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Sumario

ARTÍCULOS

THE RAIL TRACK JUDGMENT OF THE LG DORTMUND: ARE CARTEL DAMAGES CLAIMS ARBITRABLE?

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Resumen: *En una sentencia de 13 de septiembre de 2017 el Landgericht Dortmund declaró inadmisible una demanda de daños presentada por una víctima del cártel de vías de tren sancionado por la autoridad de competencia alemana por estar la disputa sujeta a arbitraje. El tribunal entendió que la cláusula arbitral que el fabricante cartelizado había pactado con el adquirente de vías también abarcaba acciones extracontractuales de reclamación de daños sufridos por un cártel contrario a las normas de defensa de la competencia. El artículo analiza esta sentencia y su posible contradicción con la sentencia CDC Peróxido de hidrógeno del TJUE, en la que el Tribunal declaró que una cláusula jurisdiccional no cubría acciones extracontractuales derivadas de un cártel contrario a las normas de la competencia, salvo que estuvieran expresamente previstas en el convenio arbitral, por no ser tales acciones previsibles para las partes. Aunque el TJUE no se pronunciara sobre la interpretación de acuerdos arbitrales, varios tribunales nacionales han interpretado dicha sentencia en el sentido de que sus conclusiones son extrapolables a cláusulas de arbitraje.*

I. Introduction

The arbitrability of disputes involving the application of competition law is today a settled matter in the European Union. Both the Court of Justice of the EU (CJEU) in *Eco Swiss/Benetton*[2] and many national courts[3] have acknowledged the jurisdiction of arbitral tribunals in such matters at the latest since Regulation (EC) 1/2003[4] recognised the direct applicability also of the third paragraph of Article 101 TFEU by national courts.

In view of the proliferation of damages actions based on infringements of the competition rules throughout the EU following the adoption and implementation of the Damages Directive[5], recourse to alternative dispute resolution mechanisms to resolve such claims has become a highly relevant issue in practice. At the same time, the discussion on the arbitrability of competition disputes has reached a new stage: are follow-on damages claims also arbitrable and, more specifically, do they come within the scope of standard arbitration clauses?

Although the EU legislator purported to facilitate damages claims by indirect purchasers in the Damages Directive, most of these actions still concern claims

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1 Martinez Lage, Allendesalazar & Brokelmann, S.L.P., Madrid. An extended version of this article will be published in the Liber Amicorum Frédéric Jenny.

2 Judgment of the Court of 1 June 1999, Case C-126/97 Eco *Swiss/Benetton*, ECLI:EU:C:1999:269.

3 See, e.g., in Spain the Orders of the Audiencia Provincial de Madrid in *Combustibles del Cantábrico/Total Spain*, of 27.05.2004, ECLI: ES:APM:2004:4690A, and in *Camimalaga/DAF*, of 18.10.2013, ECLI: ES:APM:2013:1988A; in Germany see BGH judgment of 25.10.1966, Schweissbolzen (Az.: KZR 7/65, para. A.II.1); in the UK, *ET Plus SA/Welter* [2005] APP.L.R. 11/07, para. 51; in France CA Paris, 19.05.1993, *Société Labinal/ Sociétés Mors et Westland Aerospace.*

4 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003, pp. 1–25.

5 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. OJ L 349, 5.12.2014, pp. 1–19.

brought by customers of the manufacturers that participated in a cartel. And many of these direct purchaser actions, albeit brought as tort actions, have their origin in the contractual relationship between supplier and buyer, which often provide for arbitration clauses which commit the parties to submit any disputes arising from the contract to arbitration.

In a recent judgment of 13 September 2017, the Landgericht (District Court, hereinafter LG) Dortmund[6] has opened the door to the arbitrability of such tortious damages claims, possibly entering into conflict with a previous judgment of the CJEU in the *CDC* case[7], which has been interpreted by some national courts and authors as closing the door to the arbitrability of such claims.

This article will analyse the judgment of the LG Dortmund and its implications for the arbitrability of follow-on cartel damages claims based on tort.

