Is the Arbitrability of Competition Law Claims A Truly Settled Matter?

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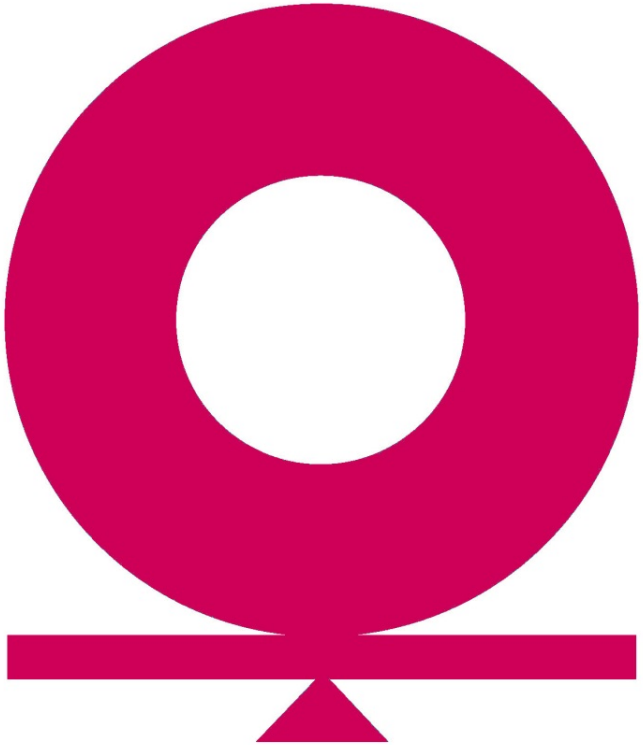

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The Historical Origin of the Problem: Institutional Mistrust of Arbitration

- Antitrust, incl. EU competition laws, pursue **public policy objectives** that by their nature are arguably most efficiently safeguarded by organs of the State, including Member State courts as “juges communautaires” and national/supranational regulators (e.g. NCAs and the European Commission)

- Private judges, i.e. arbitrators, do not have the public interest at heart, but adjudicate the private interests pursued by the stakeholders involved in the arbitration: **Abuse of the arbitration process** (privacy/confidentiality) for the enforcement of cartels (***Kartellschiedsgerichtsbarkeit***) at the cost of the public interest (arbitrators as cartel facilitators, assisting in the circumvention of the application of relevant competition laws) – e.g. **Switzerland** (“**arbitration paradise**”)

- Arbitrators are **not sufficiently experienced** in the complex application of antitrust/competition laws

- Arbitrators can only apply EU competition laws to the extent that they do not find an infringement or to the extent that they do not draw any civil law consequences therefrom (e.g. ICC Interim Award No. 6106, 28/05/1990; and *Société Phocéenne de Dépôts v. Dépôts Pétroliers de Fos*, Paris CA of 20/01/1989)

The Historical Origin of the Problem: Institutional Mistrust of Arbitration (cont'd)

- **1994 European Parliament Resolution** on arbitration: arbitration jeopardises the uniform interpretation and application of Community law

- ***American Safety v. McGuire*** sums up the historical position held internationally for the better part of 20th century:

> *"a claim under the antitrust laws is **not merely a private matter**. Antitrust violation can affect hundreds of thousands, perhaps millions, of people and **inflict staggering economic damage**. We do not believe Congress intended such claims to be resolved elsewhere than in the Courts. … **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**."*

For the better part of 20th century, pervasive institutional mistrust of arbitration and its stakeholders was at the origin of the non-arbitrability of antitrust/competition laws internationally.

