Arbitrability of Competition Disputes: The Past, the Present and the Future

Professor Renato Nazzini
King's College London

(I am grateful to my student Felix Hermann for many helpful discussion on German law)

KING'S College LONDON

Structure

- Cause of action
- Arbitrability before the *CDC* case
- The *CDC* case
- Arbitrability after the *CDC* case
- More uncertainty after the *Achmea* case?
- Conclusions

KING'S College LONDON

Cause of action

- Tort or contract?
- Tort
  - Common law tort
    - English law: breach of statutory duty (modified) - *South Australia Asset Management v Milk Marketing Board* [1984] AC 130
  - Statutory cause of action
    - Germany: statutory cause of action: § 33(1) GWB provides for a claim for a cease and desist order and for a remedy, whereas § 33a(1) GWB provides for a claim to damages
    - USA: 15 USC § 15 (s 4 of the Clayton Act)
  - General tortious liability
    - France: Articles 1382 and 1383 of the Civil Code
    - Italy: Art 2043 Codice Civile

Cause of action

- Could there be another basis of liability?
  - contract
    - if contract provided for compliance with antitrust laws (e.g. in public tenders general conditions may provide that bidders shall not have disclosed, discussed, or agreed tender with any other bidder) or, as in *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch), if contract provides that prices have to be negotiated in good faith
    - possibly under German law any contract contains by implication an obligation not to charge prices or apply conditions that are the result of a cartel arrangement: § 241(2) BGB and Dortmund Regional Court, Case no. 8 O 30/16 (Kart) (Dortmund Regional Court, 13 September 2017)
  - misrepresentation – *dol* (French law)
  - § 311(2) BGB – *culpa in contrahendo*/pre-contractual liability (German law)?

Arbitrability *stricto sensu* before *CDC*

- *Mitsubishi v Soler* 473 US 614 (1985)
  - distribution agreement between Mitsubishi, Chrysler and Soler, a Puerto Rican company
  - arbitration clause provided for arbitration in Japan
  - statutory claims under the Clayton Act are arbitrable as the statute does not prohibit waiver of judicial forum
  - so-called "second look doctrine" but note that the SCt considered it sufficient that arbitrators "took cognisance of the antitrust claims and actually decided them"
  - *Baxter International v Abbott Laboratories* 315 F 3d 829 (7th Cir) confirmed that the standard of review is the same as that which applies generally under Art V of the New York Convention
- *Labinal v Mors* Rev Arb (1993) (France)
  - J-V between Mors and Westland to compete against Labinal – Mors issued proceedings in the French courts against Westland for breach of contract and Labinal for having cooperated with Westland against Mors
  - CA Paris held that the dispute with Westland was arbitrable even if there was an issue as to the compatibility of the J-V agreement with Art 101 TFEU
- *Bulk Oil v Sun International* [1986] 2 All ER 744 and *ET Plus SA v Welter* [2005] EWHC 2115 (Comm) (Eng)
- *Terra Armata v Tensacciai SpA* [2007] ASA Bull n 3, 618 (CA Milan, Italy)

KING'S College LONDON

Construction of arbitration agreements before *CDC*

- Broad clauses and narrow clauses
- English law
  - one-stop-shop presumption: *Fiona Trust v Privalov* [2007] 4 All ER 951 (HL), para 6
  - tort claims arbitrable if "sufficiently closely connected" with the transaction: *Woolf v Collis Removal Service* [1948] 1 KB 11 (CA); *The Playa Larga* [1983] 2 Lloyd's Rep 171
  - fact that claimant may have a claim against defendants who are not parties to the arbitration agreement irrelevant: *Ashot Egiazaryan, Vitaly Gogokhiya v OJSC OEK Finance, The City of Moscow* [2015] EWHC 3532 (Comm)
- German law
  - one-stop-shop presumption: BGH 10.12.1970 - II ZR 148/69
  - broad clauses would include claims in tort as long as there is some connection with the contract: LG Essen Urt v 24.3.2015 – 12 O 37/12
  - narrow clauses would include claims in tort only if the tort also led to breach of contract: BGH NJW 1965, 300
- USA – more important to distinguish different forms of words, eg "arising under", "arising out of", "arising in connection with"

KING'S College LONDON

CDC: The AG's Opinion

- Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (CDC)*
- AG Jääskinen: (1) the effectiveness of Article 101 TEFU 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; (2) 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 Recast] 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
- Two pillars: (1) effectiveness; (2) analogy with exclusive jurisdiction clauses under Art 25(1) of the [Brussels I Regulation Recast] 'in connection with a particular legal relationship'

