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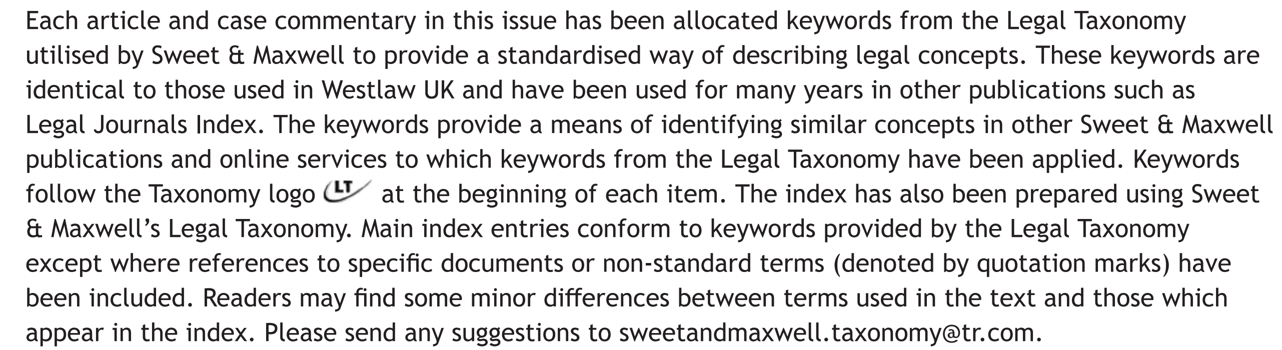

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The Arbitrability of Antitrust Disputes: The Critics of the Chinese Supreme People's Court in Shell v Huili

Qingxiu Bu

Arbitrability; Arbitration clauses; China; Competition law claims; Distribution agreements

Introduction

Undertakings can harm consumers through unfair pricing and inhibiting new entrants in an anticompetitive market.[1] Antitrust law seeks to protect public interests by ensuring free and fair competition in markets,[2] while arbitration is of a private nature and a creature of contract.[3] The former is enacted to maintain competition among various businesses participating in a particular market segment,[4] while the latter is characterised by its hallmarks of adaptability and access to expertise.[5] Parties benefit from efficiency of arbitration,[6] which is attributed to only narrow circumstances for judicial review on limited grounds.[7] Based on an orthodoxic divide between right in rem and right in personam, antitrust law is normally enforced through public agencies.[8] With the boundary between public enforcement and private dispute resolution becoming increasingly blurred, the arbitrability of private antitrust actions has long been a highly debated topic. Disputes differ considerably in terms of suitability for arbitration, which could be further limited by the scope of the arbitration agreement at issue. Furthermore, private antitrust claims have long been thought non-arbitrable due to the public nature of antitrust law, though the scope of non-arbitrability varies from one jurisdiction to another. It is essential to explore a variety of inquiries in this controversial scenario. Is the lack of legislation explicitly a decisive obstacle to recognise the antitrust-related arbitration? Does a party's strategy to deploy alternative dispute resolutions (ADRs) play a role in increasing the bargaining power of the claiming party to its business counterpart? Does the public nature of Chinese Antimonopoly Law (AML 2008) preclude the arbitration in the antitrust-dispute's resolution? Of the most challenged is how Chinese People's Courts respond to arbitration awards made by their counterparts in the US and EU in cross-border cases.

This study focuses on the abovesaid long-standing inquiry, and undertakes a comparative analysis on the arbitrability or non-arbitrability of antitrust disputes between China, the US and the EU, but the focus will be put on the SPC's ruling on *Shell v Huili*. The paper starts with the evolutional analysis of the US law on the arbitrability of antitrust dispute. It then moves to the EU perspective, on the basis of a judgment of *Eco Swiss* made by the European Court of Justice (ECJ). The inconsistency of judgments in China's lower courts was seemingly resolved when the SPC handed down the judgment in the *Shell* case on 21 August 2019. Primary critics take issue with the SPC's controversial reasoning, and China's potential integration into the international arbitration regime. The paper draws on a deterrence theory to propose an innovative basis for striking a balance between party's autonomy and limited judicial review of arbitral agreements. It concludes that the existing regimes are adequate to protect the public policy and public interest, and it is imperative to make China's approaches compatible with the international arbitration regime.

The arbitrability of antitrust disputes in the US and the EU

The question of arbitrability has been settled conclusively in both the US and the EU.[9] The superseded *American Safety* doctrine previously allowed the courts to refuse arbitration of antitrust disputes.[10] A variety of factors had been advanced to justify the courts' refusals in the US, including the overreading of public interest, complexities, and exclusive jurisdiction over antitrust disputes.[11] In a ground-breaking ruling in *Mitsubishi*, the US Supreme Court held that if an international contract contained an arbitration agreement, it would normally be given effect to include submission of an antitrust dispute to arbitration.[12] The sea change is not only manifested in the landmark case, but also in the first antitrust arbitration

[1] *Apex Hosiery Co v Leader* 310 US 469, 493 (1940).
[2] 15 U.S.C. § 4 (2018); The Clayton Act will be initiated to prevent and restrain antitrust violations, in particular, where an undertaking has dominant power.
[3] Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124 *The Yale Law Journal* 2804 2939.
[4] 15 U.S.C. § 1 (2018).
[5] *Mitsubishi Motors v Soler* 473 US 633 (1985).
[6] Pamela Bookman, "The Arbitration-Litigation Paradox" (2019) 72 *Vanderbilt Law Review* 1119, 1149.
[7] 5 U.S.C. §§ 571–84 (2018).
[8] Harry First, Eleanor Fox and Daniel Hemli, "The United States: The Competition Law System and the Country's Norms" in Eleanor M. Fox and Michael J. Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford, Oxford University Press, 2013), pp.329–383.
[9] Robert Brandt von Mehren, "The Eco-Swiss Case and International Arbitration" (2003) 19 *Arbitration International* 465, 469.
[10] *American Safety Equipment Corp v J.P. Maguire & Co* 391 F.2d 821 (2d Cir.1968).
[11] Thomas Brewer, "The Arbitrability of Antitrust Disputes: Freedom to Contract for an Alternative Forum" (1997) 66 *Antitrust Law Journal* 91, 126.
[12] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 105 S. Ct. 3346 (1985).

initiated by the Antitrust Division of Department of Justice (DoJ).[13] The ruling of *Eco Swiss* by the ECJ[14] represents a similar approach to *Mitsubishi* in that no specific type of contract dispute had been pre-excluded from arbitration, thus supporting the arbitrability of competition disputes.

