

FRÉDÉRIC JENNY  
Standing Up for Convergence and  
Relevance in Antitrust

*Liber Amicorum* - Volume I

Foreword by Sir Philip Lowe

Editors

Nicolas Charbit

Sonia Ahmad

# Table of Contents

Foreword.....	V
Contributors .....	IX
Table of Contents .....	XI
Frédéric Jenny Biography .....	XV

## Part I: Global Perspectives

Development of Multilateral Cooperation from a National Competition Authority's Point of View .....	3
Andreas Mundt	
The Next Frontier of International Cooperation in Competition Enforcement .....	19
John Pecman & Duy Pham	
Frédéric Jenny And The Harmonization Of National Competition Laws .....	43
Diane Wood	
Due Process And Competition Law: Global Principles, Local Challenges, An Argentine Perspective .....	55
Pablo Trevisán	
Convergence and Divergence in Singapore's Competition Law Regime.....	79
Han Li Toh	
The Deepening Interaction of Economics and Competition Policy: Overview and the Japanese Example.....	93
Hiroyuki Odagiri	

## Part II: Economics and Antitrust

Merger Efficiencies And Competition Policy .....109  
Frederic Michael Scherer

The Antitrust Economics Treatment Of Standard Essential Patents -  
the EU v the US .....121  
Daniel Rubinfeld

A Methodology for Empirically Measuring the Extent of Economic Analysis  
and Evidence and for Identifying the Legal Standards in  
Competition Law Enforcement.....131  
Yannis Katsoulacos, Svetlana Avdasheva and Svetlana Golavanova

How Accurate is the Coordinate Price Pressure Index to Predict  
Mergers’ Coordinated Effects?.....151  
Marc Ivaldi and Vicente Lagos

Why Economists Should Design and Enforce Competition Laws  
in Developing Countries .....171  
Ian McEwin

Excessive Pricing by Dominant Firms, Private Litigation,  
and the Existence of Alternative Products .....189  
David Gilo

## Part III: Enforcement Matters

Means and Ends in Competition Law Enforcement .....205  
John Davies

OECD-Inspired Reform: The Case of Corporate Fines  
for Cartel Conduct.....221  
Caron Beaton-Wells and Julie Clarke

Should Competition Authorities Perform a Consumer Protection Role? .....243  
Allan Fels

New Challenges for Anti-Monopoly Regulation  
in the Digital Economy .....255  
Igor Artemiev

Regulation and Antitrust in the Pharmaceutical Field .....275  
Enrico Adriano Raffaelli

Data-Related Abuses in Competition Law.....	293
Gönenç Gürkaynak, Ali Kağan Uçar and Zeynep Buharali	
The Arbitrability of Follow-on Damages Claims .....	311
Santiago Martínez Lage, Helmut Brokelmann	
Revisiting The Political Content Of Antitrust: The Changing Role Of Speech .....	331
Albert Foer	
Democracy and Markets: A Plea to Nurture the Link.....	351
Eleanor Fox	

# The Arbitrability of Follow-on Damages Claims

SANTIAGO MARTÍNEZ LAGE\*

HELMUT BROKELMANN\*\*

Martínez Lage, Allendesalazar & Brokelmann

## Abstract

The CDC Hydrogen Peroxide judgment of the CJEU has moved the discussion on the arbitrability of competition disputes to a new level: are follow-on cartel damages claims also arbitrable and, more specifically, do they come within the scope of standard arbitration clauses? In a judgment of September 2017, on a damages claim related to the German rail track cartel, the Landgericht Dortmund ruled that the arbitration clause binding the parties to the dispute covered such tortious damages claims and consequently dismissed the claim as inadmissible. Our contribution to this *Liber Amicorum* analyses this judgment and other national rulings reaching similar conclusions, such as the Microsoft/Sony judgment of the English High Court, in light of the CDC ruling, the principle of effectiveness of EU law and the ECJ's longstanding Nordsee case law, which bars arbitration tribunals from making preliminary references to the ECJ. We conclude that tortious follow-on cartel damages claims are covered by standard arbitration clauses and that the effective and uniform

---

\* Santiago Martínez Lage is president of Martínez Lage, Allendesalazar & Brokelmann, SLP (Madrid), the firm he founded in 1985. He has devoted most of his professional career to the practice of EU law and competition law. Over the past 20 years, he has been dedicating more of his time to alternative dispute resolution, particularly arbitration proceedings.

