ABA Antitrust Section | Civil Redress Committee

International Civil Redress Bulletin

ABA SECTION OF ANTITRUST LAW
Promoting Competition Protecting Consumers

ISSUE 4 | March 2015

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Letter from the Editors

The International Civil Redress Bulletin returns to Europe to examine a recent and highly-anticipated advocate general opinion, focusing on matters of "territorial jurisdiction" in cross-border competition cases. This opinion, you'll see, is an important one, because, while it is non-binding and advisory, it very well may influence the outcome of the binding decision expected later this year on these same questions by the EU's highest court, the European Court of Justice ("ECJ"). The ECJ has not yet before provided its interpretation of how territorial jurisdiction applies to cartel cases, or specifically answered the questions addressed in the opinion: "*Can claims arising out of a cross-border infringement against defendants from a number of Member States be consolidated before one national court?*" "*If so, can there still be jurisdiction over the foreign defendants in such cases if the claim is withdrawn against the 'anchor defendant' (the company resident in the Member State in which the claim was filed)?*"

(**continued**)

Letter from the Editors (continued)

Several expert antitrust litigators acting in the United Kingdom, The Netherlands, and Germany provide below a rich discussion of jurisdictional issues in the respective Member States and the implications of this particular advisory opinion on the future of private competition enforcement.

We hope you enjoy the read, and encourage you to contact us if you have ideas to write on in future issues.

Sincerely yours,

Judith Zahid
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TERRITORIAL JURISDICTION IN EUROPEAN CROSS-BORDER CARTEL DAMAGES CLAIMS – CONSOLIDATION BEFORE ONE NATIONAL COURT.[1]

Recent years have witnessed a tremendous growth in anti-trust civil redress actions in Europe. And, while EU Member States embark on the implementation into national legal systems of a new, more harmonised, regime intended to facilitate claims in Europe pursuant to the new EU Damages Directive,[2] a hot issue which is not, however, addressed in the Directive is the question of where victims of anti-competitive conduct can bring their claims.

In which of the 27 EU Member States can a claim arising out of a cross-border infringement be brought? This, the question of "territorial jurisdiction", is a key and thorny one. The matter is harmonised by the so-called Brussels Regulation in Europe. The interpretation of those rules is ultimately a matter for the EU's highest court, the European Court of Justice (ECJ). However, to date, there have been no cases heard by the ECJ in the specific sphere of anti-trust damages and ruling by judges in different Member States, who come from different legal traditions, are unpredictable.

It has therefore been with great expectation that EU anti-trust lawyers have been awaiting the outcome of the first cartel case to come before the ECJ under the Brussels Regulation.[3] It did so on a referral from a German court. The so-called "preliminary reference" was made to the ECJ in 2013 by the Landgericht Dortmund ("the Dortmund Court") in a civil damages action brought by the well-known claims aggregator, Cartel Damages Claim ("CDC").

The CDC claims arise out of the European hydrogen peroxide cartel which was sanctioned by the European Commission in 2006.[4] CDC set up a special purpose vehicle to which claims were assigned by affected undertakings and brought a follow-on damages action in Germany against the German Evonik Degussa GmbH and other non-German members of the cartel ("the CDC Case").[5] One of the preliminary issues that has arisen before the Dortmund Court is the question of territorial jurisdiction under the Brussels Regulation. The Dortmund Court decided it was necessary to make a request to the ECJ to clarify the application of the Brussels Regulation in the cartel sphere before it could take a final decision. It accordingly referred certain questions under the Brussels Regulation to the ECJ. They relate to three particular jurisdictional bases which are particularly significant for litigation in this area:

a) special jurisdiction in tort actions based on the place of the harmful event (Article 5(3));
b) jurisdiction clauses (Article 23); and
c) the joining of defendants from different Member States before one court (Article 6(1)).

It is on the last of the three legal bases (Article 6(1)) that this set of articles focuses.

Article 6(1) provides that "*A person domiciled in a Member State may also be sued [..] where he is one of a number of defendants, in the courts for the place where any one of them is domiciled provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*". This allows the consolidation of claims against defendants from different Member States before the courts of one Member State, so long as the claimant has a claim against what is commonly referred to as an "anchor defendant" who is from that Member State and who co-participated in the tort.

While many actions have been filed across Europe in recent years using this mechanism under the assumption that it would be applicable to cartel cases, its use has not yet been validated by the ECJ. Furthermore, the CDC Case raises the further question of whether Article 6(1) can still apply where, as in that case, the claim is withdrawn against the anchor defendant at a very early stage and proceeds only against foreign defendants.

Advocate General Jääskinen ("AG Jääskinen") published his long-awaited Opinion in the CDC Case on 11 December 2014. This opinion is non-binding and is submitted to the ECJ by the Advocate General for the court's consideration before the ECJ adopts its binding judgment (expected later this year). Such opinions are however very influential and are quite largely followed by the ECJ.

The following set of articles provides insight into the Opinion from the perspective of three European jurisdictions where the question of the application of Article 6(1) has arisen in various ways in cartel damages cases: the UK in the *Carbon Case*, the Netherlands in a series of international cartel actions and Germany in the CDC Case itself. The views presented for each jurisdiction are personal to each of the authors, fruit of their own experience in the cases which are mentioned, and do not pretend to offer a single or united view of the issues raised by Article 6(1). Indeed, on some issues the authors adopt opposing views. Ever was it thus!