Would arbitration affect the antitrust law development?

Initially, the US jurisdiction emphasised the nature of public law in antitrust law, and held that antitrust law disputes were not within the scope of arbitrable disputes. The legal landscape has changed enormously, given that arbitration plays an increasingly significant role in antitrust law disputes. A more specific inquiry arises as to whether the increased use of arbitration will affect the development of antitrust precedent. The US' validation of private arbitration began in 1925 when Congress enacted the Federal Arbitration Act (FAA).[15] If a commercial contract contains an agreement to settle controversies that arise from the contract through arbitration, the promise to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".[16] The FAA creates a presumption in favour of arbitration,[17] which echoes the New York Convention in its Ch.II.[18] With only narrow grounds for judicial review of the resulting awards,[19] the statute can be used to bar access to courts when merchants allege violations of the antitrust laws.[20] Antitrust disputes had long been non arbitrable in the US.[21] The Second Circuit in *American Safety* became the first Court of Appeals to hold that antitrust claims were not subject to arbitration.[22] The doctrine of *American Safety* was thus established, prohibiting arbitration of antitrust issues.

Firstly, a theoretical basis lies in the awareness that, a claim under the antitrust law could be of more than private interest.[23] There was a concern regarding whether an arbitration tribunal can realise the ultimate legislative intent, that is, to address a scenario where a transaction substantially lessens competition under s.7 of the Clayton Act. Secondly and most importantly, arbitration normally does not create precedent in the same manner as do courts.[24] A court ruling is normally made public, and provides valuable precedents for future cases.[25] In this vein, arbitration is typically confidential, the decision is not disclosed in public domains.[26] Given its confidential nature, the public may not be able to benefit from the collateral estoppel.[27] In addition, arbitration does not adhere to the principle of stare decisis, which is fundamental to a common law jurisdiction.[28] Arbitration awards do not hold the same weight of authority as that of a court ruling. Arbitration decisions are generally not subject to any substantive appeals. [29] As such, merely resolving disputes in lieu of intending to make law, arbitral awards have little or no precedential value in future disputes.[30] From a perspective of creating precedents, a court decision is preferred. Some commentators have even argued that increased use of arbitration will jeopardise the evolving of common law.[31] A third concern might be that arbitral tribunals are unwilling to apply certain laws as accurately as courts would.[32] For instance, arbitration may not be appropriate in merger cases involving multiple dispositive antitrust issues, or lacking structural remedies.[33] It remains paradoxical as to whether merging parties would prefer an arbitration, characterised by confidentiality, to a proceeding in a public courthouse.[34] Given the growth of cross-border transactions, the Supreme Court in *Mitsubishi* even initiated to consider whether Sherman Act claims could be decided by international arbitration tribunals.[35]

[13] DoJ, "Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation" (Washington DC, 9 March 2020), *https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute* [Accessed 7 July 2021].
[14] *Eco Swiss China Time Ltd v Benetton International NV* (C-126/97)EU:C:1999:269; [1999] 2 All E.R. (Comm) 44; [2000] 5 C.M.L.R. 816.
[15] 9 U.S.C. §§1–200 (2012).
[16] Federal Arbitration Act (FAA) s.2; 9 U.S.C. §2.
[17] Richard Frankel, "The Arbitration Clause as Super Contract" (2014) 91 *Washington University Law Review* 531, 587.
[18] FAA Ch.2; 9 U.S.C. § 201.
[19] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[20] *Am. Express Co v Italian Colors Rest* 133 S. Ct. 2304 (2013); *Mitsubishi Motors v Soler* 473 U.S. 614 (1985).
[21] *Baxter International v Abbott Laboratories* 315 F 3d 832 (7th Cir.2003).
[22] *American Safety Equipment Corp v J.P. Maguire & Co* 391 F.2d 821 (2d Cir.1968).
[23] William Nissen, "Antitrust and Arbitration in International Commerce Developments in International Commercial Arbitration" (1976) 17 *Harvard International Law Journal* 110, 121.
[24] Michael Abramowicz and Maxwell Stearns, "Defining Dicta" (2005) 57 *Stanford Law Review* 953, 1004.
[25] Luca Radicati di Brozolo and Laurence Idot, "Hearing: Arbitration and Competition" (Paris, OECD, October 2010), *https://www.oecd.org/daf/competition/abuse/49294392.pdf* [Accessed 7 July 2021].
[26] Stefan Pislevik, "Precedent and development of law: Is it time for greater transparency in International Commercial Arbitration?" (2018) 34 *Arbitration International* 241, 260.
[27] Mark Lemley and Christopher Leslie, "Antitrust Arbitration and Merger Approval" (2015) 110 *Northwestern University Law Review* 1, 62.
[28] Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators" (2011) 2 *Journal of International Dispute Settlement* 5, 23.
[29] 5 U.S.C. § 580(d).
[30] Abramowicz and Stearns, "Defining Dicta" (2005) 57 *Stanford Law Review* 953, 1004.
[31] Richard McAdams, "The Expressive Power of Adjudication" (2005) 5 *University of Illinois Law Review* 1043, 1118.
[32] *American Safety* 391 F.2d 821 (2d Cir.1968).
[33] Mark Lemley and Christopher Leslie, "Antitrust Arbitration and Merger Approval" (2015) 110 *Northwestern University Law Review* 1, 62.
[34] Pamela Bookman, "The Adjudication Business" (2020) 45 *Yale Journal of International Law* 227, 283.
[35] *Mitsubishi Motors v Soler* 473 US 632–635 (1985).

