot be allowed to demonstrate that the application of the rule of national law which requires him to arbitrate a cartel damages claim would make such a claim impossible or excessively difficult to pursue.

But this is, it is suggested, an inquiry which can only be carried out on the facts of each particular case. It is not an inquiry that a national court of a Member State can refuse to undertake. The court is bound to give effect to the principle of effectiveness of EU law. But, equally, such a principle cannot be applied so as to exclude cartel damages claims from arbitration clauses in general. The starting point must be, and continue to be, that an arbitration clause will have to be enforced on its terms and, if it does cover a cartel damages claim, such a claim must be arbitrated. The burden would then be on the party who wishes litigate his claim to persuade the court that, on the facts of the case, there are unusual or perhaps exceptional circumstances that would make impossible or excessively difficult to arbitrate the claim.

8. Conclusion

It is evident that the arbitrability of competition disputes continues to generate difficulties. 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. It has further demonstrated that, in English law, cartel damages claims should not be excluded from a typical arbitration clause as a matter of contractual construction. 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. However, also in the light of the Attorney General’s opinion in *CDC*, it cannot be excluded that the principle of effectiveness of EU law may require, in exceptional circumstances, 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, it is difficult to conceive of circumstances in which such a burden may ever be satisfied.
REFERENCES

Legislation
Clayton Act 15 USC § 15
The Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC [2004] OJ C101/54

Table of Cases

EU
Case 102/81 Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG [1982] ECR 1095 (Nordsee)
Case C-126/97 Eco Swiss China Time Ltd v Beneton International NV [1999] ECR I-3055 (Eco Swiss)
Case C-352/13 Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC) ECLI:EU:C:2015:335
Case C-453/99 Courage Ltd v Bernard Crehan [2001] I-06297


Domestic
American Express Co v Italian Colors Restaurant 133 S Ct 2304 (2013)
American Safety v McGuire 391 F 2d 821 (US Ct of Apps (2nd Cir), 1968)
Asbot Egiazaryan, Vitaly Gogokhiya v OJSC OEK Finance, The City of Moscow [2015] EWHC 3532 (Comm) (Egiazaryan)
Bulk Oil v Sun International [1986] 2 All ER 744
Case Flattery Ltd v Titan Maritime LLC 647 F 3d 914 (US Ct of Apps (9th Cir), 2011)
Dialysis Access Cir, LLC v RMS Lifeline Inc 638 F 3d 367 (US Ct of Apps (1st Cir), 2011)
Empresa Exportadora De Azucar (CUBAZUCAR) v Industria Azucarera Nacional SA (LANSA) (The Playa Larga and Marble Islands) [1983] 2 Lloyd's Rep 171
ET Plus SA v Welter [2006] 1 Lloyd's Rep 251
Fawzy v Fawzy 199 NJ 456, 456 (NJ Sup Ct, 2009)
Fiona Trust v Privalov [2007] 4 All ER 951 (HL)
Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP [2012] EWHC 1486 (Comm) (Fortress Value)

Granite Rock Co v Int'l Bhd of Teamster 130 S Ct 2847 (2010)

Heyman v Darwins [1942] AC 356

Heyman v Hyman [1929] AC 601

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


Mabey and Johnson Ltd v Danos [2007] EWHC 1094 (Ch)

Mitsubisi v Soler 473 US 614, 105 S Ct 3346 (1985)

Re Polemis and Furness, Withy & Co Ltd [1921] 3 KB 560

Schechter v Schechter 881 NY 2d 151 (NY App Div, 2009)

The London Steamship Owners’ Mutual Insurance Association Ltd v The Kingdom of Spain and The French State [2015] EWCA Civ 333

Woolf v Collis Removal Service [1948] 1 KB 11 (CA)
BIBLIOGRAPHIC REFERENCES