II. The ruling of the Landgericht Dortmund of 13 September 2017

The case before the LG concerned a damages claim brought by a victim of the German rail track cartel fined by the Bundeskartellamt in 2012. The claimant brought the damages action against the manufacturer that had supplied it during the cartel's operation between 2001 and 2011 with rail tracks and turnouts based on two contracts concluded for that purpose. Both supply contracts were supplemented with an arbitration agreement which, in the first contract, stipulated that *"all disputes arising out of the contract of 26.02.2003 shall be settled, under exclusion of the ordinary jurisdiction, through an arbitration tribunal pursuant to the Arbitration Regulation* [of the Building Industry]". The second contract included a broader wording referring to al disputes arising *"in the context"* of the contract. Based on this clause, the defendant in the proceedings argued that the ordinary commercial court seized by the claimant lacked jurisdiction. The claimant argued that based on the *CDC* judgment of the CJEU, cartel damages actions were not caught by the arbitration clauses at issue.

The LG Dortmund first confirmed that damages actions following infringements of competition law are generally arbitrable since a former provision in the German Competition Act (§ 91 GWB), which excluded arbitration in cartel matters, had been derogated as of 1998. It then turned to the interpretation of the arbitration clause, which made no express reference to actions based on competition law infringements. The LG held that arbitration clauses must be construed arbitration-friendly and thus broadly to favour their validity and applicability. Pursuant to the case-law of the German Supreme Court arbitration agreements should be construed broadly to avoid a fragmentation of claims between arbitral tribunals and ordinary courts.

The Court held that —both so-called broad (which refer to disputes arising in the context of a contract) as well as narrow arbitration clauses (which refer to disputes out of the contract)— must not be limited to contractual claims. With reference to previous case law from the German Supreme Court, the Court argues that actions for unjust enrichment, which are based on the contract's invalidity, clearly come within the scope of such arbitration clauses and that this has

6 Landgericht Dortmund, 8 O 30/16 [Kart] ECLI:DE:LGDO:2017:0913.8O30.16KART.00.

7 Judgment of the Court of 21 May 2015, Case C-352/13 - CDC *Hydrogen Peroxide*, ECLI:EU:C:2015:335.

also been recognized for tortious claims, such as the one brought by the claimant.

Concerning such tortious claims, the LG argues that the German Supreme Court had already acknowledged that tort claims come even within narrow arbitration clauses if the conduct of the defendant on which they are based factually coincides with a contract violation. Otherwise, a claimant could avoid arbitration proceedings by bringing its action under tort rather than contract law. Consequently, also tortious cartel damages claims must be covered by a (narrow) arbitration clause in so far as they mirror a contractual claim based on the same factual conduct. The Court reminds that the splitting up of tort and contractual claims between arbitration and ordinary jurisdiction is neither desirable nor in the interest of the parties, whose will, as laid down in the clause, the Court is called upon to interpret.

The Court then goes on to analyse whether the same facts brought forward by the claimant would also give rise to a contractual claim, which it confirms on the basis of the provisions of the German Civil Code (§ 280 BGB). Even if we are in presence of a conduct that predates the contract between the parties, the LG draws a parallel with abusive conduct of a dominant undertaking within the framework of an existing contract to argue that there is no convincing reason to distinguish between (collective) cartel conduct and such (unilateral) conduct, which clearly comes within an arbitration clause.

In any event, the LG argues that cartel damages claims are connected with the underlying contract, because it is not only the conclusion but also the performance of the contract, i.e. the entire supply relationship that is influenced by the cartel overcharge. According to the ruling, it is only the contract which gives the cartel agreement the potential of having damaging effects and it is also not uncommon that pre-contractual misconduct is the cause for a contractual claim for damages.

The LG also rejects that the degree of fault —in cartel cases the infringement of the competition rules is usually intentional— could exclude the claim from the scope of the arbitration clause, not least because the admissibility of a claim cannot depend on a substantive issue to be analysed in the merits of the case. Similarly, the public interest focus of competition law infringements cannot exclude the claim from arbitration since also general tort claims ultimately pursue public interests and may readily fall under an arbitration agreement.

The LG's ruling also explicitly addresses the question of whether the CJEU ruling in CDC stands against the arbitrability of cartel damages claims, as argued by the claimant in the proceedings before the LG. The LG recalls that the CJ highlighted that the applicability of a jurisdiction clause for cartel damage claims depends on the fact that, at the time the clause was entered into, it must have been foreseeable for the injured party that it also included claims arising from infringements of Article 101 TFEU. According to the CJ, this had regularly to be denied, as the injured undertaking at that time usually had no knowledge of the involvement of its contractual partner in an illegal cartel. For this reason, cartel damage claims should only be covered by clauses that also refer to disputes concerning liability due to competition law infringements; only then may they lead to the derogation of an internationally competent court.