1. The UK: A further challenge to the English Courts' Discretion?

Paul Hitchings, Cuatrecasas, Gonçalves Pereira[6]

In December 2010, a number of European railcos (including Deutsche Bahn, Trenitalia and the Dutch and Portuguese Railways) brought proceedings before the Competition Appeal Tribunal ("CAT") in London for damages arising out of the European electrical carbon cartel ("*Carbon*").[7] The proceedings were commenced against Morgan Crucible ("Morgan"), a UK-domiciled company, and German, Austrian and French companies which had all been sanctioned by the European Commission with Morgan for their participation in the cartel. The claims against Morgan were subsequently struck out by the CAT on the basis that they were time-barred, that decision not becoming final until April 2014 following appeals to the Court of Appeal and the Supreme Court.[8]

While not doubting the applicability of Article 6(1) to them in principle as joint tortfeasors, the non-UK defendants challenged the jurisdiction of the CAT to hear the claims against them to the extent that, if there was in fact no claim against a UK anchor defendant alongside which the claims against them could be heard, there was no basis for Article 6(1) to be applied to them in this case. The claimants relied, however, on the ECJ's ruling in *Reisch*[9] to maintain that the striking out of the Morgan claims was irrelevant to the question of international jurisdiction.

The jurisdiction issue came up for hearing in September 2014. It was not finally determined, however, as the parties agreed to withdraw the proceedings, and consequently the question as to how this matter would be decided remains open. It is one which raises an interesting tension between the discretion-based or "*broad commonsense*" approach traditionally adopted by the English courts to issues of territorial jurisdiction and the

more formalistic civil law approach which underlies the ECJ's ruling in *Reisch* and characterizes the Brussels Regulation. While we await the ECJ's ruling on the CDC Case, AG Jääskinen's opinion indicates that the balance may be tipped in favour of the latter approach.

a) The common law approach

Some English courts and commentators have been damning in the past about the ECJ's ruling in *Reisch*. It has been described as "*peculiarly unconvincing*" or "*just wrong*"[10] and "*difficult to reconcile*" with normal English court practice.[11] It is fair to say that there have also been some opposing views aired by civil lawyers, including the Spanish Advocate General in *Reisch* itself who considered that the case should have been decided differently.

The particular difficulty under English procedural law arises because of the role reserved to judges in assessing whether to grant permission to claimants to serve a claim out of the jurisdiction under common law.[12] Accordingly, the courts must be persuaded that an anchor claim in the UK raises a "*serious issue to be tried*" or "*have a real prospect of success*"[13] and, at times, have been prepared to adopt quite a pragmatic approach to the question of whether claims which may theoretically be connected could, in fact, threaten irreconcilable judgments when taking into account realities of the litigation, such that Article 6(1) should apply.[14] The point of the non-UK defendants in *Carbon* is simple: as the claims against Morgan were inadmissible, then there could be no serious issue to be tried (indeed, the claims were struck out) and no risk of irreconcilable judgments (indeed, there would be no judgment against Morgan).

The difficulty for the English courts is that *Reisch* is binding law. The courts have suggested that, if it came to it, it may be possible to confine *Reisch* to its facts, for example by limiting its application to cases where the claim against an anchor defendant was precluded by national law on procedural, as opposed to substantive, grounds. It remains an open question whether such a restricted approach to the judgment could be applied and, if it were to be applied, how it would apply – for instance to a time-bar such as the CAT rule which grounded the CAT's rejection of the claims against Morgan in *Carbon*. Arguably, such a restriction may not be possible as a matter of European law.

b) The European approach

So what did *Reisch* decide and what is the logic which underpins it?

The case (a reference from the Austrian Supreme Court) concerned a claim against an Austrian defendant, against whom bankruptcy proceedings had previously been commenced in Austria, and a German guarantor, this latter on the base of Article 6(1). The former claim was precluded as a matter of Austrian law at the moment it was filed given the pre-existing bankruptcy proceedings and hence the claim was declared inadmissible shortly after it was filed. The ECJ held, nevertheless, that Article 6(1) is applicable even when the action against the anchor defendant is regarded under a national provision as inadmissible from the time it is brought. Accordingly, the Austrian court had international jurisdiction under the Brussels Regulation to proceed against the German defendant. The ECJ reserved one exception to this position: where the sole aim of the claimant in filing against the anchor defendant was to oust jurisdiction from the Member State of the foreign defendant (i.e. it was an abusive or spurious claim filed solely to obtain jurisdiction). However, the ECJ indicated that this did not seem to be the case on the facts in *Reisch* (the defendant had not produced evidence that the claimant was in fact aware of the bankruptcy proceedings when it filed and there was no suggestion of bad faith).[15]

The Brussels Regulation principles of legal certainty and autonomy are central to the ECJ's reasoning. The jurisdiction rules of the Brussels Regulation must be "*highly predictable*"[16] and enable a normally well-

informed litigant reasonably to foresee before which courts it may be sued (or could sue).[17] In addition and linked to this, the terms of the Brussels Regulation must have an autonomous meaning and not depend on national rules or interpretations, subject only to specific exceptions where remission to national law is expressly indicated or required by the rule in question.[18] From a procedural perspective, the moment at which these questions should be addressed is when proceedings are instituted.[19,20]

According to this line of reasoning, the ECJ held in *Reisch* that the inadmissibility of a particular action under national law is a separate and subsequent question which does not affect the prior and autonomous issue of international jurisdiction. This has the, for some, surprising result that a claim which was objectively doomed to fail from the start can nevertheless serve as an anchor for jurisdiction purposes.[21] However, it is also true that many claims could be said to be "doomed to fail", depending on one's perspective, the level of assessment that is invested and the stage of litigation at which the question is posed. The question, then, is what level of prior assessment will be required of a claim's viability. The solution given by the ECJ in *Reisch*, aimed at ensuring uniformity across different jurisdictions, is to require simply that the claims presented be sufficiently connected as pleaded, controls of viability being then limited to situations of abuse (e.g. spurious claims which are essentially constructed for the sole purpose of asserting jurisdiction). The attraction of this approach can be seen in *Carbon* where it was necessary for three and a half years of litigation all the way to the Supreme Court to establish whether or not the claims were in time against Morgan. A different approach to jurisdiction would have left the question of jurisdiction unresolved for all that time and required the claimants to file in a number of alternative jurisdictions to protect their legal position, a situation which the Brussels Regulation seeks to avoid and most civil jurisdictions would not contemplate.