The Supreme Court's Mitsubishi ruling

The Supreme Court in *Mitsubishi* first applied the FAA to preclude litigation of a federal statutory right.[36] A core inquiry before the court was whether Soler's antitrust claim should be resolved in court or through arbitration.[37] It critically revoked rationales, as cornerstones of the *American Safety* doctrine, used to render antitrust disputes non-arbitrable.[38] The Supreme Court in *Mitsubishi* held that:

> "The private right of action statute[39] will remain just as viable in arbitration as in judicial litigation and thus as "the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies."[40]

As a strategy to avoid antitrust labiality, some businesses impose arbitration agreements on their distributors and customers.[41] For instance, they attempt to preclude class action litigation in their arbitration clauses.[42] It is worth noting that the landmark ruling foreshadows the application scope in terms of domestic and international scenarios.[43] The Supreme Court emphasised the importance of

> "international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes… Even assuming that a contrary result would be forthcoming in a domestic context".[44]

This ruling confirms the role of the effective vindication doctrine in streamlining the use of arbitration of antitrust disputes, which, to some extent, strengthens the antitrust victims' statutory rights.[45] This doctrine may also be invoked to invalidate the detrebling provisions embedded in arbitration clauses.[46] The *Mitsubishi* ruling indicates confidence in arbitrators' willingness to enforce US antitrust law, and their ability to deal with its complexity.[47] This includes deterrence, which is often identified as the more important public benefit.[48] As such, the Supreme Court affirmed that:

> "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function".[49]

Plausibly, the Supreme Court did not reverse the *American Safety* doctrine, but distinguished its domestic application vis-à-vis that of *Mitsubishi's* international focus. It thus explained that "[t]he importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court".[50] More importantly, the Supreme Court did not leave aside the orthodoxic issue of public interests and held that:

> "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."[51]

Apparently, the court justified its ruling on the ground that arbitration awards will receive scrutiny "sufficient to ensure that arbitrators comply with the requirements of the statute at issue".[52] As Scodro observed, the Supreme Court struck a proper balance to vindicate Soler's rights effectively while enabling courts to ensure arbitral cognizance of antitrust law when asked to enforce the award.[53] In this vein, a double-check mechanism was established through the second-look doctrine.[54]

The Department of Justice Antitrust Division's first Antitrust Arbitration

Antitrust legal proceedings could be viable through alternative mechanisms. The Antitrust Division explained that arbitration is favoured by federal policy and would offer "a speedier and less costly alternative to litigation".[55]

[36] *Mitsubishi Motors* 473 US 614 (1985).
[37] *Mitsubishi Motors* 473 US 624 (1985).
[38] Ramona Lampley, "Is Arbitration Under Attack? Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape" (2009) 18 *Cornell Journal of Law and Public Policy* 477, 518.
[39] Clayton Act s.4, 15 U.S.C. s.15.
[40] *Mitsubishi Motors* 473 US 636 (1985).
[41] Judith Resnik, "Fairness in Numbers: A Comment on AT&T v Concepcion, Wal-Mart v Dukes, and Turner v Rogers" (2011) 125 *Harvard Law Review* 78, 122.
[42] Myriam Gilles and Gary Friedman, "After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion" (2012) 79 *The University of Chicago Law Review* 623, 675.
[43] Lisa Sopata, "Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc: International Arbitration and Antitrust Claims" (1986) 7 *Northwestern Journal of International Law & Business* 595, 617.
[44] *Mitsubishi Motors* 473 US 629 (1985).
[45] Raul C. Loureiro, "Ineffective Vindication of Antitrust Rights" (2019) 21 *The University of Pennsylvania Journal of Business Law* 978, 1005.
[46] Mark Lemley and Christopher Leslie, "Antitrust Arbitration and Merger Approval" (2015) 110 *Northwestern University Law Review* 1, 62.
[47] Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" (2015) 124 *The Yale Law Journal* 2804, 2939.
[48] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[49] *Mitsubishi Motors* 473 US 614, 637 (1985).
[50] *Mitsubishi Motors* 473 US 635 (1985).
[51] *Mitsubishi Motors* 473 US 638 (1985).
[52] *Shearson/Am. Express, Inc v McMahon* 482 US 220, 232 (1987).
[53] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[54] Alexandra Theobald, "Mandatory Antitrust Law and Multiparty International Arbitration" (2016) 37 *University of Pennsylvania Journal of International Law* 1059, 1089.
[55] *AT&T Mobility LLC v Concepcion* 563 US 333, 344–46 (2011).