Mitsubishi and *Eco Swiss*: The Turning Point

US Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc,* 473 US 614 (1985)	**CJEU in Case C-126/97 - *Eco Swiss China Ltd and Benetton International NV*, 1 Jun. 1999, [1999] ECR I-3055**
• *"By agreeing to arbitrate a statutory claim [under the Sherman Act], a party does not forge the substantive rights afforded by the statute; it only submits to their resolution in an **arbitral, rather than a judicial, forum**. It **trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration**. […] Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the needs of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that the contrary result would be forthcoming in a domestic context."* • Later extended to domestic context	• "[...] according to Article 3(g) of the EEC Treaty (now after amendment, Article 3(1)(g) EC), Article 85 of the Treaty [now **Art. 101 TFEU**] constitutes a **fundamental provision which is essential** for the accomplishment of the tasks entrusted to the Community and, in particular, **for the functioning of the internal market**. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85(2) of the Treaty [now Art. 101(2) TFEU] that any agreements or decisions prohibited pursuant to that article are to be automatically void ... [T]he provisions of [**Art. 101 TFEU**] may be regarded as **a matter of public policy within the meaning of the New York Convention**." • The CJEU *presumed* the arbitrability of EU competition law

"It is fair to say that the road to arbitrability of competition law has been opened on the international scene by the leading decision of the US Supreme Court in Mitsubishi." (Mourre)

Competition Arbitrability: The Status Quo across Europe - National Legislation

Country	Legislation
Sweden	• S.1, **1999 Swedish Arbitration Act**: *"[A]rbitrators may rule on the civil law effects of competition law as between the parties."*
Norway	• Para. 9, **2004 Norwegian Arbitration Act**: *"The private law effects of competition law may be tried by arbitration."*
Germany	• former German Act against Restrictions of Competition (GWB)1990, whose para. 91 contained a prohibition of arbitrating antitrust disputes, was repealed by the new **1999 GWB** containing no such prohibition
Lithuania	• **2012 Lithuanian Law on Commercial Arbitration** removed references to the non-arbitrability of *"disputes connected with competition"* contained in the 1996 version of that Law

Competition Arbitrability: The Status Quo across Europe (cont'd) – National Case Law Precedent

Country	Case reference	Ratio decidendi
Austria	*Radenska v. Rajo*, OGH, 23/02/1998	• affirms arbitrability of domestic and EU competition law
France	*Aplix v. Velcro*, CA Paris, 14/10/1993	• *"… **arbitrators, like ordinary judges, can draw the civil law consequences of an illicit behaviour under rules of public policy** that can be directly applied to the legal relationship at hand [i.e. the EU competition law rules and in particular art.101 TFEU]."*
	Labinal v. Mors, CA Paris, 19/05/1999	• *"even if the **mandatory nature of EC competition law** prohibits arbitrators from issuing injunctions or imposing fines, they may **draw the civil law consequences** from conduct that is found to violate the prevailing rules of public policy."*
England & Wales	*Bulk Oil v. Sun*, CA, 1984	• implies/**presumes** the arbitrability of EC competition law
	ET Plus v. Welters, English HC, 2005	• *"there is **no realistic doubt** that such 'competition' or 'antitrust' claims are arbitrable"*

Competition Arbitrability: The Status Quo across Europe – National Case Law Precedent (cont'd)

Country	Case reference	Ratio decidendi
Germany	*Schweissbolzen*, BGH, 25/10/1966	• *"Provided there is a valid arbitration agreement, the **arbitrator may decide competition law issues** irrespective of whether these constitute the principal claim or are incidental to the dispute."*
Greece	Areios Pagos, Greek Supreme Court, 2009	• affirms the arbitrability of both domestic and EU competition law
Italy	*Istituto Biochimico Italiano S.p.A. v. Madaus A.G.*, CA Milan,13/09/ 2002	• *"[A]ny doubts [on competition arbitrability] have now been overcome by the evolution of legal thinking, as well as by case law, both at the national and Community level …: **The possibility to arbitrate antitrust claims … is recognised.** This is in particular true for disputes between private individuals in which the validity of an agreement is challenged on the basis of art.81 EC [now art. 101 TFEU] or art.2 of Law 287/1990 [i.e. the Italian Competition Law]. … **as a matter of principle**, issues of Italian or **Community competition law can be referred to arbitrators**, and there is **no difference** for that matter **between domestic and international arbitration**."*

Competition Arbitrability: The Status Quo across Europe – National Case Law Precedent (cont'd)