\*\* Helmut Brokelmann is a German-qualified lawyer. He holds an LLM from the London School of Economics and is managing partner of Martínez Lage, Allendesalazar & Brokelmann. He has worked on all sorts of cases involving Spanish and EU competition law, EU law and regulatory law, in administrative proceedings and before the Spanish and European Courts. Over the past 10 years he has devoted more and more time to follow-on damages claims.

application of the Treaty's competition rules is warranted by the possibility of referring preliminary questions in review proceedings of arbitral awards, as can be seen in the *Eco Swiss v Benetton* and *Genentech v Hoechst* judgments of the ECJ.

## I. Introduction

The arbitrability of disputes involving the application of competition law is today a settled matter, both in the US<sup>1</sup> and in the Member States of the EU, where many national courts<sup>2</sup> have recognised the jurisdiction of arbitral tribunals in such matters at the latest since Regulation (EC) 1/2003<sup>3</sup> recognised the direct applicability also of the third paragraph of Article 101 TFEU (Treaty on the Functioning of the European Union) by national courts. In *Eco Swiss v Benetton*<sup>4</sup> the Court of Justice of the EU (CJEU) also implicitly endorsed the arbitrability of competition disputes.

Since the CJEU's rulings in *Courage v Crehan* and *Manfredi*<sup>5</sup> and, more recently, the implementation of the EU Damages Directive,<sup>6</sup> 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?

Recital 48 of the Damages Directive provides that:

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.

---

1 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985).

2 See, e.g., in Spain the Orders of the *Audiencia Provincial de Madrid* in *Combustibles del Cantábrico v Total Spain*, of 27/05/2004, ECLI: ES:APM:2004:4690A, and in *Camimalaga v 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 v Welter* [2005] EWHC 2115 (Comm); in France, CA Paris, 19/05/1993, *Société Labinal v Société Mors et Westland Aerospace* Rev Arb 1993.

3 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

4 Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-03055.

5 Case C-453/99 *Courage v Crehan* [2001] ECR I-06297 and joined cases C-295/04–C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619.

6 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 [2014] OJ L349/1.

This express reference to alternative dispute resolution mechanisms in damages actions following competition law infringements shows that EU legislators are not only open to such mechanisms but actually promote and facilitate having recourse to them, as can be seen in the measures contemplated in Articles 18 and 19 of the Damages Directive, to which the quoted recital refers. In view of the proliferation of damages actions based on infringements of competition rules throughout the EU following the adoption and implementation of the Damages Directive, recourse to alternative dispute resolution mechanisms to resolve such claims has become a highly relevant issue in practice. The latest example is the thousands of purchasers of trucks which have announced or already brought damages actions against the truck manufacturers fined by the European Commission in its 2016 truck cartel decision.<sup>7</sup>

Although EU legislators purported to facilitate damages claims by *indirect* purchasers in the Damages Directive, most of these actions still concern claims 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 provides for arbitration clauses committing 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<sup>8</sup> 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,<sup>9</sup> which has been interpreted by some national courts and authors as closing the door to the arbitrability of such claims.

In our contribution to this *Liber Amicorum*, we will analyse these (and other) judgments and their implications for the arbitrability of follow-on damages claims based on tort.

