



The Impact of the *CDC Hydrogen Peroxide* Judgment on Present and Future Arbitration Agreements

Pascal HOLLANDER

HANOTIAU & VAN DEN BERG
Brussels

SCC-CEA Joint Conference
Stockholm
28 April 2017

CONTEXT: PRIVATE ENFORCEMENT OF COMPETITION LAW

- Public enforcement: actions and decisions by the European Commission and national competition authorities (investigations, fines, etc)
- Private enforcement: decisions by courts (arbitral tribunals) sanctioning infringements of competition law:
 - Nullity of anticompetitive agreements
 - Follow-on damages actions aimed at the compensation of damages suffered by victims of anti-competitive acts



Likely Important Development of Private Enforcement Actions

- Directive 2014/104/EU 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 (the “*EU Damages Directive*”)
- Transposition by 27 December 2016 - 12 countries so far:
 - Sweden: Act of 3 November 2016
 - Belgium: ?

EU Damages Directive: Key Principles

- Full compensation of damage (article 3)
- Disclosure of evidence (articles 5 to 8)
- Joint & several liability of infringers (article 11)
- Rebuttable presumption of harm caused by cartel infringements (article 17.2)

Impact of EU Damages Directive on Arbitration?

- Recital 48:

Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. **Therefore, infringers 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** out-of-court settlements (including those where a judge can declare a settlement binding), **arbitration**, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. **The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.**

- Consensual Dispute Resolution (articles 18 & 19)

A (Bad) pre-Directive Example: the *CDC Hydrogen Peroxide* Judgment

- ECJ 21 May 2015, C-352/13
- Follow-on damages action after finding by the European Commission in 2006 of a cartel between chemical companies
- Claimant CDC = transferee of cartel damage claims from likely victims
- Damage action filed before the *Landgericht* of Dortmund against 6 cartel members

A (Bad) pre-Directive Example: the *CDC Hydrogen Peroxide* Judgment

- Claimant alleged that *Landgericht* of Dortmund had jurisdiction based on Articles 5(3) and 6(1) of the Brussels I Regulation
- Jurisdictional objection raised by several defendants based on jurisdiction or arbitration clauses contained in the supply contracts between the cartel participants and their customers
- Validity of jurisdiction and arbitration clauses referred to the ECJ for preliminary ruling



CDC Hydrogen Peroxide Judgment: **Referred Question**

In the case of actions for damages for infringement of the prohibition of agreements, decisions and concerted practices contained in Article 81 EC/Article 101 TFEU [...], **does the requirement of effective enforcement of the prohibition of agreements, decisions and concerted practices laid down in [EU] law allow 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 with international jurisdiction under Article 5(3) and/or Article 6(1) of Regulation ... No 44/2001 in relation to all the defendants and/or all or some of the claims brought?'

Opinion of Advocate General

- Addresses both jurisdictional and arbitration clauses, in spite of exclusion of arbitration from the scope of Brussels I Regulation, relying on *West Tankers*
- Likelihood of EU law not being applied is greater when jurisdiction is conferred to non-EU (Lugano) courts or to arbitrators ...
- Uncertainty of legal qualification of follow-on damages actions as contractual or tort actions
- National courts are required not to apply an arbitration clause where the implementation of such clause would hamper the effectiveness of Article 101 TFEU

Opinion of Advocate General (cont'd)

- Application of arbitration clauses is not *in itself* an obstacle to effectiveness of Article 101 TFEU (!) but ...
- ... It is delicate to put this theory in practice in respect of for sanctioning cartels
- Right to claim compensation derives from the tort consisting of the cartel agreement arranged
- Claim is about the pecuniary consequences of that fraudulent conduct, which is *inherently different* from the supply contracts
- *It is not possible that [...] an arbitration clause should have been validly agreed [...] even before the persons allegedly adversely affected knew of the event giving rise to the damage or loss*

Opinion of Advocate General (cont'd)

Article 101 TFEU must be interpreted as meaning that, in the context of an action for compensation for damage caused by an agreement declared to be contrary to that article, **the implementation of jurisdiction and/or arbitration clauses does not *in itself* compromise the principle of the full effectiveness of the prohibition of agreements, decisions and concerted practices.** In so far as a clause of one or other of those categories could be declared applicable, pursuant to the law of a Member State, in a dispute concerning liability in matters of tort, delict or quasi-delict that might follow from such an agreement, **that principle**, in my view, **precludes jurisdiction over that dispute being attributed under a clause of a contract whose content had been agreed when the party against whom that clause is relied on was unaware of the cartel agreement in question and of its unlawful nature, and could not, therefore, have foreseen that the clause could apply to the damages sought on that basis**

The ECJ Judgment

- Carefully avoided addressing arbitration by relying on an alleged lack of information and therefore only ruled in consideration of jurisdiction clauses (§ 58)
- A jurisdiction clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship, which limits the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into (§ 68)
- 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 (§ 69)

The ECJ Judgment

- 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 (§ 70)
- By contrast, **where a clause refers to disputes in connection with liability incurred as a result of an infringement of competition law** and designates the courts of a Member State other than the Member State of the referring court, the latter ought to decline its own jurisdiction (§ 71)

The ECJ Judgment

Article 23(1) of Regulation No 44/2001 must be interpreted as allowing, in the case of actions for damages for an infringement of Article 101 TFEU [...], account to be taken of jurisdiction clauses contained in contracts for the supply of goods, even if the effect thereof is a derogation from the rules on international jurisdiction provided for in Article 5(3) and/or Article 6(1) of that regulation, **provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law**

Impact of CDC Hydrogen Peroxide Judgment on Arbitration

- No direct impact as arbitration is not addressed BUT:
- Increased risk that restrictive interpretation of jurisdiction clauses under Article 23 Brussels I (Article 25 Brussels I Recast) be applied by analogy by Member State courts considering arbitration clauses for the purpose of effectively enforcing EU competition law
- Likely conflict between (i) generally accepted broad interpretation of arbitration clauses as covering also torts in connection with the main legal relationship to which the arbitration clause applies and (ii) restrictive interpretation of jurisdiction clauses in case of infringement of competition law



Impact of CDC Hydrogen Peroxide Judgment on Arbitration

- Practical difficulties of arbitrating cartel follow-on damages claims is no reason to generally restrict arbitration of disputes resulting of infringement of competition law (quid damages resulting from nullity of competition restrictive agreement?)
- Pro-arbitration stance of Directive 2014/104/EU should hopefully come at the rescue of arbitration clauses
- Future clauses: risk can be avoided if infringement of competition law is expressly referred to in arbitration clause



Thank you!

Pascal HOLLANDER

HANOTIAU & VAN DEN BERG

480, Avenue Louise – Bte 9

1050 Brussels

Tel. : + 32 2 290 39 00

Fax : + 32 2 290 39 39

pascal.hollander@hvdb.com