Country	Case reference	Ratio decidendi
The Netherlands	*X v. Vertex Standard Co*, The Hague CA, 23/11/2013	• *"[a] dispute is **not non-arbitrable** on the sole ground that it requires an assessment of European (competition) law"*
Spain	*Combustibles del Cantábrico v. Total Spain*, Audiencia Provincial Madrid, 2004	• *"**In principle, nothing prevents the [contracting] parties from referring to arbitration disputes that are regulated by EU law**. … **No provisions of EU law confer upon State-appointed judges exclusive jurisdiction over the application of EU law**. This interpretation would lead to the absurd conclusion that arbitration as a viable disputes resolution method would need to disappear given that in a number of areas of private law, especially commercial law, it is difficult to find a subject-matter that is not be affected, at least to some extent, by EU law."*
	Camimalaga, S.A.U. v. DAF, Audiencia Provincial Madrid, 2013	• Affirms that Reg. 1/2003 and Commission Reg. 1400/2002 do not contain wording contrary to competition arbitrability and that **a tribunal is bound to hear all relevant competition law issues once seized**
	Licensing Projects v. Pirelli, Audiencia Provincial Barcelona, 29/04/2009	• Affirms the arbitrability of both **contractual and tortious** competition law claims.

Competition Arbitrability: The Status Quo across Europe – National Case Law Precedent (cont'd)

Country	Case reference	Ratio decidendi
Sweden	*Systembolaget Aktiebolag v. The Absolut Company Aktiebolag*, Svea CA, 23/10/2013	• Affirms arbitability of domestic and EU competition law within the meaning of **s.1 SAA**, but denies availability of public law sanctions in arbitral forum.
Switzerland	*V. Spa v. G. SA*, Swiss FT 28/04/1992	• *"[n]either Art. 85 of the Treaty [i.e. art.101 TFEU] nor its Regulation of implementation no. 17 prohibit the national judge or the arbitrator before which a dispute relating to the parties' accounts in respect to the performance of a contract is brought, from examining the validity of [that contract]. …* ***The assessment by arbitrators of the validity of contracts by reference to Community law is necessary in order to avoid decisions that are contrary to that law****."*

Nowadays, competition arbitrability is a *fait accompli* across Europe and has invited references to a *"generalisation of arbitrability of competition issues"* (Idot) and to competition arbitrability as a *"transnational principle"* of arbitration (Komninos).

Competition Arbitrability: Arbitral Practice to Date

- around **58 ICC antitrust arbitrations** from 1964 to date in relation to alleged antitrust infringements (e.g. exclusivity and non-compete provisions) in e.g. distribution and licensing agreements, exclusive long-term supply agreements, exclusive agency agreements, joint R&D or other co-operation/JV agreements

    - **46** of these deal with EU competition law (incl. Arts 101 and 102 TFEU and State aids), **7** of which **expressly consider the question of competition arbitrability**
    - **10** of these deal with domestic antitrust laws (Czech, French, German, Hungarian, Italian, Korean, Portuguese and Spanish competition law)
    - **2** of these deal with US antitrust law
    - **1** of these deal with an EU merger control commitment

- a number of **AAA**, **DIS** and **Swiss Chamber of Commerce** antitrust arbitrations

- a number of **ad hoc** antitrust arbitrations

Arbitral practice confirms the principle and practice of competition arbitrability across Europe and beyond.

Competition Arbitrability: ICC Arbitral Practice to Date

ICC Reference	Ratio decidendi
ICC Partial Award No. **7673** (1993)	• Confirms the **arbitrability of EU competition law** under Swiss law
ICC Award No. **8423** (1998)	• *"The **arbitrability of disputes in relation to [EU] competition law** and in particular the validity or invalidity of a contract under that law is **nowadays fully recognised** by the courts."*
ICC Award No. **10433** (2001) ICC Award No. **11502** (2002)	• Recognise the **arbitrability of Art. 101 TFEU** under **s.1 SAA**
ICC Award No. **14042** (2010)	• Recognises **arbitrability of Arts 101 and 102 TFEU** under Swiss law
Note that most **more recent ICC Awards do not even discuss** the matter of **competition arbitrability.**	