The Opinion in the CDC Case echoes and affirms the reasoning of the ECJ in *Reisch* exactly and suggests it was correctly decided. On the facts, AG Jääskinen probably need not have followed that reasoning entirely, since the application of the principle of *perpetuatio jurisdictionis* is arguably sufficient in this case and is one that is generally accepted in European jurisdictions. Indeed, the result of the Opinion is perhaps unsurprising.[22] There is still a chance the ECJ will take a different stance, therefore, even if it wishes to reach the same conclusion.

c) Conclusion

It seems increasingly likely, as European law currently stands, that the English judge's discretion to consider the viability or admissibility of claims as part of its review of jurisdiction applications will find itself curtailed by the Brussels Regulation. To what extent may be clarified in the forthcoming CDC ECJ judgment, but the Opinion certainly points in that direction. It would not, of course, be the first time[23] and, indeed, such limitations are something which is in the DNA of what is a civil law inspired system and was accepted as such by the UK when it acceded to its predecessor, the Brussels Convention, in 1978.

2. The Netherlands

Martijn van Maanen, BarentsKrans N.V.[24]

In the four most important cases brought in the Netherlands so far, the plaintiffs filed suit against one or more defendants domiciled in the Netherlands and several foreign addressees of the EC Decision. In each of those proceedings motions were filed by foreign defendants to contest Article 6(1) jurisdiction. The decisions rendered on those motions by different courts demonstrate a broader consensus that Article 6(1) jurisdiction may be assumed in follow-on cases where the European Commission has found that the addressees took part in a single and continuous infringement of European competition law. As such, Dutch case law is consistent with the views expressed by AG Jääskinen in the CDC Case.

a) Applicability of Article 6(1)

In September 2011, the CDC special purpose vehicle CDC Project 14 ("CDC P14") commenced proceedings before the district court of The Hague against inter alia Shell Petroleum, Sasol, Esso and Total. As addressees of the EC decision regarding the paraffin wax cartel, they were held jointly and severally liable by CDC P14 for all the damages that the assignors had incurred. Shell Petroleum, which had been included in the EC decision as a parent exercising control over a subsidiary actively engaged in the cartel, was selected as anchor defendant. The other defendants challenged the jurisdiction of the court, arguing that the damage claims against Shell Petroleum were insufficiently connected with the claims against other addressees, that they did not derive from the same legal and factual situation, that it was not predictable for other addressees to be sued at the forum of a parent, and that there was no risk of irreconcilable judgments if they would be sued in their own courts.

The district court dismissed those arguments:

> 4.16 […] Shell Petroleum and Total S.A. and Sasol International have been held liable as parent companies that directed the policy of the subsidiaries which the Decision has classified as actual participants, i.e. Shell Oil and Shell Deutschland, Total Raffinage and Sasol Wax, respectively. The Decision holds each of the addressees liable pursuant to Community law competition rules relating to the EEA, for the "single and continuous infringement".
>
> 4.17 Accordingly, the claims against all the Defendants in the Main Action turn on the question of the civil-law consequences of the liability pursuant to Community law competition rules that the Commission established in its Decision in relation to the cartel defined in that Decision. In general, acts as part of a cartel are, by their very nature, committed jointly by the direct participants in the cartel. In addition, the policy-directing role of the parent companies assumed in the Decision based on the Community law competition rules cannot really be separated from the liability assumed in the Decision of the subsidiaries that have been classified as direct participants in the cartel. All this means that there is a sufficiently close connection within the meaning of Article 6 Brussels I Regulation between the claims issued against all the Defendants in the Main Action, thus including those against Shell Petroleum on the one hand and Sasol et al. and Total et al. on the other.

The district court considered that Article 6(1) jurisdiction could extend to claims against foreign defendants regarding a period of the cartel in which the anchor had no involvement, as these were still sufficiently connected:

> 4.18 Partly in view of the findings at 4.15 as regards the application of Article 6 Brussels I Regulation, the fact that Shell Petroleum was held liable for a relatively short period (from 1 July 2002 to 17 March 2005) in the Decision does not preclude the assumption of a close connection within the meaning of Article 6 Brussels I Regulation.

The district court further observed that all addressees of the Decision could reasonably have foreseen that they might be sued in civil law proceedings in a court in the domicile of one (or more) of the other addressees.