In some situations, Congress has allowed parties to obtain the advantages of arbitration if they are willing to accept less certainty of legally correct adjustment.[56] In *Mitsubishi*, the Supreme Court lifted the bar against enforcement of agreements to arbitration.[57] The ruling laid the foundations for antitrust arbitration, recognising as arbitrable claims under the Sherman Antitrust Act.[58]

A dispositive motion plays a critical part in the development of the antitrust law, which has been influenced by several Supreme Court antitrust decisions.[59] When deployed properly, it can potentially reduce the time and expense in a case, which is also consistent with the goals of arbitration.[60] As justice Blackmun noted:

> "By agreeing to arbitrate a statutory claim, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[61]

Expanding the use of arbitration for merger review cases could make federal antitrust enforcement more flexible and efficient.[62] On 4 September 2019, the DoJ filed a complaint in the US District Court for the Northern District of Ohio, challenging Novelis' proposed $2.6 billion acquisition of Aleris Corp.[63] At stake was, a focus upon a narrow but dispositive issue of the relevant market definition. Both the Antitrust Division and the merging parties agreed on the parameters of a divestiture remedy, seeking to expedite the pathway to close the transaction through binding arbitration.[64] The result would determine whether Novelis would divest the overlap facility, or the Antitrust Division would move to dismiss the complaint. On 9 March 2020, the DoJ prevailed in its first-ever arbitration of a merger issue in this landmark case.[65] The case of *Novelis* signals not only the Antitrust Division's willingness to decide dispositive issues, but also an opportunity for merging parties to avoid a trial through alternative remedies, like arbitration.[66]

The Administrative Dispute Resolution Act of 1996 (ADAR) allows a federal government agency to "use [an alternative] dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding".[67] The legislative intent of ADAR is to alleviate the court's burden via the ADR.[68]

Despite ADAR's theoretical existence over two decades, this marks the first time DoJ has used arbitration as an alternative to litigation to resolve a merger challenge case.[69] The case of *Novelis* witnesses that ADR mechanisms are no longer just a theoretical means for resolving antitrust investigations.[70] However, an inquiry arises as to whether the availability of arbitration would be limited to cases in which the issues in dispute are well-defined and discrete.[71] It might be too early to affirm whether this case portends a larger shift in the Antitrust Division's approach. After all, this ground-breaking practice foreshadows a potential model for DoJ to resolve future antitrust disputes. The exploration of the EU's approaches may shed more light on the extent to which arbitration is used as a competition law dispute resolution mechanism.

The EU and the US share similar approaches

The *Mitsubishi* position has been reiterated by the ECJ in *Eco Swiss*.[72] Although the ruling of *Eco Swiss* does not distinguish between different breaches of EU competition law, the ECJ accepts the arbitrability of EU antitrust disputes. The DoJ's use of arbitration in *Novelis* and the increasing acceptance of international arbitration to determine EU competition law issues demonstrate that arbitration can be a useful tool to settle their antitrust disputes.[73]

Competition disputes are arbitrable under the EU law.[74] In *Eco Swiss*, the dispute had been proceeded by an arbitral tribunal, which ordered Benetton to make

[56] *American Safety* 391 F.2d 828 (2d Cir. 1968).
[57] Monroe Leigh, "Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc 105 S. Ct. 3346" (1986) 80 *The American Journal of International Law* 168, 170.
[58] George Bermann, "Navigating EU Law and the Law of International Arbitration" (2012) 28 *Arbitration International* 397, 445.
[59] *Bell v Twombley* 550 US 544 (2007).
[60] James H. Carter, "Dispositive Motions in International Arbitration and the Role of U.S. Courts" in John Norton Moore (ed.), *International Arbitration: Contemporary Issues and Innovations* (Martinus Nijhoff, Brill, 2013), pp.39–45.
[61] *Mitsubishi Motors* 473 US 628 (1985).
[62] DoJ, "Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation" (Washington DC, 9 March 2020), *https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute* [Accessed 7 July 2021].
[63] *United States v Novelis Inc* 1:19-CV-02033, Dkt. 1, (N.D. Ohio 4 September 2019).
[64] 9 U.S.C. §§ 10–11 (2018).
[65] DoJ, "Justice Department Wins Historic Arbitration of a Merger Dispute: Novelis Inc. Must Divest Assets to Consummate Transaction with Aleris Corporation" (Washington DC, 9 March 2020), *https://www.justice.gov/opa/pr/justice-department-wins-historic-arbitration-merger-dispute* [Accessed 7 July 2021].
[66] Karen Hoffman Lent, Kenneth Schwartz and Heather Cicchese, "DoJ and the Arbitration Option for Merger Review" (Columbia Law School's Blog on Corporations and the Capital Markets, 22 October 2019). *https://clsbluesky.law.columbia.edu/2019/10/22/skadden-discusses-doj-and-the-arbitration-option-for-merger-review/* [Accessed July 2021].
[67] The Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 et seq.
[68] 5 U.S.C. § 572(a) (2018); 5 U.S.C. § 575 (2018).
[69] US DoJ, "Antitrust Division Update 2020", *https://www.justice.gov/file/1280196/download* [Accessed 7 July 2021].
[70] Pamela Bookman, "The Arbitration-Litigation Paradox" (2019) 72 *Vanderbilt Law Review* 1119, 1149.
[71] Catherine Rogers, "Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration" (2002) 39 *Stanford Journal of International Law* 1, 58.
[72] *Eco Swiss* (C-126/97) [1999] 2 All E.R. (Comm) 44; [2000] 5 C.M.L.R. 816.
[73] Christopher Cook, Sven Frisch, Vladimir Novak, "Recent Developments in EU Merger Remedies" (2020) 11 *Journal of European Competition Law & Practice* 309, 326.
[74] George Bermann, "Navigating EU Law and the Law of International Arbitration" (2012) 28 *Arbitration International* 397, 445.

compensation for the damage suffered by Eco Swiss.[75] Benetton applied for annulment, alleging that the contract in question was inconsistent with the principle of public policy.[76] The question before the ECJ was:

> "[I]f the court considers that an arbitration award is in fact contrary to Article 85 of the EC Treaty, must it allow a claim for annulment of that award if the claim otherwise complies with statutory requirements?"[77]