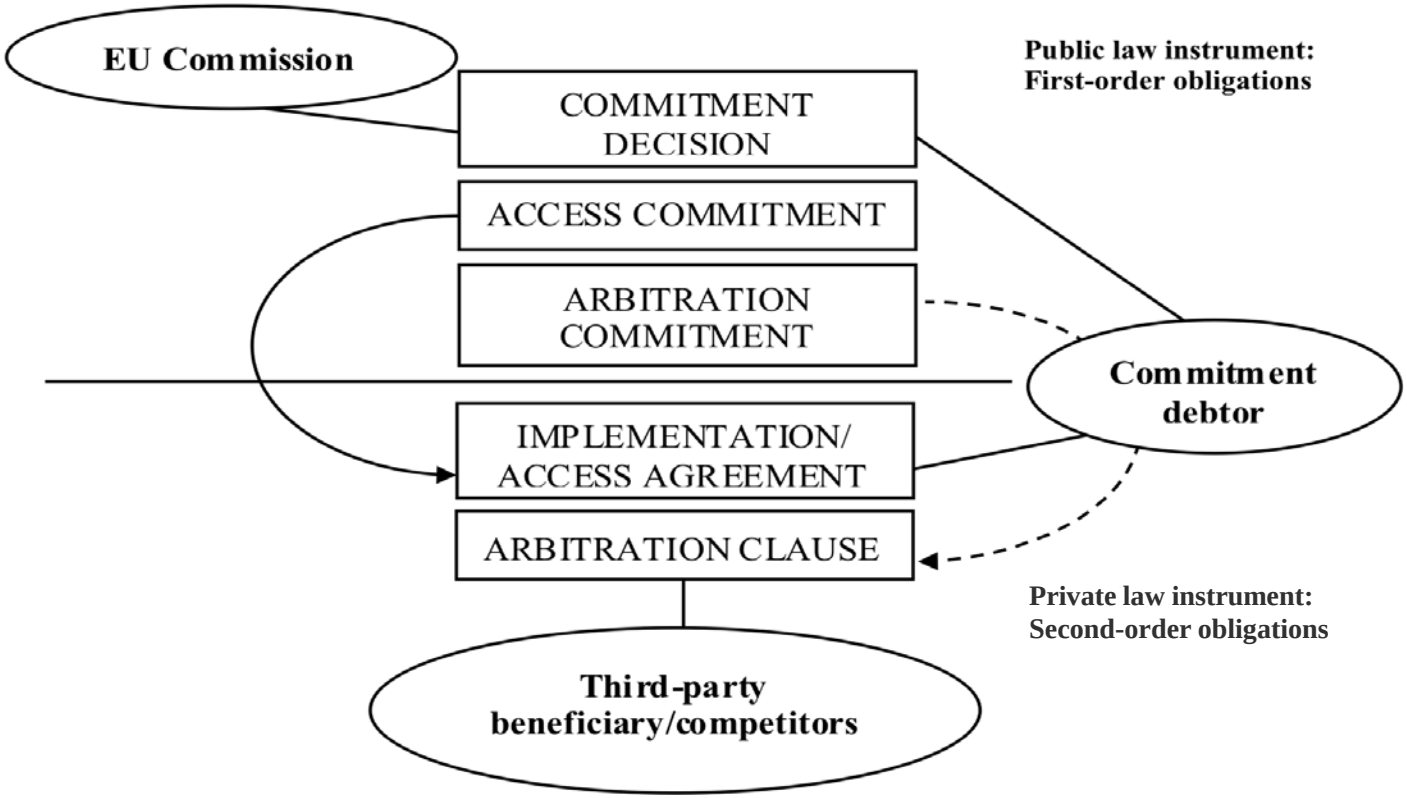
Nowadays, competition arbitrability is *presumed* in an ICC arbitral forum.