The LG, however, rejects the CJUE's foreseeability argument. First, because it understands that there are also contractual claims —such as cases of wilful deceit or an initial objective impossibility— which are unknown to a party at the time of concluding the contract and the arbitration agreement and which nonetheless readily lead to claims from the contract covered by an arbitration clause. A party's unawareness of the cartel is therefore not a valid argument for the LG to discard that the claim comes within the scope of a standard arbitration clause.

Second, and perhaps more importantly, the LG rejects that the principles established by the CJEU for jurisdiction clauses can be simply extrapolated to arbitration clauses. The LG points out that, although the preliminary reference in the CDC case concerned both jurisdiction clauses and arbitration clauses (as both were present in the national proceedings), the CJEU limited its reply in the CDC judgment to jurisdiction clauses. While the question of derogation from jurisdiction established under the Brussels I Regulation[8] is one of EU law (pursuant to Article 23 of the Regulation), which must therefore be construed and applied uniformly throughout the Union, procedural arbitration law is at the outset genuinely national law. As can be seen in Article 1(2)(d) and recital 12, which exclude arbitration from the Regulation's scope, and thus reserve this question to the *lex fori*, as the CJ has confirmed in its case-law[9], the competence of the CJEU to interpret arbitration clauses seems questionable.

The LG's ruling also discards, as did the CJEU in CDC, that the principle of effectiveness of EU law, in this instance referred to Article 101 TFEU, called into question the conclusion that a national judge is bound by an arbitration clause (in CDC, a jurisdiction clause) derogating from the rules of jurisdiction laid down in the Brussels Regulation. According to the CJEU in CDC, which rejected the views expressed by AG Jääskinen in his Opinion, national systems of legal remedies and the preliminary ruling procedure (Art. 267 TFEU) afford sufficient guarantees of effective enforcement of Article 101 TFEU to individuals.

The LG therefore rejects to apply the principles established in CDC for jurisdictional clauses to arbitration clauses since in the circumstances of the case inclusion of the dispute in the arbitration clause would not take a party by surprise within the meaning of *CDC* judgment. The Court concludes that both the narrow arbitration clause of the first contract and the broader clause of the second apply to the tortious cartel damage claim brought by the claimant against its supplier and, consequently, declares the claim brought before the ordinary jurisdiction inadmissible.

III. The CDC ruling of the CJEU of 21 May 2015

Before analysing the judgment of the LG Dortmund, we should briefly recall the preliminary ruling of the CJEU in the *CDC* case. In that case, "Cartel Damage

8 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1, of 16.1.2001. This Regulation has in the meantime been replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1, of 20.12.2012.

9 Judgment of the Court of 25 July 1991. - *Marc Rich/Società Italiana Impianti,* Case C-190/89, ECLI:EU:C:1991:319, para. 18.

Claims (CDC) Hydrogen Peroxide SA", a vehicle created under Belgian law to which damages claims arising out of the Hydrogen Peroxide cartel fined by the European Commission in 2006[10], had been transferred by 71 companies, brought a damages action against the seven companies fined in the Commission's Decision. In 2013, the LG Dortmund referred a preliminary reference to the CJEU which primarily concerned the doubts of that national court regarding its jurisdiction under Articles 6(1) and 5(3) of the Brussels I Regulation (today Articles 8(1) and 7(2) of the Recast Regulation).

Having replied in the affirmative to the first two questions relating to the Landgericht's jurisdiction to hear CDC's action, also the third question referred by the LG Dortmund to the CJEU became relevant. By this question the referring court asked whether Article 23 of the Brussels I Regulation (now Art. 25 of the Recast Regulation) and the principle of effectiveness of the competition rules (in particular Art. 101 TFEU) hindered the application of jurisdiction and arbitration clauses contained in several supply contracts because they derogated from the LG's jurisdiction under Articles 5(3) and 6(1) of the Regulation.