In June 2014, the Amsterdam District Court adopted the same reasoning in proceedings between CDC Project 13 and AkzoNobel *et al* in regard to the Sodium Chlorate cartel.[25] Seven months later, the district court accepted Article 6(1) jurisdiction in respect of British Airways and Lufthansa in Air Cargo.[26] The court not only referred to the decisions in Paraffin Wax and Sodium Chlorate, but also quoted AG Jääskinen that a proceeding for damages against an anchor defendant and foreign defendants, which is based on the decision of the European Commission that the defendants took part in a single and continuous infringement of article 101 TFEU in various periods and various member states, meets the requirements of Article 6(1).[27]

Unless the ECJ would depart from this view, the courts in the Netherlands are expected to continue to accept Article 6(1) jurisdiction in follow-on litigation. A notable exception is the situation in which the European Commission has not qualified the cartel conduct as a single and continuous infringement. The EC decision in Elevators for instance identified several cartels within members states. When cartel members were sued before the Rotterdam District Court on the premise that the claims regarding those cartels were sufficiently connected, the court did not accept Article 6(1) jurisdiction in respect of claims against defendants for their involvement in cartels in other jurisdictions than the Netherlands, where the anchor defendant was alleged to have participated.[28]

b) Abuse of Article 6(1)?

There has been one recent example in the Netherlands in which the defendants argued that Article 6(1) jurisdiction should be denied on the basis of abuse.

In 2010, Equilib had initiated proceedings against KLM, Martinair and Air France, holding them jointly and severally liable for all damages incurred by assignors as a consequence of the Air Cargo cartel. When the financial position of these defendants deteriorated, Equilib decided to protect its recourse position by filing a second suit against the same defendants, British Airways and Lufthansa. This would also preserve the claims against those airlines under the relevant statutes of limitation. Contesting jurisdiction, British Airways and Lufthansa argued that it was abusive for Equilib to file suit against KLM a second time with the sole objective of using KLM as an anchor to draw in foreign defendants on the basis of Article 6(1). If Equilib had wanted to sue foreign defendants in the Netherlands, it should have done so in the first proceedings.

It was uncertain whether the Amsterdam District Court would be prepared to apply such a test. In *Freeport* the ECJ had emphasized that if there was a sufficient connection between the claims for Article 6(1) jurisdiction, there was no need to separately determine whether the claims were brought with the sole (abusive) objective of ousting the jurisdiction of the courts of the Member State where one of the defendants was domiciled.[29] The existence of a sufficient connection between the claims would already exclude that risk.[30] *Freeport* therefore appeared to preclude the use of other criteria.

A superficial reading of the opinion of AG Jääskinen in the CDC Case would, however, suggest that he would allow abuse criteria to be considered by national courts in the context of Article 6(1) notwithstanding the strict limitations set by Freeport. Closer review, particularly of paragraph 88, shows, in my opinion, that the AG has no such intention. He would only deny Article 6(1) jurisdiction if it is shown that the claims against the anchor were already settled prior to filing the case, that this was kept secret, and that the anchor was therefore sued with no other objective than to create jurisdiction in respect of foreign defendants. In those circumstances, he notes that the claims against the anchor would have been replaced by claims under the settlement, so that there would no longer be a sufficient connection with claims against the foreign defendants.

The Amsterdam District Court decided not to address the consequences of *Freeport*, but simply concluded that the practice of filing second proceedings to draw in other defendants (to correct mistakes, to protect claims under the relevant statute of limitations, or to increase recourse possibilities) was acceptable under Dutch civil procedure and did not present an issue of abuse.[31] The court observed that the foreign defendants had not suffered any detriment by not being sued in the first proceedings. It further noted that the second proceedings at issue were consistent with the objective of Article 6(1), as confirmed by AG Jääskinen, to have one court decide on such matters and to prevent irreconcilable judgments. Now that the claims filed in the second proceedings were sufficiently connected, the court could accept jurisdiction.

The overview of Dutch case law regarding Article 6(1) demonstrates that the various attempts of foreign defendants to challenge this basis for jurisdiction have been largely counterproductive. Their strategy has

allowed the courts to formulate a doctrine that solidifies the link between Article 6(1) and follow-on cartel litigation. The response of the courts is also in line with the views of AG Jääskinen and his colleagues. Unless the ECJ would change course, the real question for defendants will be whether there is any merit left in contesting jurisdiction in this particular area.

3. Germany: AG Jääskinen's Opinion and Its Implications in the CDC Case

Meike von Levetzow and Kathrin Westermann, Noerr LLP[32]

In the CDC Case, the Belgian claimant, CDC Hydrogen Peroxide SA ("CDC HP"), based its action for damages on a decision by the European Commission[33] according to which several companies supplying hydrogen peroxide and sodium perborate operated a Europe-wide cartel and thereby infringed EU competition law (former Article 81 EC Treaty, now Article 101 TFEU). CDC HP had damages claims assigned to it by numerous companies in order for these to be submitted as a bundle of claims in the proceedings before the Dortmund Court. The action for damages was brought against six European companies involved in the cartel, although only one of these, Evonik Degussa GmbH, was actually domiciled in Germany (the "anchor defendant"). CDC HP based the competence of the Dortmund Court on Article 6(1) which allows the joining of defendants from different Member States before the court of the place where any one of them is domiciled "*provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*". Right after the action had been served on all defendants, CDC HP withdrew its action against the German anchor defendant after having settled the respective claims.

The competent German judge was thus faced with complex cartel-law damages proceedings that had no significant bearing on German law as neither the plaintiff nor the remaining five defendants were domiciled in Germany. As the ECJ had not yet decided on the applicability of Article 6(1) to cartel-law damages claims, the *judge* referred the following questions to the ECJ:

a) whether Art. 6(1) had to be interpreted in such a way that it was applicable in the CDC Case; and
b) whether it was relevant that the claim against the anchor defendant was withdrawn after service of process to the defendants.