Competition Arbitrability under Arts 101 and 102 TFEU: Arbitrator's Powers

Art. 101 TFEU (directly effective)	Art. 102 TFEU (directly effective)
• Declare an anti-competitive agreement in violation of Art. 101(1) null and void *ab initio* under **Art. 101(2)**	• Declare that an undertaking is dominant under **Art. 102**
• Declare that an agreement that complies with the conditions under **Art. 101(3)** is individually exempted or block-exempted (note Reg. 1/2003 - Modernisation)	• Find an **abuse of dominance** within the meaning of Art. 102
• Draw the **civil law consequences** from any of the above, incl. awarding compensation to the victim of the competition infringement under the applicable national laws (taking account of the principles of equivalence and effectiveness)	

Both Art. 101 and Art. 102 TFEU are fully arbitrable, including the legal exception under Art. 101(3) TFEU.

Arbitrability of EU Commitments under Art. 9 Reg. 1/2003 and Arts 6 and 8 Merger Reg. – Context



Arbitrability of EU Commitments under Art. 9 Reg. 1/2003 and Arts 6 and 8 Merger Reg. (cont'd)

- The **Commission's practice** in the area in and of itself bears testimony to the arbitrability of behavioural EU commitments under the Modernisation and Merger Regs (**10** Art. 9 arbitration commitments and **81** conditional merger clearance arbitration commitments to date)

- The **revised 2008 Notice on Remedies** makes express provision for arbitration for monitoring purposes:

> "In order to render them effective, those [i.e. behavioural] commitments have to contain the procedural requirements necessary for monitoring them, such as the requirement of separate accounts for the infrastructure in order to allow a review of the costs involved, and suitable monitoring devices. Normally, such monitoring has to be done by the market participants themselves, e.g. by those undertakings wishing to benefit from the commitments. **Measures allowing third parties themselves to enforce the commitments *are in particular access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees) or via arbitration proceedings involving national regulatory authorities*** if existing for the markets concerned. If the Commission can conclude that the mechanisms foreseen in the commitments will allow the market participants themselves to effectively enforce them in a timely manner, no permanent monitoring of the commitments by the Commission is required. In those cases, an intervention by the Commission would only be necessary in cases *where the parties do not comply with the solutions found by those dispute resolution mechanisms*." (para. 66)

Arbitrability of EU Commitments under Art. 9 Reg. 1/2003 and Arts 6 and 8 Merger Reg. (cont'd)

- The **EU General Court** approves of the submission to arbitration of the competition-compliant implementation of EU commitments: Case T-158/00 - *ARD v. Commission*, 30/09/2003; and T-177/04 - *easyJet Airline Co Ltd v European Commission*, 04/07/2006

- To the extent that implementation/access agreements qualify as **ordinary commercial agreements**, they are arbitrable in the same way and manner as commercial agreements

- **Incipient arbitral practice** recognises the arbitrability of EU merger commitments: **ICC Case No. 16974/FM/GZ**, according to which an arbitral tribunal *"can adjudicate disputes between private parties in the context of obligations and undertakings arising under the Commitments [i.e. the terms and conditions of the implementation agreement or failure to conclude the same]"* (para. 217)

The competition-compliant implementation of EU commitments under the Modernisation and the Merger Control Regulations is arbitrable.

Competition Arbitrability of EU Commitments: Arbitrator's v. Commission's Powers

Arbitrator	European Commission
• determines whether the **commitment debtor has complied with the underlying access commitments**, i.e. the terms and condition of the access agreement, **taking account** of the intended competitive effect, i.e. **the regulatory objectives** of the underlying commitments; and • **draws the civil law consequences from a commitment-debtor's non-compliance** (e.g. order compensation or specific performance)	• preserves its **regulatory functions**, in particular the **prerogative to impose public law sanctions** (such as fines, the withdrawal of the underlying commitment decision or the dismantling of an already-consumed merger or the adoption of an Art. 7 prohibition decision); and • ultimately **remains responsible for the accurate implementation of the commitments** under Reg. 1/2003 and the Merger Reg.