## II. The CJEU's judgment in the *CDC* case

The ECJ's 2015 *CDC* judgment concerns a preliminary reference from the same LG Dortmund that delivered the above-mentioned 2017 judgment. In the *CDC* case, "Cartel Damage 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<sup>10</sup> had been transferred by 71 companies, brought a damages action against the seven companies fined by the Commission. The LG Dortmund referred a preliminary reference to the CJEU which primarily

---

7 *Trucks* (Case AT.39824) Commission Decision C(2016) 4673 [2017] OJ C/108/6

8 Landgericht Dortmund, 8 O 30/16 [Kart].

9 Case C-352/13 *CDC Hydrogen Peroxide v Evonik Degussa GmbH* [2015] ECLI:EU:C:2015:335.

10 *Hydrogen Peroxide and Perborate* (Case COMP/F/C.38.620) Commission Decision 2006/903/EC [2006] OJ L/353/54.

concerned the doubts of that 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).<sup>11</sup> The CJEU first confirmed that the German court had jurisdiction to hear an action brought against several infringers because the different actions were closely connected within the meaning of Article 6(1) of the Regulation and at least one of the defendants had its domicile within the court's jurisdiction. As regards Article 5(3), the Court held that the claimed damage actually manifested itself at the registered office of each cartel's victim for the purposes of Article 5(3).

Having replied in the affirmative to the first two questions relating to the LG's jurisdiction to hear CDC's action, 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 Article 25 of the Recast Regulation) and the principle of effectiveness of the competition rules (in particular Article 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 LG Dortmund's question referred to both jurisdiction and arbitration clauses, it is important to note from the outset that the Court replied only regarding 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 regarding the arbitration clauses because they "do not fall within the scope of application of Regulation No 44/2001".<sup>12</sup> We will later come back to this absence of any reference to arbitration clauses in the Court's judgment.

The Court confirmed its prior case law that parties may derogate (via a jurisdiction clause) from both the general (Article 2) and special (Articles 5(3) and 6(1)) jurisdiction provisions of the Regulation if the formal requirements of Article 23 are met. It rejected the argument 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 for individuals in any EU jurisdiction.

In doing so, the Court rejected the thesis advanced by Advocate General (AG) Jääskinen in his Opinion delivered in the *CDC* case. The AG argued that the principle of effectiveness of EU law required national courts not to apply an arbitration or

---

11 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 L12/1. This Regulation has since 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 L351/1.

12 *CDC Hydrogen Peroxide*, para 58.



jurisdiction clause in cases where the implementation of such clauses would hamper the effectiveness of Article 101 TFEU.<sup>13</sup> The AG explained that specifically:

In the case of a horizontal restriction of competition ... I find it 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.<sup>14</sup>

The AG argued that the requirement of close connection between the clause and a particular legal relationship, developed in the case law on Article 23 of the Brussels I Regulation (which refers to “any disputes which have arisen or which may arise in connection with a particular legal relationship”), is also necessary in the case at hand to guarantee the predictability of jurisdiction. In this respect, the AG qualified the action brought in the national proceedings as tortious and consequently declared that:

In my opinion, the rights relied upon in this case derive, instead, from the tort consisting of the cartel agreement arranged and put in hand, covertly, by the defendants in the main proceedings. The issue in the case in the main proceedings is the pecuniary consequences of that fraudulent conduct, which is inherently different from the supply contracts invoked. It is not possible that a clause conferring jurisdiction or an arbitration clause should have been validly agreed in such circumstances, in other words, even before the persons allegedly adversely affected knew of the event giving rise to the damage or of the loss so occasioned.<sup>15</sup>

The Opinion therefore proposed the adoption of a foreseeability requirement:

In consequence, I consider that 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*

---

13 Case C-352/13 *CDC Hydrogen Peroxide v Evonik Degussa GmbH* [2015] ECLI:EU:C:2014:2443, Opinion of AG Jääskinen, para 124.

14 *ibid*, para 126.

15 *ibid*, para 130.

*the party against whom that the 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.*<sup>16</sup>

Although the Court's judgment did 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 aforementioned 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, the judge must ascertain whether the dispute at issue falls within the scope of the clause. And it is in this respect that 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 regarding actions based on tort liability. The Court declared that:

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. The purpose of that requirement is to *avoid a party being taken by surprise by the assignment of jurisdiction to a given forum* as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made (see, to that effect, judgment in *Powell Duffryn*, C214/89, EU:C:1992:115, paragraph 31).

In the light of that purpose, 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.*<sup>17</sup>

The Court explained its conclusion,<sup>18</sup> 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 that undertaking had no knowledge of the unlawful cartel at that time. Therefore, such litigation could not be regarded as stemming from a

---

16 *ibid*, para 132 (emphasis added).

