

Topics in competition / distribution law litigation in France

by

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Topic: Following recent case law of the European Court of Justice and the French Supreme Court, Jurisdiction clauses may be challenged in France in case of actions for damages for competition law infringements.

General context

1. Victims of infringements of the competition law provisions of the European Union can :
 - a. file a complaint before the European Commission and
 - b. file a claim for damages before a national court in one of the member states.
2. The following only deals with the second case, that is damage claims between companies for infringement of competition rules based on article Article 101 of the Treaty of the European Union which states:

"1. The following shall be seen as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void."

3. While in the past, the public enforcement of article 101 by the European Commission dominated the competition scene, private actions before national courts have been favored and received a legal framework by the directive 2014/104 EU of 26 November 2014 on actions for damages under national law for infringement of the competition law provisions of the member states and the European Union.

4. Article 3.1 of the directive states: "*member states shall ensure that any natural or legal person, who has suffered harm caused by an infringement of competition law, is able to claim and to obtain full compensation for that harm*".

Jurisdiction of State Courts

1. The Directive does not deal with the question which national court has jurisdiction for such action and which national law applies.
2. According to the case-law of the European court of justice, these questions are governed by the usual instruments of proceedings in civil and commercial matters. At present:
 - The regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (Brussels 1 bis regulation) determines the jurisdiction of the national courts,
 - Rome 1 regulation 593/2008 of June, 17, 2008 determines the law applicable to contractual obligation and,
 - Rome II Regulation 864/2007 of July, 11, 2007 the law applicable to non-contractual obligations.
3. The jurisdiction aspect which raises numerous questions and brings often surprising and unforeseeable results.
4. This is shown by the 2 following decisions. One by the European Court of Justice, the Cartel Damage Claims Decision of May, 21, 2015 and one by a decision of the French Supreme Court of October, 7, 2015 Ebizcuss against Apple Sales International.
5. The question behind that interests legal advisers, and not only competition specialists, is about the efficiency of contractual jurisdiction clauses.
6. In the cartel damage claims case, which concerns a very complex litigation initiated by the victims of the hydrogen peroxide cartel, the European Court of Justice had to answer the question whether article 25 of the Brussels 1 bis Regulation, in the case of actions for damages for an infringement of article 101 of the European Treaty, allows to take into account jurisdiction clauses contained in contracts for the supply of goods where this has the effect of excluding the jurisdiction of a court with jurisdiction under article 7.2 and/or article 8 of that same regulation.
7. Article 7.2 of the Brussels 1bis regulation gives jurisdiction to the court of the place where the harmful event occurred, or may occur, a rather complex notion in cartel matters, but this is not my topic.
8. Article 8 of the Brussels 1bis Regulation gives jurisdiction to the courts of one of the co-defendants.
9. Both jurisdictions are to be disregarded if the parties have validly agreed on the exclusive jurisdiction of a national court in conformity with article 25 of the Brussels 1bis regulation. Under permanent case law of the European Court, parties can validly derogate from the special jurisdictions under articles 7.2 and 8.
10. In the cartel damage claim case, the court now states that :*"* this conclusions cannot be called into question by the requirement of effective enforcement of the prohibition of cartel agreements.

11. But now comes the most interesting part: the court reminds that a jurisdiction clause can concern only disputes which have arisen in connection with the particular legal relationships. In the present case, the claimants were bound by supply contracts which contained the jurisdiction clause with one of the cartel members.
12. The court states that a clause which abstractly refers to all disputes arising from contractual relationships does not apply to the tortious liability that one party incurred as a result of its participation in an unlawful cartel, since the victim could not reasonably foresee such litigation at the time it agreed to the jurisdiction clause.
13. Therefore, such litigation cannot be regarded as stemming from a contractual relationship.
- 14. The European Court concludes: a jurisdiction clause contained in contracts for the supply of goods allows, in the case of the actions for damages for an infringement of article 101 of the European Treaty, prevails over rules on international jurisdiction under article 7.2 and 8 of the regulation, **provided that such clause refers to disputes concerning liability incurred as a result of an infringement of competition law.****

Practical consequences

15. The practical consequences of the Cartel Damage Claims decision are shown by the following decision of the French Supreme Court. The French company Ebizcuss which had concluded a Distribution Agreement with the Irish subsidiary of Apple Inc., filed an action before a French Commercial Court, to claim damages suffered from alleged infringement of competition law and unfair trade practice by Apple.
16. Apple contested the jurisdiction of the French courts on the basis of the jurisdiction clause in favor of the Irish courts validly agreed in the Distribution Agreement. The Paris Court of Appeal followed Apple's arguments by considering that the jurisdiction clause had validly been agreed between the parties and concluded that it would apply to all disputes arising between the parties in relation with the contract since it was conforming to the conditions of article 25 of the Brussels 1bis Regulation. Ebizcuss filed an Appeal before the French Supreme Court.
17. On the basis of the decision of the European Court rendered a few months earlier, the French Supreme Court decided that the jurisdiction clause was not applicable to the claim for damages, since it did not contain an express reference to disputes resulting from an infringement of competition law.
18. Practical consequences of this case law: contractual jurisdiction clauses may lose their efficiency if one of the concerned parties claims damages for infringement of competition law, which is very frequent in litigation resulting from distribution agreements or from their termination.
19. Certainly parties in the future could amend the jurisdiction clauses by referring to disputes concerning liability incurred as a result of an infringement of competition law but this seems quite difficult to negotiate in practice.
20. In the future, parties may face problems in France with parallel actions filed before a French national court disregarding the contractual jurisdiction clause.
21. The above case law does not apply to Arbitration Agreements which may be a safer way to provide foreseeability to parties in Distribution Agreements.