Endorsement of Competition Arbitrability: Judge Forwood, EU General Court

"… reliance on regulators alone to enforce competition law rules will never be sufficient. The "private enforcement" of the anti-trust rules has long been the primary enforcement mechanism in the United States, and it is now becoming increasingly crucial in the European Union. Ordinary courts may sometimes provide an effective forum in competition cases where the facts are simple, the remedies sought are conventional, and where the existence of an infringement has been previously determined by the regulator. But in many situations, in both the EU and the US, **arbitrating competition law disputes offers real advantages**. It enables the parties to **select arbitrators experienced in the law and economics of competition** and anti-trust – still regrettably an exception for many national judges. It allows **greater procedural flexibility**, as well as **a less public forum for resolving matters that can be of the greatest commercial sensitivity**. Competition law also has as one of its main distinguishing characteristics the fact that the issues requiring resolution frequently concern the present and the future, rather than the past. This is particularly the case when **the issues to be resolved arise in the field of merger control, when recourse to arbitration is increasingly considered as a key component of the monitoring mechanisms of non-structural remedies imposed on the merging entities**." ("Foreword" in G. Blanke and P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International, 2011) pp. cvii-cviii)

Arbitrability of EU State aid and issues relating to public undertakings

- **Arts 107 and 108 TFEU** are directly effective and have therefore been found arbitrable, so has **Art. 106 TFEU**
- For the same reason, arbitrators are competent to apply the **Commission Block Exemption Decision on State Aid** and the **General State Aid Block Exemption Regulation**
- Note that the arbitrability of Arts 107 and 108 TFEU is subject to the European **Commission's exclusive power to declare the compatibility of individual State aid measures with the EU competition law rules**
- **Discrete acquis** in arbitration practice (incl. both commercial and investment arbitration)

Arts 106 to 108 TFEU are arbitrable in relevant part.

Competition Arbitrability Revisited in the Light of Recent Developments

- Some recent cases before the EU Member State courts and the CJEU have called into question **the proper interpretation** of **widely-scoped arbitration clauses** that *refer "all disputes arising from"* or *"in connection with this agreement"* to arbitration

- This question has in particular arisen with the context of arbitration defenses raised by defendants (members of a cartel) to **follow-on damages actions** brought by victims of the cartel on the basis of an infringement decision issued by the European Commission

- The thrust of the various Member State rulings is that **widely-scoped arbitration clauses do not capture cartel damages claims unless** the victims of the cartel (being the claimants in the main action) can be shown to have **expressly consented** to the submission of cartel damages claims to arbitration - As a result, the EU Member State courts have rejected the arbitration defense and confirmed their own jurisdiction

- The **CJEU** concluded to the same effect in relation to **exclusive jurisdiction clauses** under the Brussels Regulation, avoiding reference to arbitration, but its reasoning may be extendable to arbitration clauses by analogy (especially on the basis of the AG's Opinion)

- Follow-on damages actions sounding in tort, these cases more specifically question the **automatic inclusion of *tortious* claims into widely-scope arbitration clauses**

The CJEU and the AG in *CDC v. Akzo Nobel et al.*

CJEU, ruling of 21/05/2015	AG Jääskinen, Opinion of 11/12/2014
"… the referring court must, in particular, regard ***a clause which abstractly refers to all disputes arising from contractual relationships as not extending to a dispute relating to the tortious liability*** *that one party allegedly incurred as a result of the other's participation in an* ***unlawful cartel****.* *Given that the undertaking which suffered the loss could* ***not reasonably foresee*** *such litigation at the time that it agreed to the jurisdiction clause and that that undertaking* ***had no knowledge of the unlawful cartel at that time****, such litigation cannot be regarded as stemming from a contractual relationship. Such a clause would not therefore have validly derogated from the referring court's jurisdiction."* (paras 69-70) • Quaere meaning of "**reasonable foreseeability**"?	*"****national courts are required by EU law not to apply an arbitration clause****, or a jurisdiction clause not governed by Article 23 of the Brussels I Regulation****, in cases where the implementation of such a clause would hamper the effectiveness of Article 101 TFEU****."* (para. 124) *"****[i]n the case of a horizontal restriction of competition, […] [it was] difficult to accept an exclusion of the normal forms of judicial protection****, unless the parties allegedly adversely affected have expressly entered into an agreement to that effect and the national or arbitration courts*** *to which jurisdiction has been assigned in this way are required to apply the provisions of EU competition law as rules of public policy."* (para. 126) • Need to **impose an express obligation to apply EU competition law**?