CDC: The Judgment

- The Court of Justice did not rule on arbitration clauses. However, it ruled 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
- Reasons
  - 'in connection with a particular legal relationship'
  - party taken by surprise

KING'S College LONDON

Arbitrability after *CDC*

- Can the reasoning in *CDC* apply to arbitration clauses?
- Not really as issue of construction of arbitration clauses is not - not even in part - an issue of EU law but an issue to be determined under the (national) law applicable to the arbitration agreement (which may be the law of a non-EU Member State)
- Only avenue would be to argue that an arbitration agreement must be declared ineffective because to apply it would run counter to the principle of effectiveness of EU law
- However …

KING'S College LONDON

Arbitrability after *CDC*

- *Kemira Chemicals Oy v CDC Project 13 SA* ECLI:NL:GHAMS:2015:3006 (21 July 2015, Gerechtshof Amsterdam) (sodium chlorate cartel)
  - Court applied *CDC* 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": para 2.14
  - Court went on to say: "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. The third plea must be rejected": para 2.16
- But is it correct to apply the reasoning in *CDC* in relation to jurisdiction clauses under the Brussels I Regulation (now Brussels I Regulation Recast) to arbitration clauses?

KING'S College LONDON

Arbitrability after *CDC*

- *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch)
  - 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: para 45
  - necessary to consider whether tortious claim is sufficiently closely related to any contractual claims arising out of the relationship, whether such contractual claims are pleaded or not: para 72
  - if a contractual claim was pleadable against the defendant for breach of express obligation to negotiate prices in good faith, then the arbitration clause would cover the tortious claim too: ibid

KING'S College LONDON

Arbitrability after *CDC*

- Thus the position appears to be that only if claimant cannot assert an arguable contractual claim with which the tortious claim was closely connected, then the arbitration clause would not cover the tortious claim
- In *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd*, Peter Smith J held that not only an unarguable claim but also a strained one was relevant to whether rational businessmen would have intended a tortious claim to be covered by an arbitration clause in a contract
- In *Ryanair v Esso* [2013] EWCA Civ 1450, a case concerning a jurisdiction clause, Art IV in the contract 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

KING'S College LONDON

Arbitrability after *CDC*

- *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch): did EU law require setting aside the arbitration clause?
  - Microsoft argued that enforcing the arbitration clause would lead to "fragmentation" because (a) other defendants could not be joined in arbitration and (b) claimant would lose "anchor defendant" in E & W
  - Peter Smith J held that there was nothing in the *CDC* case that would require him to declare ineffective the arbitration clause: para 81

KING'S College LONDON

Arbitrability after *CDC*

- Dortmund Regional Court, Case no. 8 O 30/16 (Kart) (Dortmund Regional Court, 13 September 2017)
  - Competition claims are arbitrable and, under German law, can be covered by a properly worded arbitration clause
  - *CDC* is not relevant because
    - » tortious claims for cartel damages are connected with the purchase contract
    - » Court of Justice did not rule on arbitration agreements anyway and ...
    - » ... probably would not have competence to do so as the construction of arbitration clauses is a matter of national law

More uncertainty? Or not?

- Case C-284/16 *Slovak Republic v Achmea BV*
  - an arbitration agreement under a BIT between the Netherlands and the Slovak Republic was incompatible with EU law as it could prevent disputes relating to EU law being resolved in a manner that ensures the full effectiveness of EU law, contrary to the principles of mutual trust between Member States and autonomy of EU law
  - Court distinguishes investment arbitration from commercial arbitration: "However, arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law … disputes which may concern the application or interpretation of EU law": para 55

KING'S College LONDON

Conclusions

- Serious questions relating to whether and, if so, in what circumstances, an arbitration clause applies to claims for damages in tort
- While *Achmea* does not apply to commercial arbitration, it may have implications – after all, *CDC* does not apply to commercial arbitration either ...
- Onus on arbitrators to run arbitrations so that rights under EU law are effectively protected
- Closer cooperation between the Commission and the arbitration community to establish "mutual trust"?
- Need/desirability of not undermining arbitration as a forum for the effective and efficient resolution of commercial disputes

KING'S College LONDON

Arbitrability of Competition Disputes: The Past, the Present and the Future

KING'S College LONDON