17 *CDC Hydrogen Peroxide*, paras 68–69 (emphasis added).

18 *ibid*, paras 70–72.

contractual relationship and such a clause would not therefore have validly derogated from the referring court's jurisdiction.

Only where a clause refers to disputes in connection with liability incurred as a result of an infringement of competition law can the national court, with jurisdiction pursuant to the Regulation's special rules in Articles 5(3) and 6(1), decline its own jurisdiction in favour of the jurisdiction of the courts of another Member State.

The Court therefore established, at least in 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."<sup>19</sup>

In the aftermath of this preliminary ruling, national courts have asked themselves whether this important limitation of the scope of jurisdiction clauses should also be applied to arbitration agreements. Particularly in the Netherlands, this question has been answered in the affirmative. The Amsterdam Court of Appeal, upholding a prior judgment of the Amsterdam District Court, held in the *CDC v Kemira* judgment of 21 July 2015<sup>20</sup> that there were no reasons to depart from the CJEU's approach to jurisdiction clauses in *CDC* as regards arbitration clauses contained in the supply agreements between the participants of the sodium chlorate cartel<sup>21</sup> fined by the European Commission in 2008 and their respective customers. Also, in respect of arbitration clauses it could not be concluded that the victims of the cartel had consented to the applicability of the clauses to competition law infringements. The same conclusion was reached by the District Court of Rotterdam in a ruling of 25 May 2016<sup>22</sup> relating to a damages claim related to the elevator cartel fined by the Commission.<sup>23</sup> The court refused to apply arbitration clauses invoked by the defendants, holding that they did not cover claims resulting from competition law infringements.

---

19 *ibid*, para 72.

20 *CDC v Kemira*, 21 July 2015 ECLI:NL:GHAMS:2015:3006.

21 *Sodium Chlorate* (Case COMP/38.695) Commission Decision C(2008)2626 [2009] OJ C/137/6.

22 *Elevator manufacturers* ECLI:NL:RBROT:2016:4164.

23 *PO/Elevators and Escalators* (Case COMP/E-1/38.823) Commission Decision C(2007)512 [2008] OJ C/75/19.

### III. 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, during the cartel's operation between 2001 and 2011, supplied it with rail tracks and turnouts based on two contracts concluded for that purpose. Both supply contracts were supplemented by 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 all 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 CJEU's *CDC* judgment, 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 (*Gesetz gegen Wettbewerbsbeschränkungen*)), 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 arbitration clauses (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 LG argued 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 also been recognised for tortious claims, such as the one brought by the claimant.

Concerning such tortious claims, the LG argued that the German Supreme Court had already acknowledged that tort claims come within even narrow arbitration clauses if the conduct of the defendant on which they are factually based 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 remarked 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 was called upon to interpret. The LG thus rejected the argument that in such circumstances inclusion of the dispute in the arbitration clause would take a party by surprise, within the meaning of the *CDC* judgment.

The Court then went on to analyse whether the same facts brought forward by the claimant would also give rise to a contractual claim, which it confirmed on the basis of the provisions of the German Civil Code (§ 280 BGB (*Bürgerliches Gesetzbuch*)). Even if there is relevant conduct that predates the contract between the parties, the LG draws a parallel with the 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 argued 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 for producing damaging effects and it is also not uncommon that pre-contractual misconduct is the cause for a contractual claim for damages in other areas of law.

The LG also rejected the argument 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 general tort claims also 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 recalled that the CJEU 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 to the injured party that it also included claims arising from infringements of Article 101 TFEU. According to the CJEU, 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, rejected the CJEU'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 arbitration agreement and which, nonetheless, readily lead to claims under the contract covered by an arbitration clause. A party's unawareness of the cartel is therefore not a valid reason for the LG to conclude that the claim does not come within the scope of a standard arbitration clause.

Second, and perhaps more importantly, the LG rejected the argument that the principles established by the CJEU for jurisdiction clauses can be simply extrapolated to arbitration clauses. The LG pointed out that, although its 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 is one of EU law (pursuant to Article 23 of the Regulation), which must therefore be construed and applied uniformly throughout the EU, 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*, and as the CJEU has confirmed in its case law,<sup>24</sup> the competence of the CJEU to interpret arbitration clauses seems questionable.