The ECJ affirmed in *Eco Swiss* that the national courts in the EU should grant annulment of any award where "its domestic rules of procedure require it … for failure to observe national rules of public policy".[78] It is implied that an arbitral award shall be enforced, if the competition issue does not go against public policy or involve a hard-core violation under arts 101 and 102 TFEU.[79] Otherwise, a competition claim would fall outside the jurisdiction of arbitrations. The case of *Eco Swiss* represents the first one where the ECJ indirectly admitted the arbitrability of competition claims.[80]*Eco Swiss* establishes a duty of the arbitral tribunal to apply art.81 of the EC Treaty ex officio.[81] It shows a possible annulment of arbitration agreement by EU national courts in case of an infringement of TFEU on the ground of public interests.[82] It is notable that the ECJ in *Eco Swiss* does not require national courts to undertake a greater level of review in respect of EU competition law than they would where other public policy arguments are triggered.[83] Meanwhile, the ECJ qualifies the EU competition law as a matter of public policy within the meaning of art.V(2)(b) of the New York Convention. As Blanke observed:

> "[I]t imposed an obligation on EU member state courts in their capacity as supervisory courts to perform a full substantive review of international commercial arbitral awards to ensure their compliance with EU competition law."[84]

Apart from the primary driving force of public policy leading to reservation, *Eco Swiss* also signals that arbitration is a competent forum for addressing the EU antitrust issues.

Arbitration has traditionally played a marginal role in antitrust enforcement, the US and EU's approaches exemplify its increasingly significant role in future resolution of antitrust law disputes.[85] The role of international arbitration in competition law disputes will continue to grow across jurisdictions.[86] This abovesaid affirmative judgments are reflective of the arbitrability of competition claims from both the EU and the US perspectives. The ECJ's ruling in *Eco Swiss* epitomises the EU's attitude toward the arbitrability across the Atlantic and ensures the continued attractiveness of arbitration to an EU-based business.[87] To avoid any asymmetrical gap between China, the EU and the US, it is worth exploring the approaches by the SPC in *Shell v Huili*.[88]

Divergences in China's approaches in Shell v Huili (2019)

The controversy over the validity of arbitration clauses in antitrust disputes has been a long-standing issue in China. The inquiry goes further as to whether an arbitration clause in the contract can exclude the court's inherent jurisdiction to hear an antitrust dispute. The SPC has responded on the issue, but left scope for ambiguity. Seeking to address the arbitrability of antitrust claims, The SPC has made a landmark ruling in *Shell*, concerning Shell's objection to jurisdiction in an antitrust lawsuit. One of the key procedural issues is whether antitrust disputes are arbitrable or not, given that neither the China Arbitration Law 2017 nor its AML 2008 provides expressly whether monopoly disputes may be resolved by arbitration.

Shell v Huili

The case was initially heard by the Hohhot Intermediate People's Court and was appealed to the SPC by Shell. The dispute arose from an agreement between Shell China and Huili, one of its Chinese distributors. The plaintiff brought a lawsuit against Shell before the Intermediate People's Court of Hohhot for violation of AML 2008. Huili alleged that Shell had organised a horizontal monopolistic agreement among its distributors and colluded in the bidding process.[89] The defendant Shell insisted on excluding the court's jurisdiction because of

[75] Michael Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Bloomsbury, 2004), pp.311–388.
[76] The Treaty on the Functioning of the European Union (TFEU) art.85.
[77] *Eco Swiss* (C-126/97) [1999] 2 All E.R. (Comm) 44; [2000] 5 C.M.L.R. 816 at [30].
[78] *Eco Swiss* (C-126/97) [1999] 2 All E.R. (Comm) 44; [2000] 5 C.M.L.R. 816 at [41].
[79] Niamh Dunne, "Characterizing Hard Core Cartels Under Article 101 TFEU" (2020) 65 *The Antitrust Bulletin* 376, 400.
[80] *Eco Swiss* (C-126/97) [1999] 2 All E.R. (Comm) 44; [2000] 5 C.M.L.R. 816.
[81] TFEU art.81(1).
[82] TFEU art.81.
[83] Pierre Heitzmann and Jacob Grierson, "SNF v CYTEC Industrie: National Courts Within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Article 81 EC" (2007) 2 *Stockholm International Arbitration Review* 39, 49.
[84] Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last?" in Heather Bray and Devin Bray (eds), *Post-Hearing Issues in International Arbitration* (New York: Juris Publishing, 2013), pp.169-227.
[85] Andrew Guzman, "Arbitrator Liability: Reconciling Arbitration and Mandatory Rules" (2000) 49 *Duke Law Journal* 1279, 1334.
[86] Alexandra Theobald, "Mandatory Antitrust Law and Multiparty International Arbitration" (2016) 37 *University of Pennsylvania Journal of International Law* 1059, 1089.
[87] Gordon Blanke, "Achmea: How Far Does It Reach?" *Arbitration Blog* (25 October 2018), *http://arbitrationblog.practicallaw.com/achmea-how-far-does-it-reach/* [Accessed 7 July 2021].
[88] *Huili v Shell* (Supreme People's Court, No.47, 29 August 2019).
[89] Yang Yang, "Chinese Private Ligation Rules and the Apple v Pepper Supreme Court Decision-Standing and Burden of Proof in Private Enforcement" *Competition Policy International* (28 November 2019).

a pre-existing arbitration clause, which allowed the parties to settle disputes by arbitration in lieu of litigation. Shell appealed to the SPC on the ground that the case should be submitted to arbitration because the distribution agreement contained a valid arbitration clause which stipulated that all disputes were to be resolved by arbitration. In its verdict, the SPC pointed out that AML 2008 is silent as to the arbitrability of antitrust disputes.[90] The issue was whether Huili's claim fell within the scope of the arbitration clause contained in their distribution agreement. The Intermediate People's Court rejected the jurisdictional challenge on the ground of public interest and the lack of explicit statutory basis for the arbitrability of monopoly disputes. Based on the same reasoning under the Arbitration Law 2017, Shell argued that the People's Court should honour the contractually agreed arbitration clause as being valid and binding, because of the lack of explicit preclusion against arbitrability. The SPC held that antimonopoly cases involve the public interest and, in the absence of an express rule allowing arbitration of such private disputes, an arbitration clause may not serve as a basis for jurisdiction in a dispute between private parties.[91] Thus, the SPC clarified that a contractual arbitration clause cannot exclude the jurisdiction of Hohhot Intermediate People's Court in adjudicating alleged horizontal monopoly arrangements.[92]

