

Jurisdiction for damage claims in international cartel cases

Practical considerations

Erik Pijnacker Hordijk



Consequences of the CDC judgment of the ECJ

Position of individual claimants

- ECJ: "*Erfolgsort*", place where financial damage occurred caused by artificially high prices "is located, in general, at (...) victim's registered office"
- Thus, individual claimants can, as a rule, always sue before their own court

Position of claim vehicles

- "*Handlungsort*" in most cases impossible to identify; "*Erfolgsort*" will differ for each individual claimant as assignment to claim vehicle has no impact on determination of jurisdiction
- Hence, "*Handlungsort*" and "*Erfolgsort*" useless criteria for claim vehicles
- Claim vehicle may always sue all cartel participants before court of domicile of 'anchor' defendant, in case of follow-on claims based on Commission decision
- But *quid* in case decision is annulled or claim is wider than scope cartel decision?

Consequences of the CDC judgment of the ECJ

Impact of jurisdiction and arbitration clauses

- CDC judgment only deals with jurisdiction clauses
- ECJ: jurisdiction clauses may only derogate from rules on jurisdiction rules of Brussels I Regulation, "provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law". Why requirement that jurisdiction should specifically refer to infringements of competition law and not just to tortuous acts generally?
- How about arbitration clauses, that do not as such fall within ambit of Brussels I Regulation?
- Probable outcome: jurisdiction and arbitration clauses will have to be ignored unless they refer explicitly to claims based on competition law
- But: ECJ should clarify this further in future preliminary rulings

Room for torpedos

- 'Negative claims' generally admissible
- Attempts before German and Dutch courts to challenge torpedo based on abuse of procedure fail systematically
 - Cf. Dawn Foods vs. Südzucker
- Race for jurisdiction ("Zustellungswettlauf") perfectly permissible
- Claimants should at all times be aware of possibility for cartel participant to launch torpedo
- But: cartel participant will on basis of jurisdictional rules Brussels I Regulation not necessarily be able to sue before its own home court

Competent court ≠ applicable law

- Since CDC judgment, most important questions regarding determination of competent jurisdiction have been resolved
- Determination of applicable law remains complex issue
- In case of multiple claims (united by claim vehicle), multiple national laws may apply
- Rome II Regulation provides quick solution to avoid applicability of several national laws: if applicant sues before court of domicile of defendant, applicant may choose law of that court
- But what in case of multiple defendants: choice of law of court of anchor defendant only permissible against all defendants "if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court". Is this condition met in case of single and continuous infringement?