The LG's ruling also rejected the argument, as did the CJEU in *CDC*,<sup>25</sup> 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, as discussed above, rejected the views expressed by AG Jääskinen in his Opinion, national systems of legal remedies and the preliminary ruling procedure (Article 267 TFEU) afford sufficient guarantees of effective enforcement of Article 101 TFEU to individuals.

The LG therefore refused to apply the principles established in *CDC* for jurisdiction clauses to arbitration clauses. The LG concluded that both the narrow arbitration clause of the first contract and the broader clause of the second apply to the tortious cartel damages claim brought by the claimant against its supplier and, consequently, declared the claim brought before the ordinary jurisdiction inadmissible.

## IV. Comment

As mentioned above, in the aftermath of the CJEU's *CDC* judgment of 2015, several authors and national courts, particularly in the Netherlands, interpreted that ruling 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

---

24 Case C-190/89 *Marc Rich v Società Italiana Impianti* [1991] ECR I-03855, para 18.

25 *CDC Hydrogen Peroxide*, paras 62–63.

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 cartelised competitors for excluding it from the market;<sup>26</sup> or where damages claims are brought by indirect purchasers. In such scenarios arbitration will only be feasible if agreed ad hoc after the event.

The LG Dortmund, however, which was also the referring court in the *CDC* case, has now disagreed with the Advocate General and such a reading of the *CDC* judgment, and has 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 cartelised 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 similar scenario was at the heart of a preliminary reference referred to the CJEU by the French *Cour de cassation* on 16 October 2017,<sup>27</sup> in a case between Apple Sales International and its distributor eBizcuss. The case concerned a damages action brought by the distributor against its supplier on the basis of Article 102 TFEU. The national court raised the interesting question of whether Article 23 of the Brussels I Regulation (Article 25 of the Recast Regulation) allows the referring court to apply a jurisdiction clause set out in the contract binding the parties. The *Cour de cassation* also asked whether it might apply the jurisdiction clause “*where that clause does not expressly refer to disputes relating to liability incurred from an infringement of competition law*” and whether it may disregard the jurisdiction clause “*where no infringement of competition law has been [sic]*”.

## 1. Is the CJEU Competent to Interpret the Scope of an Arbitration Clause?

The first question which may be asked is whether the LG Dortmund was right in rejecting the CJEU’s competence to interpret the scope of an arbitration clause in the case at hand in 2017. Should the CJEU, against the view of the LG Dortmund, actually be competent to interpret whether EU law opposes the inclusion of tortious cartel damages claims in an arbitration clause of the kind analysed in the national proceedings? The LG should at least have discussed whether to refer a preliminary reference to the CJEU for clarification of that question. Although not under an

---

26 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.

27 Case C-595/17 *Apple Sales International v MJA* [2017] OJ C/437/21.

obligation to do so, since the LG is not a court of last instance within the meaning of Article 267(3) TFEU, the existence of a doubt of interpretation of EU law should at least be contemplated and the reply discussed even by lower courts. Arguably, where a lower court wants to deviate from the existing case law of the CJEU, its discretion as to whether to refer a preliminary question to the Court could be reduced to the point that it could be obliged, under the general duty of sincere co-operation provided for in Article 4(3) TFEU, to make such a reference even if it were not a court of last instance.

Before addressing this question, it should be briefly recalled what the CJEU declared in respect of the interpretation of a *jurisdiction* clause concluded under Article 23(1) of the Brussels I Regulation in order to derogate from the rules of jurisdiction laid down in the Regulation. After confirming that a national court was bound by such a jurisdiction clause, the Court declared that: “In that regard, *it is for the national court to interpret the clause conferring jurisdiction* invoked before it in order to determine which disputes fall within its scope.”<sup>28</sup>