The grey area of arbitrability

There is no inherent bar to the private enforcement of competition law by way of arbitration. The controversy stems largely from the fact that both the Arbitration Law 2017 and the AML 2008 are silent on the matter. Arbitration is not specifically stipulated in AML 2008 as the means for resolution of antitrust disputes. In terms of the scope of arbitrable disputes, the Arbitration Law 2017 provides that "contractual disputes and disputes arising from property rights may be put to arbitration".[93] The parties ought to be able to settle the claim by arbitration, since plaintiffs are free to refrain from suing after a violation has occurred.[94] The SPC held that the case between Shell and Huili was a monopoly-related civil dispute rather than a contractual dispute. As such, the arbitration clause should not exclude people's courts' jurisdiction over the antitrust civil disputes.

Hypothetic challenge vis-à-vis objective cognizance

The rationale behind the SPC ruling, is that the arbitration clause cannot directly exclude the court's inherent jurisdiction to hear antitrust cases. It further explained that AML 2008 stipulates expressly that monopoly-related cases are to be resolved either through civil litigation or by administrative authorities.[95]AML 2008 does not make a reference to arbitration. In furtherance of its reasoning, the SPC referred to Arbitration Law 2017 that a People's Court has jurisdiction over a dispute on the ground that:

1) one of the parties has already filed its claims in a court; and
2) the dispute is not related to contractual rights or other property rights.[96]

The SPC blocks the arbitration of competition claims, partly due to the lack of explicit provisions covered by the scope of arbitration of China Arbitration Law 2017. Plausibly, civil disputes caused by monopolistic behaviour are disputes between the two equal parties, the issue of which is tort liability.[97] Antimonopoly disputes are ostensibly usually viewed as a public policy matter.[98] Following the reasoning of standing and eligibility, a paradoxical approach seems to be that public enforcement is to be implemented by antitrust authority and private enforcement by Chinese courts or arbitration tribunals. Impliedly, antimonopoly disputes between contractual parties with equal standing are thus out of the arbitrable scope enshrined in China Arbitration Law 2017.[99] As such, the absence of existing provisions explicitly allows antitrust disputes to be settled via arbitration, which plausibly leads to the invalidity of the arbitration clauses. Hereby, it should not exclude the court's jurisdiction over disputes concerning horizontal monopoly agreements.

The scope of review for statutory claims is, prime facie, the same as those arbitrated claims. The enforcement relies primary on regulatory agencies. There is no explicit legal provision on arbitration, as an ADR for antitrust disputes. The current law does not expressly exclude arbitration from being used for antitrust dispute resolution. AML 2008 provides that one party shall be liable for the damage where another party suffers loss due to the underlying monopolistic conduct,[100] but does not explicitly stipulate that only the courts have jurisdiction over antitrust disputes. In particular, art.50 of the AML does not exclude the feasibility of arbitrary dispute resolution. Another three provisions define the scope of arbitrable

[90] Siyou Zhou, "Arbitrability of Competition Claims in China—A Case Study of the EU, US and China" *Leiden Law Blog* (16 December 2019).
[91] Alexandra K. Theobald, "Mandatory Antitrust Law and Multiparty International Arbitration" (2016) 37 *University of Pennsylvania Journal of International Law* 1059, 1089.
[92] *Huili v Shell* (Supreme People's Court, No.47, 29 August 2019).
[93] China Arbitration Law 2017 art.2.
[94] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[95] AML 2008 arts 10, 50.
[96] China Arbitration Law 2017 art.2.
[97] Hannah Buxbaumt, "The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation" (2001) 26 *The Yale Journal of International Law* 219, 263.
[98] Daniel Crane, "The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy" (2014) 79 *Antitrust Law Journal* 835, 853.
[99] China Arbitration Law 2017 art.2.
[100] AML 2008 art.50.

matters,[101] none of which negates the arbitrability of antitrust issues. In addition, art.2 of the Arbitration Law 2017 provides that:

> "Contractual disputes and other disputes over the rights and interests in property between citizens, legal persons, and other organisations that are equal subjects may be arbitrated."

It seems that the statutory disputes relating to antitrust matters can be within the scope of arbitration. From a dialectical perspective, the non-arbitrability subject matters stipulated in the Arbitration Law 2017 do not include competition claims.

The blurred scope of review: statutory claims vis-à-vis arbitrable claims

The SPC clarifies the Chinese People's Courts' jurisdiction over antitrust disputes, and they may only be resolved by civil litigation or administrative sanctions, despite an arbitration clause existing in the concerning contract. However, it has not addressed the monopolistic arbitrability from the angle of jurisprudence. Inconsistent rulings have been made on the issue of the arbitrability of antitrust disputes. In *Songxu Technology*, the Jiangsu High People's Court emphasised that:

> "AML 2008 is a matter of public law and that since the law does not clearly stipulate that AML-related disputes can be resolved through arbitration, the courts should have jurisdiction, given the public law nature of the AML and the underlying public interest."[102]