Although the question of the LG Dortmund referred to both jurisdiction and arbitration clauses, it is important to note from the outset that the Court replied only as regards the compatibility of *jurisdiction* clauses with these provisions and principles. The Court seemed to understand that it could not reply to the question referred by the LG Dortmund as regards the arbitration clauses because they *"do not fall within the scope of application of Regulation No 44/2001."*[11]

The Court confirmed its prior case law that parties may derogate (via a jurisdiction clause) from both the general (Art. 2) and special (Arts. 5(3) and 6(1)) jurisdictional provisions of the Regulation if the formal requirements of Article 23 are fulfilled. It rejected —contrary to the thesis advanced by Advocate General (AG) Jääskinen— that the principle of effectiveness of Article 101 TFEU could call this conclusion into question since it is settled case law that substantive rules must not affect the validity of a jurisdiction clause and, most importantly, the Court acknowledged that the legal remedies available in the Member States and the possibility of making preliminary references on the interpretation of the competition rules under Article 267 TFEU afforded sufficient guarantees on individuals in any EU jurisdiction.

Although the Court's judgment's does not follow the AG's proposal to limit the scope of jurisdiction and arbitration clauses pursuant to the principle of effectiveness of EU law when the inclusion of tortious claims in their scope was not foreseeable for one of the parties, the judgment nonetheless follows a similar reasoning, albeit not under the heading of the effectiveness principle. In paragraphs 68-69 of the judgment, the Court —only in respect of jurisdiction, not arbitration, clauses— declares that, before applying the afore-mentioned formal requirements of Article 23 of the Brussels Regulation, the national judge must ensure that the jurisdiction clauses in question actually bind the applicant. In other words, it must ascertain whether the dispute at issue falls within the scope of the clause. And it is in this respect where the Court, although acknowledging that it was for the national judge to interpret the scope of a jurisdiction clause, made a potentially far-reaching consideration as regards actions based on tort liability. The Court established, at least in

10 Case COMP/F/C.38.620 — *Hydrogen Peroxide,* Commission Decision of 03.05.2006.

11 Para. 58 of the judgment.

respect of jurisdiction clauses, that such clauses can validly derogate from the jurisdiction resulting from the Brussels I Regulation's provisions only in respect of contractual disputes that were foreseeable for the parties to the contract. By contrast, follow-on damages claims based on the infringer's tort liability are not covered by generally worded jurisdiction clauses, unless such clauses expressly *"refer to disputes in connection with liability incurred as a result of an infringement of competition law"*.

The Court explained its conclusion[12] arguing that the undertaking which suffered the loss could not reasonably foresee such litigation at the time it agreed to the jurisdiction clause and that the undertaking had no knowledge of the unlawful cartel at that time. Therefore, such litigation could not be regarded as stemming from a contractual relationship and such a clause would not therefore have validly derogated from the referring court's jurisdiction.

IV. Comment

In the aftermath of the CJEU's *CDC* ruling, national courts have asked themselves whether the limitation of the scope of jurisdiction clauses articulated by the Court should also be applied to arbitration agreements. Several authors and national courts, particularly in the Netherlands[13], have interpreted the *CDC* judgment as opposing the submission of tortious cartel damages claims to arbitration, and this was also the position of AG Jääskinen in the Opinion delivered in that case. This is certainly true for tort claims made in the absence of a contractual relationship between the parties, such as damages claimed by the victim of an abuse of a dominant position lacking a contractual relationship with the defendant; where a competitor claims damages against cartelized competitors for excluding it from the market[14]; or where damages claims are brought by indirect purchasers. In such constellations arbitration will only be feasible if agreed *ad hoc* after the damaging event occurred.

In its 2017 judgment, the LG Dortmund, also the referring court in the CDC case, has now disagreed with the AG and such a reading of the CDC judgment and held that EU law has no say over whether a standard arbitration clause (broad or narrow) also covers tort claims arising from infringements of the competition rules where the dispute concerns the parties to a pre-existing contract that provides for an arbitration clause. In other words, where damages are claimed by the direct purchaser from its supplier, usually the cartelized manufacturer. Under German law, the *lex fori* in the damages claim at issue, the LG Dortmund interpreted the agreed arbitration clauses in an arbitration-friendly manner as also covering tortious cartel damages claims brought by a direct purchaser against its supplier and dismissed the claim brought before it as inadmissible for lack of jurisdiction.

A preliminary issue to be discussed concerns the qualification of cartel damages claims as tortious or contractual in nature. The assertion in the *CDC* judgment as well as in the AG's Opinion that in spite of the existence of supply contracts

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12 Paras. 70-72 of the judgment.