This statement could be interpreted as meaning that it is not a question of interpretation of Article 23 of the Brussels I Regulation, which merely lays down the requirements of form for such clauses to validly derogate from the Regulation’s jurisdiction rules, but rather a question for the national judge to interpret under national law whether a given jurisdiction clause covers a specific dispute or not. Nonetheless, the subsequent paragraphs of the *CDC* judgment carry out a rather detailed analysis of this issue, and develop the “foreseeability” requirement discussed above, to conclude that jurisdiction clauses may be taken into account to derogate from the Regulation’s jurisdiction rules, “provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law”, which the Court itself denied in the case at hand. And the Court does so by interpreting Article 23(1) of the Brussels I Regulation, i.e. by interpreting EU law:

Consequently, the answer to the third question is that *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 and Article 53 of the EEA Agreement, 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.*<sup>29</sup>

---

28 Judgments in C214/89 *Powell Duffryn v Wolfgang Petereit* [1992] ECR I-01745, para 37, and in C269/95 *Benincasa v Datalkit Srl* [1997] ECR I-03767, para 31 (emphasis added).

29 *CDC Hydrogen Peroxide*, para 72 (emphasis added).



It is at least questionable whether this last proviso is actually covered by the interpretation of Article 23(1) of the Regulation or whether it rather is an issue of national law not coming within the scope of the Brussels I Regulation. Contrary to the Opinion of AG Jääskinen,<sup>30</sup> however, the Court's judgment in *Allianz v West Tankers*<sup>31</sup> in our view does not mean that the applicability and validity of an arbitration agreement falls within the scope of the Brussels I Regulation. That judgment does not establish that it is for the CJEU to examine the validity and scope of such clauses in the context of the interpretation of Article 23 of that Regulation but rather that a national court seised in proceedings coming under that Regulation may also itself incidentally examine the scope and validity of such clauses to ascertain its jurisdiction.

On this background it seemed reasonable for the LG to argue that the interpretation of the scope of an arbitration clause in the rail track damages cartel before the LG Dortmund was a question of national law for the national judge, irrespective of whether the Brussels I Regulation excludes arbitration from its scope of application. It is for national law to determine which disputes come within the scope of both a given jurisdiction and a given arbitration clause.<sup>32</sup> As a matter of fact, Article II(1) of the 1958 New York Convention<sup>33</sup> explicitly obliges signatory States to recognise arbitration agreements irrespective of whether the dispute submitted to arbitration is contractual or non-contractual and it is for national law to construe the purpose of an arbitration clause and the parties' will.

## 2. Are Follow-on Damages Claims Necessarily Tortious?

In this regard, the assertion in the *CDC* judgment as well as in the AG's Opinion<sup>34</sup> that, in spite of the existence of supply contracts 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 Article 5(3) of the Brussels I Regulation), should also be rejected. 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

---

30 *CDC Hydrogen Peroxide*, Opinion of AG Jääskinen, point 98.

31 Case C-185/07 *Allianz SpA and Generali v West Tankers* [2009] ECR I-00663, paras 26–27.

32 See R Nazzini, "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" [2016] Italian Antitrust Review 79.

33 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

34 *CDC Hydrogen Peroxide*, para 43: "With regard to the place of the causal event, it must be pointed out at the outset that, in circumstances such as those in the present case, the buyers were supplied by various participants in the cartel within the scope of their contractual relations. However, the event giving rise to the alleged loss *did not consist in a potential breach of contractual obligations*, but in a restriction of the buyer's freedom of contract as a result of that cartel in the sense that that restriction prevented the buyer from being supplied at a price determined by the rules of supply and demand." See also *CDC Hydrogen Peroxide*, Opinion of AG Jääskinen, point 130.

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 v Sony* judgment of the English High Court.<sup>35</sup> 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.<sup>36</sup> The purchase agreement between Nokia and Sony contained an arbitration clause stating that “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 *Kompetenz-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 of whether a tortious damages claim came within the arbitration clause depended, following English legal precedent, 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.”<sup>37</sup> This one-stop shop assumption goes back to the *Fiona Trust* case,<sup>38</sup> quoted in the *Microsoft* judgment.