The Dortmund Court as well as AG Jääskinen upheld the fundamental applicability of Article 6(1). In our opinion, the unreserved endorsement of this view is arguable taking into account the considerations set out below, not least due to the far-reaching consequences for the competent judge.

a) The requirement of a close connection in European cartel damages cases

On the question of when associated claims within the meaning of Article 6(1) are deemed to be linked by the required close connection, AG Jääskinen refers to ECJ decisions including the *Roche Nederland*[34] and *Freeport*[35] cases, according to which a risk of irreconcilable judgments must arise in the context of the same legal and factual situation. The existence of this requirement was disputed between the parties in the CDC Case as the alleged infringements of the defendants were committed in different Member States, at different locations and during different periods of time. Therefore, the remaining co-defendants argued that the different participation in time, place and range of each cartel member would contradict the assumption of an identical factual situation and thus Article 6(1) could not be applied. In addition, the defendants argued that different national laws were applicable for each claim against the respective defendants leading to essential differences in the applicable legal principles. CDC HP maintained that the individual actions rely on the same factual situation because the alleged damage claims resulted from a single and continuous infringement of

Article 81 EC Treaty (Article 101 TFEU), Article 53 EEA Agreement, which creates a liability in tort of each offender for all damages caused by the offenders.

The AG and the Dortmund Court aligned themselves with CDC HP arguing that the same situation of fact arose from the fact that the European Commission had established a single and continuous infringement of Art. 101 TFEU whereas the same legal situation mainly derived from the joint and several liability of the cartel members and from the risk that the courts of different Member States could apply – or not apply – such rules of joint and several liability leading to conflicting decisions.[36] In addition, the non-application of Article 6(1) could lead to the risk that the courts of different Member States would come to different results in assessing the alleged damages according to their respective national law.[37]

The AG's arguments are in line with the ECJ's decisions in *Freeport* and *Painer* according to which the fact that claims brought against a number of defendants have different legal bases (contract and tort) does not preclude application of Article 6(1) if it was clear to the defendants in advance that a claim could be brought against them in the Member State in which at least one of them had his domicile.[38]

In our opinion, doubts about AG Jääskinen's view are justified for the following reasons.

First, in the CDC Case the court will have to apply different national laws to the respective claims against each of the defendants and, in *Painer*, the ECJ stated that the application of differing national legal provisions was harmless in that case because the referring court had deemed these to be "*identical in substance*".[39] In the CDC Case, neither the Directive on Antitrust Damages Actions[40] nor the Rome II Regulation[41] result in any simplification of the applicable law as the cartel law infringement occurred so long ago. Rather, the applicable law is German private international law[42] which will likely result in a dispersion of applicable law ("*mosaic principle*"), assuming that the reference point in cartel damages cases is the location in which the damage occurs (*Erfolgsort*)[43], i.e. the location where cartel prices were paid.[44] The damages claims in the CDC Case are thus governed by the national law at the damaged party's location, e.g. Dutch, Belgian, Finnish, Spanish and French law. Unlike the national copyright damages provisions in the *Painer* case, however, the legal bases applicable to breaches of cartel law differ considerably within the relevant legal systems, have their origins to a certain extent in different legal traditions, and produce very different results with regard to liability requirements, calculation of damages, statute of limitations and interest.[45]

Secondly, there is the criticism that, for defendants in cartel damages cases, such as the CDC Case, the bringing of an action before a court in another Member State is, in fact, not predictable.[46] The ECJ has not yet defined in abstract terms when such predictability is to be assumed. In practice, it is sometimes assumed that as they know their accomplices, cartel members are always able to predict the Member State court before which they might be sued. Some authors, however, call for the additional requirement that it should be possible for the conduct of co-defendants domiciled in the forum State to be attributed to other defendants as their own. According to the case law of the ECJ, however, there was a specific lack of any common concept of liability in the legal systems of the European Union.[47] The Dortmund Court, in any event, assumed a single factual and legal situation where, for reasons of European law, the attribution of liability was necessary.[48] Whether European law demands this single attribution of liability was not addressed by the Dortmund Court; nor did AG Jääskinen address this matter in detail. Rather, the AG refers primarily to the fact that the cartel members' obligation to pay damages arises from European law; that it is thus also predictable that damages claims will be asserted against all cartel members before a court in the place where one of the cartel members is domiciled; and that this is also the case where, for example, national legal systems differ with regard to the assumption of joint and several liability.[49] It is to be hoped that the ECJ defines in detail the requirement of predictability in its decision and thus contributes to greater legal certainty for the parties.

If, despite these misgivings, the ECJ concurs with AG Jääskinen's view, then the Dortmund Court will – in view of the numerous relevant legal systems involved – be faced with the difficult task of identifying for every applicable law the relevant individual principles with regard to liability requirements, calculation of damages, statute of limitations and interest. A judge will be free to decide at his reasonable discretion how he fulfils his duty to identify the relevant applicable foreign law.[50] As it cannot be assumed that the Dortmund Court possesses the necessary knowledge of the relevant foreign legal systems, it will be necessary to obtain numerous expert opinions, thereby considerably delaying the decision.

b) The consequences of a withdrawal of claims against the anchor defendant

The Dortmund Court's second referred question on whether and to what extent the withdrawal of claims against the anchor defendant would affect any potential competence under Article 6(1), would be decided, under German law, in accordance with the principle of "*perpetuatio fori*", predominantly set out in Section 261 of the German Code of Civil Procedure (ZPO). Pursuant to Section 261 (3), no. 2 of the German Code of Civil Procedure (ZPO), jurisdiction, once established, is not affected by a change of circumstances after a *lis pendens* of an action. If CDC and Evonik Degussa had not settled until the legal action had become pending, withdrawal of the claim under national law would fundamentally have had no effect on the established jurisdiction.