13 Court of Appeal Amsterdam, 21 July 2015, *CDC / Kemira*, ECLI:GHAMS:2015:3006; District Court of Rotterdam, 25 May 2016, *Elevator manufacturers*, ECLI: NL: RBROT: 2016: 4164..

14 See, e.g., the damages awarded to MUSAAT in the Spanish insurance cartel case, Judgments of the Madrid Commercial Court of 9 May 2014, ECLI: ES:JMM:2014:3797 and of the Madrid Regional Court of 3 July 2017, ECLI: ES:APM:2017:9034.

with the injured parties claiming damages in that case the claim should be qualified as non-contractual ("tort, delict or quasi-delict" for the purposes of Art. 5(3) of the Brussels I Regulation) is not convincing. Where a supply or purchase agreement exists, cartel damages claims from direct purchasers can certainly also be of a contractual nature. While this is rather clear in continental law systems —irrespective of the existence of a contractual stipulation to that effect, since contractual claims based on the obligation to negotiate in good faith are usually provided for in continental Civil Codes— English courts seem to have struggled with this issue as evidenced in the recent *Microsoft/Sony* judgment of the English High Court[15]. In that case, Microsoft Mobile (in its own right and as an assignee of the rights of Nokia) brought a tort claim for damages against Sony, LG and Samsung based on its purchases of lithium-ion batteries for which the defendants had operated a cartel fined by the European Commission in the *Rechargeable batteries* case[16]. The purchase agreement between Nokia and Sony contained an arbitration clause requiring *"any disputes related to this Agreement or its enforcement shall be resolved and settled by arbitration"* in accordance with the Arbitration Rules of the ICC in the UK.

Having asserted its *Kompetez-Kompetenz* vis-à-vis the arbitral tribunal to interpret the scope of the arbitration clause and thus decide whether the ordinary courts have jurisdiction or not, the High Court held that the question whether a tortious damages claim came within the arbitration clause depended, on the basis of the precedents existing under English law, on whether *"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 have entered to be decided by the same tribunal."*[17]. This one-stop-shop assumption goes back to the *Fiona Trust* case[18].

This rule was put to test in a cartel damages claim brought in England by Ryanair against Esso Italiana for the overcharges applied to its purchases of fuel on Italian airports due to an illegal cartel operated in Italy[19]. Ryanair brought both a contractual and a tortious claim for breach of Article 101 TFEU against Esso and its fuel purchase contract contained a jurisdiction clause in favor of the English courts. On the basis of Ryanair's argument based on the Fiona Trust presumption in favour of the rational and reasonable businessmen's preference for one-stop adjudication, the Court of Appeal hearing the case, however, held that *"it became harder to see why reasonable businessmen would interpret the jurisdiction clause as covering a separate claim of breach of statutory duty arising out of conduct in Italy in breach of Article 101"* where the contractual claim was *"unarguable"* and had to be dismissed. The Court of Appeal thus concluded that standing by itself, without the support of a contractual claim, the tortious claim fell outside the scope of the jurisdiction clause.

The rule derived from these judgments therefore allowed to construe arbitration clauses so as to include also tortious damages claims only if such claims could arise from the contractual relationship in which arbitration was agreed and the con-

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15 Judgment of 28 February 2017 *Microsoft / Sony* [2017] EWHC 374 (Ch).

16 Commission Decision of 12.12.2016, Case AT.39904 – *Rechargeable batteries*, C(2016) 8456 final.

17 Para. 54 of the judgment.

18 Fi*ona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 (24 January 2007).

19 *Ryanair v. Esso Italiana* [2013] EWCA Civ 1450 (19 November 2013).

tract claim was actually arguable (leaving aside that for a continental lawyer it is not obvious why there can be no contractual claim if Ryanair purchased fuel from Esso).

The situation in *Microsoft/Sony* was slightly different because Microsoft had not even brought a contractual claim but based its action for damages entirely on tort. Nonetheless, the High Court held that it was irrelevant whether a contractual claim had actually been pleaded by Microsoft. Instead, the Court therefore held that it was necessary to consider whether any contractual claims —in the case at issue an obligation to negotiate price changes in good faith expressly stipulated in the contract— would be sufficiently closely related to the tortious claims actually advanced by the claimant so as to render rational businessmen likely to have intended such a dispute to be decided like a contractual dispute by arbitration pursuant to the contract's arbitration clause. In the case at hand, the English High Court concluded that it was very difficult to see how a party to the contract, like Sony, could knowingly engage in cartelist behavior without at the same time breaching the contractual obligation to negotiate prices in good faith. The Court therefore held that the arbitration clause extended to all pleaded claims save for those pre-dating the commencement of the contract[20].