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 in Italian airports due to an illegal cartel operated in Italy.<sup>39</sup> Ryanair brought both a contractual and a tortious claim against Esso for breach of Article 101 TFEU, and its fuel purchase contract contained a jurisdiction clause in favour of the English courts. Following 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 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:

Such reasoning, however, does not carry over into a situation where there is no contractual dispute (by which I intend to include disputes about contracts), but all that has happened is that a buyer has bought goods from a seller who has participated in a cartel. I think that rational businessmen

---

35 *Microsoft Mobile OY (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch).

36 *Rechargeable Batteries* (Case AT.39904) Commission Decision C(2016) 8456.

37 *Microsoft v Sony*, para 54.

38 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20.

39 *Ryanair Ltd v Esso Italiana Srl* [2013] EWCA Civ 1450.

would be surprised to be told that a non-exclusive jurisdiction clause bound or entitled the parties to that sale to litigate in a contractually agreed forum an entirely non-contractual claim for breach of statutory duty pursuant to article 101, the essence of which depended on proof of unlawful arrangements between the seller and third parties with whom the buyer had no relationship whatsoever, and the gravamen of which was a matter which probably affected many other potential claimants, with whom such a buyer might very well wish to link itself.<sup>40</sup>

The rule derived from these judgments therefore permitted the construction of 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 contract claim was actually arguable (leaving aside that for a continental lawyer it is not obvious why there can be no contractual claim if Ryanair actually purchased fuel from Esso).

The situation in *Microsoft v 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 or not a contractual claim had actually been pleaded by Microsoft:

Were the manner in which a case was actually pleaded to matter, instead of how a case could have been pleaded, it would be easy for the claimant to circumvent the scope of an arbitration or jurisdiction clause by selectively pleading or not pleading certain causes of action. It would be an extraordinary outcome were a claimant successfully to be able to contend that, because a contractual claim had not been pleaded, a “parallel” claim in tort arising out of exactly the same facts with a scope defined by that contract fell outside the scope of such provision.<sup>41</sup>

The Court therefore concluded 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 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 cartel behaviour 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.<sup>42</sup>

---

40 *ibid.*, para 46.

41 *Microsoft v Sony*, para 72.

42 *Microsoft v Sony*, para 73.

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 (at least for continental lawyers) 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 again 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 and 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 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). These cases therefore differ from situations in which there is no contractual relationship between the parties, such as, for example, damages claims brought by victims of an exclusionary abuse of a dominant position.

### **3. The Exclusion of Arbitration From the Scope of the Brussels I Regulation**

The conclusion that it is for national law to interpret and determine the scope of an arbitration clause is reinforced by the exclusion, as rightly pointed out by the LG’s ruling, of “arbitration” from its scope (Article 1(2)(d) of the Regulation, also in its current recast version). Recital 12 states:

*This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.*

[...]

*This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the*

*annulment, review, appeal, recognition or enforcement of an arbitral award*

This exclusion of arbitration from the scope of the Brussels I Regulation and, more generally, from the preliminary reference procedure laid down in Article 267 TFEU in the settled *Nordsee*<sup>43</sup> case law of the CJEU, could still call into question the conclusion of the LG Dortmund that the tortious damages claim before it was arbitrable. Even if it were accepted that it is for national law to interpret and determine the scope of an arbitration clause, 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 sufficient guarantee of effective enforcement of Article 101 TFEU to individuals.<sup>44</sup>

However, 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 v Benetton*.<sup>45</sup> Although such actions for annulment may only be brought on limited grounds and are therefore rather rare in practice, the CJEU’s *Genentech* ruling<sup>46</sup> shows that the ordinary court hearing such actions may well review the application of the TFEU’s competition rules by an arbitral tribunal in full detail.<sup>47</sup>

Given the possibility of raising Article 267 TFEU in subsequent enforcement and annulment proceedings and, more generally, because arbitrators are 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, which are particularly important in on-going business relationships between supplier and direct purchaser.

In our view, an arbitration agreement included in a contract between a cartelised manufacturer and its customer is therefore not contrary to the principle of effectiveness

---

43 Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* [1982] ECR 01095.

44 *CDC Hydrogen Peroxide*, paras 62–63.

45 Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-03055.