In contrast, *Shell v Shanxi Changling* concerned an antitrust dispute based on an allegation of abuse of dominant market position. The Beijing High People's Court in Shell v Shanxi Changlin held that: "a jurisdiction over a case should be determined by the existence of a valid arbitration clause in the contract, regardless of the basis on tortious liability or breach of contract".[103] The court considered that it had no jurisdiction over this abuse of dominance dispute, arising from a contract with a valid arbitration clause. This ruling took a similar position to that of a UK High Court in *Microsoft Mobile*.[104] In this case, the UK court held that the claim should be applicable under the Arbitration Act 1996 when considering the application of an arbitration clause in a tortious claim arising from allegations of anticompetitive conduct.[105] The UK court normally recognises the positive benefits of arbitrating competition disputes, and holds that anticompetition claims are arbitrable provided that the petition alleging an infringement falls within the ambit of a contractual arbitration clause.[106]

Beijing High People's Court and the SPC successively rendered different rulings on the jurisdiction issues in two antitrust cases related to *Shell*.[107] The two conflicting rulings are reflective of the divergences in judicial practices. The SPC's ruling is applicable to monopolistic agreements. However, in another SPC decision, it held that: "whether the arbitration clause stipulated in the contract can exclude the court's jurisdiction should be determined based on the specific circumstances of the antitrust dispute".[108] In this vein, the SPC itself is not strictly bound by its prior judgment. Although the SPC regards a court as an appropriate avenue to address monopolistic conducts,[109] such a position has not been sufficiently justified in terms of AML 2008's remedial and deterrent functions. Given the SPC's subtle justification, the ruling in *Shell v Huili* leaves considerable room for further interpretations in case of other types of antitrust disputes.

The paradoxical divide between public law and private law

The *SPC* justifies its ruling on the underlying issue with public law nature beyond personal disputes.[110] The court explained that the subject matter involved in *Shell v Huili* goes beyond the rights and obligations between the private counterparties of the contract, and thus falls outside the scope of arbitrable matters.[111] As such, the SPC made a judgment that Shell China could not rely on the arbitration clause to exclude the court's jurisdiction to adjudicate the dispute. The SPC's ruling indicates that the arbitration clause should not negate the court's jurisdiction over antitrust civil disputes.[112] It is conceivable, however, that there could be some leeway for arbitration in this arena, given that some antitrust disputes do not necessarily impact on public policy or public interests.

Public policy/interests vis-à-vis privity of contact

Antitrust law, in principle, seeks largely to protect competition instead of the competing parties, whose interests do not necessarily align well with public

[101] AML 2008 arts 2, 3, 65.
[102] *Songxu Technology v Samsung*, Jiangsu High People's Court, (Civil Court, No.00072, 29 August 2016).
[103] *Shell v Shanxi Changling*, Beijing High People's Court (Civil No.44, 2019).
[104] *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd* [2017] EWHC 374 (Ch); [2018] 1 All E.R. (Comm) 419; [2017] 5 C.M.L.R. 5.
[105] Arbitration Act 1996 s.9.
[106] *Attheraces Ltd v British Horseracing Board Ltd* [2007] EWCA Civ 38; [2007] U.K.C.L.R. 309; [2007] E.C.C. 7.
[107] *Changlin v Shell* (Beijing High People's Court, No.44, 2019); *Huili v Shell* (Supreme People's Court, No.47, 29 August 2019).
[108] *VISCAS v SGCC Shanghai Electric Power Co* (Intellectual Property Bench of the Supreme People's Court, No.356, 1 December 2019).
[109] Salil Mehra, "Deterrence: The Private Remedy and International Antitrust Cases" (2002) 40 *Columbia Journal of Transnational Law* 275, 284.
[110] *Huili v Shell* (Supreme People's Court, No.47, 29 August 2019).
[111] China Arbitration Law 2017art.17 (1).
[112] *Huili v Shell* (Supreme People's Court, No.47, 29 August 2019); Michael Scodro, "Arbitrating Novel Legal Questions: A Recommendation for Reform" (1996) 105 *The Yale Law Journal* 1927, 1961.

interests.[113] It addresses a unique area of public interest,[114] in which enforcement actions serve the public interest by seeking to maintain competitive markets.[115] The application of AML 2008 can be analogised to a prosecutorial action on behalf of consumers.[116] China is generally concerned that certain public law rights will not be handled properly in private arbitration, and that doing so would be to the detriment of the public at large.[117] In most cases, arbitral tribunals are required only to calculate the amount of awardable damages.[118] This may be a deep-rooted factor which does not render antitrust disputes arbitrable in China. In this vein, it is argued that litigation should not be relegated to arbitration merely for the sake of other variables, like cost saving, efficiency and confidentiality. Another counterargument lies in the high likelihood for potential imbalances in resources between litigants in antitrust actions given defendants' position as potential monopolists.[119] An arbitrator's background may be correlated to arbitration outcomes.[120] Since arbitrators are frequently experts drawn for their business sphere, it hardly seems proper for them to determine these issues of great public interest.[121] Arbitrators are not nearly as insulated from undue pressures, and resulting bias may influence their decisions.[122] Fleming noted that the bias problem may allow defendants the opportunity to exploit it for their own benefit, to the ultimate detriment of the public.[123] A balance needs to be struck between the public interest and other factors, like efficiency, cost savings and flexibility.