This reasoning is in line with that of the LG Dortmund which made general considerations on the relationship between contractual and tortious claims, irrespective of whether the claimant had brought only a tort claim or also a contractual claim. In the Microsoft case, the absence of a contractual claim led to the curious situation that it was for the defendant to articulate an "arguable" contractual claim against itself in order to eventually have Microsoft's claim dismissed for lack of jurisdiction of the ordinary courts. One might query whether such advances into the merits of a case at the admissibility stage are desirable or whether it should not be sufficient that contractual claims are possible in abstract to interpret an arbitration clause as also covering "parallel" tort claims.

In any event, in our view the main argument in the German *Rail Track* and the English *Microsoft* rulings relate to the need to avoid a fragmentation of contractual and non-contractual claims as well as to the fact that cartel damages claims are deeply connected with the underlying contract since the performance of the contract, i.e. the entire supply relationship, is influenced by the cartel overcharge. The claim arises out of the performance of the contract and may therefore be qualified either as of a contractual nature or as a tortious dispute that arises in connection with the parties' contractual relationship (within the meaning of Article 23(1) of the Brussels I Regulation).

The judgment of the LG Dortmund is under appeal and it remains to be seen whether a preliminary reference on the interpretation of the Brussels I Regulation as regards arbitration clauses —which the CJ did not address in the CDC ruling— will still be referred to the Court. One should not forget, that the CJ's rejection in CDC of the claim that a jurisdiction clause could run counter to the general principle of effectiveness of Article 101 TFEU was mainly based on the possibility of any national courts of a Member State making preliminary references on the interpretation of the competition rules to the CJEU (Art. 267 TFEU). The main reason for rejecting the effectiveness argument raised in the AG's Opinion was that the preliminary ruling procedure provided for in Article 267 TFEU afforded a suffi-

20 Para. 73 of the judgment.

cient guarantee of effective enforcement of Article 101 TFEU to individuals[21]. This possibility, however, is not open to arbitration tribunals pursuant to the CJEU's long standing *Nordsee*[22]case-law.

If arbitrators pursuant to the Court's long established *Nordsee* case law do not qualify as "courts" under Article 267 TFEU and may therefore not refer preliminary references to the CJEU in cartel damages claims brought before them, the effective enforcement of Article 101 TFEU would be reduced to references made in enforcement or annulment proceedings against arbitral awards, as in *Eco Swiss/Benetton*[23]. Although such actions for annulment may only be brought on limited grounds and are therefore rather rare in practice, the *Genentech* ruling of the CJEU[24] shows that the ordinary court hearing such actions may well review the application of the Treaty's competition rules by an arbitral tribunal in full detail.

Given the possibility of raising Article 267 TFEU in subsequent enforcement or annulment proceedings and, more generally because arbitrators are generally well equipped to deal with complex legal and economic issues, such as those arising in cartel damages claims, in our view the impossibility for arbitral tribunals to make preliminary references to the CJEU does not make damages claims for infringements of the Treaty's competition rules impossible or "excessively difficult" within the meaning of the effectiveness principle. Any disadvantages in respect of preliminary references to the CJEU should be weighed against the advantages of arbitration sought by the parties that entered into an arbitration agreement: speed and confidentiality of proceedings, particularly important in on-going business relationships between supplier and direct purchaser. In our view, an arbitration agreement included in a contract between a cartelized manufacturer and its customer is therefore not contrary to the principle of effectiveness of EU law.

Other considerations, such as the awareness of the parties or the plurality of defendants do not justify excluding tortious damages claims from the scope of standard arbitration clauses. As regards the foreseeability requirement developed by the CJ in the CDC case, the LG Dortmund convincingly rejects this argument by pointing to actions based on facts of which the parties to a contract were not aware of when they entered into the contract and which nonetheless are readily qualified as of a contractual nature, such as, under German civil law, actions based on the wilful deceit of one of the parties or those based on an objective impossibility of fulfilling the contract. In cartel damages claims the performance of the contract, i.e. the entire supply relationship, is influenced by the cartel overcharge, which contrary to the Commission's submission in CDC justifies extending arbitration agreements also to such tortious claims.