46 Case C-567/14 *Genentech Inc v Hoechst GmbH* (7 July 2016) ECLI:EU:C:2016:526.

47 See the final judgment of the *Cour d’appel de Paris* in *Genentech* (CA Paris 26 September 2017 16/15338) which, following the CJEU’s preliminary ruling, rejected the request for annulment brought against the arbitral award since the licensing agreement was not contrary to Article 101 TFEU and, consequently, there was no “*manifeste, effective et concrète*” violation of “*ordre public international*”.

of EU law, provided the arbitration takes place in an EU Member State. Since the *Eco Swiss* ruling, it is clear that the Treaty's competition rules are a matter of public policy within the meaning of Article V(2)(b) of the 1958 New York Convention in all Member States of the EU. By contrast, in Switzerland the Supreme Court<sup>48</sup> rejected the claim that EU competition law was part of Swiss public policy and it will be interesting to see how this question will be addressed in the UK after it leaves the EU. Thus, compliance with the EU's effectiveness principle can only be taken for granted if the arbitration is located in an EU Member State, since only then the Treaty's competition rules will necessarily form part of the public policy proviso in annulment or enforcement proceedings of an arbitral award.

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 CJEU in the *CDC* case, the LG Dortmund convincingly rejected this argument by pointing to actions based on facts of which the parties to a contract were not aware 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 to such tortious claims.

Some authors have criticised 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 or not.<sup>49</sup> 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 damages claim against only one or several infringers and may make their choice 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.

---

48 *Tensacciai S.P.A. v Freyssinet Terra Armata S.R.L.* 4P.278/2005.

49 See A Petrasincu and P Westerhoff, "Die Anwendbarkeit und Reichweite von Schiedsvereinbarungen in Kartellschadensersatzprozessen" [2017] *Wirtschaft und Wettbewerb* 585; and T Funke, "Anmerkung zum Urteil de LG Dortmund" [2017] *Wirtschaft und Wettbewerb* 624.

## 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 a judgment of the LG Dortmund relating to damages claims against the German rail track cartel in respect of an arbitration clause included in the supply contract of the claimant. The LG argued that contractual and tortious damages claims must not be fragmented and therefore rejected the foreseeability requirement established by the CJEU in construing jurisdiction clauses. A similar conclusion was reached by the English High Court in *Microsoft Mobile v Sony*.

The question remains whether the impossibility for arbitrators to refer preliminary questions on the interpretation of the competition rules or the Damages Directive<sup>50</sup> 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 that any court of a Member State (i.e. not third countries) to which jurisdiction could be assigned may 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 annulment or enforcement 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 *Eco Swiss* 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 the *Eco Swiss* ruling) or even where it does so incorrectly (the logical consequence of the *Genentech* ruling<sup>51</sup>), a national court from an EU Member State reviewing the arbitral award for its compatibility with public policy will be obliged to apply the competition rules in that context, and it will have the possibility (or obligation if it is a court of last instance) to refer preliminary questions on the

---

50 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 lodging the application initiating proceedings, case pending).

51 In that case, after a detailed analysis in a preliminary reference from a national court reviewing an arbitral award, the CJEU reached the conclusion that Article 101 TFEU was not infringed.

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 EU principle of effectiveness of these Treaty provisions, provided the arbitration takes place in a Member State of the EU.

The possible discrepancy with the CJEU's judgment in *CDC* might arguably have warranted a preliminary reference from the LG Dortmund to clarify whether its interpretation of the arbitration clause as also covering tortious cartel damages claims is consistent with the principle of effectiveness of Article 101 TFEU. The LG had doubts on the interpretation and application of that principle in view of the Court's *CDC* judgment, which made compliance of a (jurisdiction) clause derogating from the jurisdiction established under the Brussels I Regulation with that principle conditional upon the possibility of the competent court being able to make preliminary references pursuant to Article 267 TFEU. Although that is not the case for an arbitral tribunal, it is for any ordinary court of an EU Member State reviewing arbitral awards for compliance with public policy, as permitted by Article V(2)(b) of the 1958 New York Convention. As a lower court, the LG Dortmund was not obliged to make a preliminary reference, so that the issue may still be referred to the CJEU on appeal.