Although in its previous decisions, the ECJ repeatedly stressed that, from the perspective of European law, recourse to national provisions on jurisdiction is forbidden because the close connection required for Article 6(1) must be interpreted autonomously,[51] the ECJ also ascribes particular significance to the point in time when jurisdiction is established. It therefore expressly decided that jurisdiction under Article 6(1) depends on a connection between the claims against the various defendants existing at the time when these claims are brought.[52] In line with this jurisdiction, AG Jääskinen did not consider the withdrawal to be relevant for the jurisdiction of the Dortmund Court.[53]

One special feature of the CDC Case, however, is that the action against the anchor defendant was withdrawn before any of the defendants had even filed a defence. In this regard, there is at least reason to suspect that the settlement between CDC and Evonik Degussa was consciously delayed in order to wrest competence from the courts of the domiciles of the other cartel members. The ECJ has yet to make any general statements on whether the plaintiff's abusive conduct has a detrimental effect on jurisdiction under Article 6(1). In the CDC Case, it was thus a matter of controversy whether – where the requirements of Article 6(1) are met at the time when the claim is brought – a plaintiff should be refused permission to bring a claim against several defendants solely for the purpose of withdrawing from one of these defendants the competence for its domicile.[54] This could be countered by the ECJ's decision in the *Freeport* case, according to which – where the requirements of Article 6(1) are met at the time when the claim is brought – there should be precisely no need to identify whether the claim has been brought against several defendants solely for the purpose of withdrawing from one of these defendants the competence for its domicile.[55]

At first glance, AG Jääskinen's opinion appears to conflict with the ECJ's decision in *Freeport* as he states that Article 6(1) is not applicable if the invoked court deems it proven that the plaintiff concluded a legally binding settlement with the anchor defendant before it brought its claim and that the plaintiff wittingly concealed the existence of this previous agreement solely for the purpose of withdrawing from another defendant the competence for its domicile.[56] The AG and the Dortmund Court agree, however, that this does not conflict with *Freeport*. They say that the ECJ's decision in *Freeport* is to be understood such that whilst the invoked court has no obligation to always systematically consider abuse, it is nevertheless entitled to do so if there is sufficient evidence to support such abuse.[57]

In our view, this part of the opinion can, in practice, also result in a considerable amount of work for the national judge and a significant delay in proceedings as the Dortmund Court will actually have to determine whether the participants wittingly delayed conclusion of the settlement with the aim of opening up the field of application of Article 6(1). In particular, the Dortmund Court will have to decide whether the plaintiff bears a "secondary burden of proof" for this subjective fact, i.e. the extent to which CDC is required to present and prove the contrary. Although under German procedural law, the party that bases its submissions on a particular fact (here: the abusive intention) is required to bear the burden of proof, the German Federal Court of Justice has acknowledged the need for such secondary burden of proof by the opponent if the party bearing the burden of proof is unable or cannot be reasonably expected to present such proof whilst the disputing party is aware of all significant facts and can be reasonably expected to provide detailed information.[58] This is particularly to be assumed if the party bearing the burden of proof was not involved in the series of events on which it is required to submit proof and has no knowledge of the relevant facts whilst the opponent can be reasonably expected to provide details.[59]

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1 This set of articles has been coordinated and edited by Paul Hitchings, Spanish and English qualified lawyer and head of the international private enforcement practice at Cuatrecasas, Gonçalves Pereira.

2 Directive 2014/104/EU of 26 November 2014, OJ 2014 L 349/1.

3 Regulation 44/2001/EU OJ 2001 L 12/1, now replaced by Regulation 1215/2012, OJ 2012 L 351/1. Article numbers herein refer to the numbering of Regulation 44/2001.

4 Commission Decision C(2006)1766 final of 3rd May 2006 in Case COMP/F/C.38.620 – Hydrogen Peroxide and Perborate (OJ 2006 L 353, p. 54).

5 Case C-352/13.

6 Cuatrecasas advised the main group of claimants in the case described in this article. The author gratefully acknowledges the support of the team at Cuatrecasas, in particular Iñigo Quintana, as well as that of Hausfeld & Co LLP and counsel Jon Turner QC, Sara Masters QC and Rob Williams. The views expressed are the author's own, however.

7 Case 1173/5/7/10.

8 The question of limitation (and the related issue of the meaning of "decision") was a strongly argued issue which, during the process of adjudication (and even after: see the High Court's permission to amend in *Cooper Tire & Rubber Company Europe Ltd & ors v Shell Chemicals U K Ltd & ors in May 2014*), provoked extremely opposing views. So, for instance, one position was adopted by the CAT and Morgan on this occasion, by the Supreme Court and by the European Commission (which intervened before the final court), and the opposite was adopted by the claimants, the Court of Appeal and, indeed, by both the CAT and Morgan themselves on previous claims relating to the same cartel (judgment of the CAT of 17 October 2007 in *Emerson & Others v Morgan Crucible & Others*, [2007] CAT 28).

9 Case C-103/05, *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH*. See further below.

10 Briggs and Rees, *Civil Jurisdiction and Judgments* (5th Ed.), at 2.205.

11 Judgment of 28 November 2012, Flaux J, *Bord Na Mona* [2012] EWHC 3346. See also the judgment of 5 July 2012 of Mackie J in *Sibir Energy ltd.* [2012] EWHC 1844.