The Member State courts

Case reference	Ratio decidendi
Kemira v. CDC, Gerechtshof Amsterdam, 21/07/2015	• *"The fact is that Eka and Kemira [the purported cartelists] could not reasonably have concluded from the clauses that [claims for cartel damages] arose from or were connected with the agreements. For now, given the wording of the clauses, the [c]ustomers were not **reasonably required to bear in mind** that disputes about such (secretive) conduct by their suppliers would have to be settled by the chosen forum or by arbitration. **Other than** the wording of the clauses, **no relevant specific statements** were made **or actions** carried out."* (para. 2.22)
East West Debt B.V., Utrecht District Court, 27/11/2013	• Rejects arbitration defense for **lack of evidence** of the existence of the disputed arbitration clauses
CDC v. Kemira, Helsinki District Court, 4/07/2013	• *"Given that the cartel was secret, the [Claimant] Companies, when entering into the arbitration agreements, cannot have meant that the claims for damages based on the [cartel] infringement could be settled in arbitration. **The claim is not directly based on the supply agreements** or any breach of the terms and conditions of said agreements. Rather, the matter concerns a claim for damages for the overcharges of the [Claimant] Companies paid as a result of Kemira's inclusion in a secret cartel during the validity of the supply agreements."*

Critique: The Recent Case Law Precedent …

- **questions** the commonly-accepted principle of the broad (or inclusive) interpretation of **widely-scoped arbitration clauses**, incl. both contractual and tortious claims (e.g. ***Fiona Trust***, HL: standard ICC arbitration clause to be interpreted generously, having in mind the intentions and understanding of a rational businessman)

- **challenges** the **proper arbitrability of torts** in the competition law context and more specifically the **private enforcement of follow-on damages actions through arbitration**

- **challenges** hence an important objective of the **EU Damages Directive**, which inter alia seeks to promote the private enforcement of such actions through "consensual dispute resolution" (incl. arbitration: *"[I]nfringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as … arbitration ..."*)

- Introduces the requirement of "**foreseeability**" or "**awareness**" of the existence of the cartel introduces a **subjective test** into the interpretation of the proper scope of arbitration clauses, which challenges the commercial soundness of the status quo (*Fiona Trust*) – will this test replace the test of *"a sufficiently close connection to the legal relationship"* out of which the dispute arises?

Conclusion: Not all doom and gloom …

- Despite the apparent consonance between the Member State case law precedent and the approach of the CJEU, the **CJEU did not pronounce itself on** the impact of cartel damages claims on **arbitration** clauses

- Given the **carve-out of arbitration from the Brussels Regulatio**n, it is arguable that the **CJEU's findings** in relation to exclusive jurisdiction clauses **cannot extend to arbitration** clauses

- Most recent Member State court decisions may come to the rescue and save the day: E.g. ***Microsoft Mobile v. Sony*** [2017] EWHC 374 (Ch), 28/02/2017, where the English High Court (as per Justice Smith) accepted Sony's arbitration defense (admitting that Microsoft's tortious claims were sufficiently close to plausible contractual claims arising from the underlying PPA, even though no contractual claims being formally pleaded) and discounted the relevance of the CJEU's ruling in *CDC* to arbitration in the following terms:

  > *"… whilst I accept that it is possible for the provisions of EU law to permit a court to sideline or declare ineffective an arbitration clause, there is nothing in the decision of the Court in CDC to mandate such a course. ... I can see nothing in the decision of the Court to require me to displace the effect of the arbitration clause as something inimical to EU law."*

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