Some authors have criticized the judgment of the LG Dortmund for ignoring the risks of fragmentation of claims between ordinary courts and arbitral tribunals, depending on whether the various supply agreements contain arbitration clauses

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21 Paras. 62-63 of the judgment.

22 Judgment of the Court of 23 March 1982, *Nordsee/Reederei*, Case 102/81, ECLI:EU:C:1982:107.

23 See supra, footnote 2.

24 Judgment of the Court of 7 July 2016, *Genentech/Hoechst*, Case C-567/14, ECLI:EU:C:2016:526.

or not[25]. As regards the difficulties arising from the fact that not all participants of a cartel may have included arbitration clauses in the supply agreements with their respective customers, so that arbitration would be open only to some of the potential claims, the resulting issues can be addressed with the existing statutory rules on joint and several liability. In such cases, injured parties have a right to direct their damage claim against only one or several infringers and may make their choices also in view of the existence of arbitration clauses in their respective contractual relationships. Settlement agreements reached with individual, but not all, infringers raise similar issues that can be addressed by these rules in subsequent contribution claims.

V. Conclusion

The CJEU's judgment in *CDC* which refused to extend the scope of *jurisdiction* clauses to tortious follow-on damages claims based on the infringement of the Treaty's competition rules, has been interpreted by some national courts and authors as applying also to arbitration clauses, thus excluding such cartel damages claims from their scope.

This conclusion has been put into question by the judgment of the LG Dortmund related to a damages claim against the German Rail Track cartel in respect of an arbitration clause included in the supply contract of a direct purchaser with a member of the cartel. The LG argues that contractual and tortious damages claims must not be fragmented and therefore rejects the foreseeability requirement established by the CJEU to construe jurisdiction clauses. A similar conclusion was reached by the English High Court in the *Microsoft Mobile/Sony* ruling.

The question remains whether the impossibility for arbitrators to refer preliminary questions on the interpretation of the competition rules or the Damages Directive[26] makes the exercise of the rights of a damages claimant impossible or excessively difficult within the meaning of the principle of effectiveness of EU law, as argued by Advocate General Jääskinen and rejected by the CJEU in *CDC* in respect of *jurisdiction* clauses. One of the main reasons for the CJEU to do so was the possibility of any court of a Member State to which jurisdiction could be assigned to refer preliminary questions under Article 267 TFEU to the CJEU. Since such preliminary references are not available to arbitral tribunals under the Court's settled *Nordsee* case law, it could be argued that an arbitration clause renders the right to damages ex Article 101 TFEU "excessively difficult".

We would submit that it does not, because Article 267 TFEU may still be raised in subsequent enforcement or annulment proceedings against the arbitral award and, more generally, because arbitrators are well equipped to deal with complex legal and economic issues, such as those arising in cartel damages claims. The CJEU's judgments in *EcoSwiss* and *Genentech* make it clear that arbitration does not pose a risk to the uniform application and interpretation of the Treaty's competition rules: where an arbitral tribunal in a Member State of the EU does not apply Articles 101 and 102 TFEU (the situation dealt with in *EcoSwiss*) or even where it does so inco-

25 See Petrasincu, A./Westerhoff, P., Die Anwendbarkeit und Reichweite von Schiedsvereinbarungen in Kartellschadensersatzprozessen, Wirtschaft und Wettbewerb (12/2017), pp. 585-591; and Funke, T., Anmerkung zum Urteil de LG Dortmund, ibid., p. 624.

26 See, e.g., the recent reference by the Lisbon District Court on the interpretation of Articles 9 and 10 of the Damages Directive, case C-637/17, *Cogeco Communications* (15.11.2017, date of the lodging of the application initiating proceedings, case pending).

rrectly (the logical consequence of *Genentech*), a national court reviewing the arbitral award for its compatibility with public policy will be obliged to apply the competition rules in that context and will have the possibility (or obligation if it is a court of last instance) to refer preliminary questions on the interpretation of these rules to the CJEU. In our view these two judgments show that the arbitration of tortious follow-on damages claims does not render the right to claim damages for infringements of Articles 101 or 102 TFEU impossible or excessively difficult and therefore complies with the principle of effectiveness of EU law.