[12] CPR 6.37.

[13] See, for example, *The Rewia* [1991] 2 Lloyd's Report 325 and *Cooper Tire* [2010] EWCA Civ 864.

[14] See, for example the Court of Appeal's judgment in *Alfa Laval* [2012] EWCA Civ 1569.

[15] *Reisch* at 32.

[16] Paragraph 11 of the Preamble to the Brussels Regulation.

[17] See, for example, *Reisch* at 25; Case C-440/97, *GIE Group Concorde*, at 24; Case C-256/00, *Besix* at 26; Case C-281/02, *Owusu* at 38-40; Case C-269/95, *Benincasa* at 26 and Case C-125/92 *Mulox* at 11.

[18] See, for example, Case C-295/95, *Jackie Farrel* at 12; Case C-383/95, *Rutten*, at 12; *Mulox* at 10-11; Case C-89/91, *Shearson* at 13; and *Reisch* at 27 and 29.

[19] Case C-98/06, *Freeport*.

[20] This approach of the European rules is well expounded by the House of Lords in *Canada Trust v Stolzenberg (No.2)* [2002] 1 AC 1.

[21] AG Mengozzi suggested in *Freeport*, in a slightly broader interpretation of the abuse provision implicit in Article 6(1) which could have led to a different result in *Reisch*, that claims which were manifestly inadmissible or unfounded in all respects should not be capable of being used for the purposes of Article 6(1).

[22] Mackie J in *Sibir* suggests in fact an identical approach.

[23] See, for instance, the rejection of the *forum non conveniens* doctrine in *Owusu* and the comment of AG Léger as to inspiration of the EU system of jurisdiction in civil law (at 264).

[24] The author is representing claimants in some of the cases referred to in this article (specifically, CDC and Equilib). The views contained herein are his own.

[25] Amsterdam District Court 4 June 2014, ECLI:NL:RBAMS:2014:3190 (CDC / AkzoNobel et al)

[26] Amsterdam District Court 7 January 2015, ECLI:NL:RBAMS:2015:94 (Equilib / KLM et al)

[27] Opinion of AG Jääskinen, Case C-352/13, *CDC*, at 133.

[28] Rotterdam District Court 17 July 2013, ECLI:NL:RBROT:2013:5504 (Stichting Elevator Cartel Claim/Kone et al)

[29] *Freeport* at 54.

[30] *Ibid.* at 52.

[31] Amsterdam District Court 7 January 2015, ECLI:NL:RBAMS:2015:94 (Equilib/KLM et al), at 3.6-3.8.

[32] The authors are acting in the CDC Case on behalf of one of the defendants. The views contained in this article are their own.

[33] Commission Decision C(2006)1766 final of 3rd May 2006 in Case COMP/F/C.38.620 – Hydrogen Peroxide and Perborate (OJ 2006 L 353, p. 54).

[34] Case C-539/03, *Roche Nederland*, at 26.

[35] *Freeport*, at 40 *et seq*.

[36] Opinion of AG Jääskinen, at 65 and 69.

[37] Opinion of AG Jääskinen at 71.

[38] *Freeport*, 38, 45 and 47; Case C-145/10, *Painer*, 76, 80 and 81.

[39] *Painer*, 82. The referring court stated that the actions brought against several defendants for copyright infringements were based on essentially identical national legal grounds as the main points of the claims for a prohibitory injunction and for damages in all European states coincided (at 43).

[40] Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1.

[41] Opinion of AG Jääskinen, 75.

[42] Article 38 Introductory Act of the German Civil Code (EGBGB) old version/Article 40- 42 EGBGB.

[43] Von Hoffmann in Staudinger, 2001, Article 40 EGBGB, marg. no. 362-367; Kegel/Schurig, Internationales Privatrecht, 9th edition 2004, Sec. 23 V. 5., page 1130; Landgericht Dortmund, WuW/E DE-R 1352, 1354 – *Vitaminpreise Dortmund*.

[44] In accordance with this classification, Section 130(3) German Act against Restraints of Competition (GWB) - in force since 1 July 2005 and in the area of private cartel law superseding the general reference points of private international law - takes as the reference point the place affected. Article 6 of the Rome II Regulation – superseding Art. 130 GWB – also applies the place affected as the reference point for claims arising from unfair competition.

[45] Harms in EuZW 2014, 129 (132) "Der Gerichtsstand des Sachzusammenhangs (Art. 6 Nr. 1 EuGVVO) bei kartellrechtlichen Schadensersatzklagen".

[46] *Ibid.* (132, 133).

[47] *Ibid*.

[48] Landgericht Dortmund, NZKart 2013, 472, at 17.

[49] Opinion of AG Jääskinen at 67 *et seq*.

[50] Geimer in Zöller ZPO, 30th edition 2014, § 293 margin no. 20; BGH NJW 1995, 1032.

[51] Case C-103/05, *Reisch Montage* at 29 (and case law cited therein).

[52] *Freeport* at 54.

[53] Opinion of AG Jääskinen at 78 *et seq*.

[54] The ECJ has frequently decided that a plaintiff should be refused such permission in Case C-189/87, *Kalfelis* at 8 and 9; Case C-51/97, *Réunion Européenne SA* at 47; *Reisch Montage at* 32; *Painer* at 78.

[55] *Freeport* at 51 and 54.

[56] Opinion of AG Jääskinen at 90.

[57] Opinion of AG Jääskinen at 86; District court Dortmund, NZKart 2013, 472, at 20.

[58] BGH NJW 2005, 2395 (2397); NJW 2014, 3033 Rn 14; BAG NZA 2013, 559 Rn 28.

[59] Vgl. Fn. 9.

UPCOMING EVENTS

Telephonic Committee Programs

***To Be Announced**:* A discussion with the authors of this International Civil Redress Bulletin Issue, regarding territorial jurisdiction in European cross-border cartel damages claims and the joining of defendants from different Member States before one court.

Stay tuned for registration information.

28 May 2015, 1:30 p.m. to 2:30 p.m. (EDT)

Moderator

- **Nicholas Frey**, Freshfields Bruckhaus Deringer LLP, United Kingdom

Panelists

- **Paul Hitchings**, Cuatrecasas, Gonçalves Pereira, Spain
- **Martijn van Maanen**, BarentsKrans N.V., The Netherlands
- **Meike von Levetzow**, Noerr LLP, Germany

63rd ABA Section of Antitrust Law Spring Meeting, Washington DC

Through the Looking Glass: When "Direct" Means "Indirect"
Presented by the Cartel & Criminal Practice and Civil Redress Committees and the International Cartel Task Force
15 April 2015, 10:45 a.m. to 12:00 p.m. (EST)

A "crossfire-style" debate on the reach of the U.S. antitrust laws, focusing on the FTAIA's "direct" requirement in the context of "benchmark" cases and "input" markets. The debate will consider specifically how the "direct" standard has been defined and applied in *U.S. v. Hui Hsiung*; *Motorola Mobility LLC v. AU Optronics Corp.*; *Lotes Co. v. Hon Hai Precision Indus.*; and *Minn-Chem, Inc. v. Agrium, Inc.*

Moderator

- **Mark Rosman**, Wilson Sonsini Goodrich & Rosati PC, Washington, DC

Debaters

- **Kenji Ito**, Mori Hamada & Matsumoto, Tokyo, Japan
- **Kristen Limarzi**, Chief, Appellate Section, U.S. Department of Justice, Antitrust Division, Washington, DC
- **Tiffany Rider**, Skadden Arps Slate Meagher & Flom LLP, Washington, DC
- **Hollis Salzman**, Robins Kaplan Miller & Ciresi LLP, New York, NY

Your Loss, My Gain? Proving Damages Across Jurisdictions
Presented by the Civil Redress and International Committees
15 April 2015, 3:30 p.m. to 5:00 p.m. (EST)

As the EU moves to promote antitrust damages actions, litigants need to understand how differences in proving antitrust damages affect their claims across jurisdictions. This panel will examine how issues such as causation, treatment of direct v. indirect purchasers, umbrella damages, admissibility of evidence, use of economic analysis and expertise of the court can affect damages outcomes.

Chair

- **Melissa H. Maxman**, Cozen O'Connor, Washington, DC

Moderator

- **Alexander Rinne**, Milbank Tweed Hadley & McCloy LLP, Munich, Germany

Panelists

- **Catherine M. Beagan Flood**, Blake Casse & Graydon LLP, Toronto, ON, Canada
- **Stephen Kon**, King & Wood Mallesons SJ Berwin, London, United Kingdom
- **Martha S. Samuelson**, Analysis Group, Boston, MA
- **Steven N. Williams**, Cotchett Pitre & McCarthy LLP, San Francisco, CA

Bench Trials: What Is the Best Presentation?
Presented by the Civil Redress and Trial Practice Committees
16 April 2015, 8:15 a.m. to 9:45 a.m. (EST)

The DOJ's recent antitrust cases against American Express and Apple were tried to the court. The FTC brings proceedings before an ALJ, and for private litigation, bench trials and injunctions are before a single fact finder. What are the best methods of presentation? What are good examples from recent trials? We will hear advice and criticism from a federal district judge and leading practitioners.

Chair and Moderator

- **Layne E. Kruse,** Norton Rose Fulbright, Houston, TX

Panelists

- **The Honorable Michael M. Baylson**, Judge, U.S. District Court Eastern District of Pennsylvania, Philadelphia, PA
- **Ted D. Hassi**, O'Melveny & Myers LLP, Washington, DC
- **Melissa H. Maxman**, Cozen O'Connor, Washington, DC
- **Robert C. Walters**, Gibson Dunn & Crutcher LLP, Dallas, TX

International Collective Actions: What Is And Isn't Working?
Presented by the Civil Redress Committee
16 April 2015, 8:15 a.m. to 9:45 a.m. (EST)

Collective action regimes continue to develop around the world. International practitioners will discuss such regimes, identify concerns when no class mechanism exists, debate individual and collective private enforcement and defense issues across key jurisdictions (UK and other EU States, Canada and Australia), including contribution claims, consolidation, pass through and collective settlements.

Chair and Moderator

- **Judith A. Zahid**, Zelle Hofmann Voelbel & Mason LLP, San Francisco, CA

Panelists

- **Brooke Dellavedova**, Maurice Blackburn, Melbourne, Australia
- **Robert E. Kwinter**, Blake Cassels & Graydon LLP, Toronto, ON, Canada
- **Jon Lawrence**, Freshfields Bruckhaus Deringer LLP, London, United Kingdom
- **Frederieke Leeflang**, Boekel De Nerée, Amsterdam, Netherlands

The International Civil Redress Bulletin is published four times a year by the American Bar Association Section of Antitrust Law Civil Redress Committee. The views expressed in the International Civil Redress Bulletin are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the Civil Redress Committee. If you wish to comment on the contents of the International Civil Redress Bulletin, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654.