From the SPC's perspective, it is more appropriate for either an administrative organisation or a court to evaluate allegations of anticompetitive conduct.[124] The SPC distinguishes antitrust disputes from a contractual one, the former of which falls squarely within the sphere of public law. Antitrust claims normally reach beyond the rights and obligations of individuals, impacting the society as a whole.[125] They should not be limited to the narrow confines of arbitration.[126] The court referred to the AML's legislative intent, which is to prevent monopoly behaviour, maintain free competition and protect consumer interest and public interest in society.[127] A rationale behind the SPC ruling is that AML 2008 in nature falls under the arena of public law, which should be beyond the sphere of contractual relationship. Arbitrators are empowered to give effect to the parties' intent under the contract, not to advance public policies embodied in antitrust statutes.[128] In this regard, denying private contractual parties of their standing in antitrust claims seems parodically consistent with the legislative purpose.[129]

An SPC Judicial Interpretation provides further authority to address the ambiguous controversy:

> "[w]here a plaintiff directly files a civil lawsuit with the people's court or files a civil lawsuit with the people's court after a decision of the anti-monopoly law enforcement authority affirming the existence of monopolistic conduct comes into force, if the lawsuit satisfies other conditions for lawsuit acceptance as prescribed by law, the people's court shall accept the lawsuit".[130]

A court shall avoid overriding the boundary between state justice and private autonomy, given the nature of arbitration, such as privity, efficiency and independence.[131] Paradoxically, the SPC's Interpretation implies that the scope of public interests goes beyond the privity of a contract. China's Arbitration Law 2017 actually provides a safeguard provision, which allows an arbitral award to be nullified in case of violations of public interests or public policy.[132] Ostensibly, a large proportion of competition claims that involve cartels or price fixing practices inevitably affect public interests.[133] In *Shell v Huili*, the contractual clause is primarily binding on the

[113] Maurice E. Stucke, "Is competition always good?" (2013) 1 *Journal of Antitrust Enforcement* 162, 197.
[114] *American Safety* 391 F.2d 821, 828 (2d Cir. 1968).
[115] *American Safety* 391 F.2d 821, 826 (2d Cir. 1968).
[116] Hugh Fleming, "Antitrust Enforcement by Arbitration: DoJ's Use of Arbitration in United States v Novelis Puts matter of Consumer Protection in Questionable Hands" (2020) 104 *Minnesota Law Review De Novo* (24 April 2020).
[117] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[118] Miriam Driessen-Reilly, "Private Damages in EU Competition Law and Arbitration: A Changing Landscape" (2015) 31 *Arbitration International* 567, 587.
[119] *American Safety*391 F.2d 827 (2d Cir.1968); Fleming, "Antitrust Enforcement by Arbitration: DoJ's Use of Arbitration in United States v Novelis Puts matter of Consumer Protection in Questionable Hands" (2020) 104 *Minnesota Law Review De Novo* (24 April 2020).
[120] Stephen J. Choi, Jill E. Fisch, and A.C. Pritchard, "The Influence of Arbitrator Background and Representation on Arbitration Outcomes" (2014) 9 *Virginia Law & Business Review* 43, 88.
[121] *American Safety* 391 F.2d 827 (2d Cir.1968).
[122] US Const. art.III § 1; 5 U.S.C. §§ 573, 577 (2018).
[123] Fleming, "Antitrust Enforcement by Arbitration: DoJ's Use of Arbitration in United States v Novelis Puts matter of Consumer Protection in Questionable Hands" (2020) 104 *Minnesota Law Review De Novo* (24 April 2020).
[124] Eleanor Fox and Deborah Healey, "Competition Law and the State: Competition Laws' Prohibitions of Anti-Competitive State Acts and Measures" (New York and Geneva, UN, 2015), *https://unctad.org/system/files/official-document/ditcclp2015d3_en.pdf* [Accessed 7 July 2021].
[125] Katherine Stone and Alexander Colvin, "The Arbitration Epidemic" (Washington DC, Economic Policy Institute, 7 December 2015), *https://www.epi.org/publication/the-arbitration-epidemic/* [Accessed 7 July 2021].
[126] Thomas Brewer, "The Arbitrability of Antitrust Disputes: Freedom to Contract for an Alternative Forum" (1997) 66 *Antitrust Law Journal* 91, 126.
[127] AML 2008 art.1.
[128] *Alexander v Gardner-Denver Co* 415 US 53 (1974).
[129] Alexandra K. Theobald, "Mandatory Antitrust Law and Multiparty International Arbitration" (2016) 37 *University of Pennsylvania Journal of International Law* 1059, 1089.
[130] SPC, Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (Beijing, SPC, 1 June 2012) art.2.
[131] Jan Kleinheisterkamp, "Overriding Mandatory Laws in International Arbitration" (2018) 67 *International and Comparative Law Quarterly* 903, 930.
[132] China Arbitration Law 2017 art.58.
[133] Hannah Buxbaumt, "The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation" (2001) 26 *The Yale Journal of International Law* 219, 263.

contract parties, whereas the setting up of supply obligations by the defendant to the plaintiff may pertain to competition concerns, but only affects the parties under disputes.[134]

Law's intrinsic resilience applies equally to China's law evolution

The SPC seems to be less willing to embrace arbitration, which mirrors the approaches taken by the UK Competition Appeal Tribunal (CAT). In *Claymore Dairies*,[135] the CAT emphasised the public law nature of the Competition Act (CA 1998), which is to protect the public interest via the CAT.[136] As to the above analysis, two branches of the reasoning seem to justify the SPC's ruling, given that art.2 of China's Arbitration Law 2017 falls short of explicit jurisdiction in this regard. Secondly, public interests enshrined in AML 2008 go beyond the privity of contract and in turn render the competition claims inappropriate for arbitration.[137] Paradoxically, it is untenable that the SPC has invoked the absence of precedents recognising the arbitrability of antimonopoly disputes. The main rationale behind the SPC's ruling is that antitrust disputes fall within the ambit of public policy and public interests. The court's reasoning resembles the *American Safety* doctrine established by the US Second Circuit Court of Appeals in 1968,[138] which held that courts are the appropriate avenue for resolving antitrust disputes.[139] The US courts had long adhered to the doctrine, which limited the arbitrability of domestic antirust disputes.[140]

The SPC, in *Shell v Huili*, has seemingly addressed the non-arbitrability of antitrust civil disputes and held that they are not within the scope of arbitrable arena. Its ruling, to some extent, is helpful to settle a split among lower courts and offered plausible clarity for companies with operations in China. Nevertheless, the SPC may have lost an opportunity to make a milestone ruling to address the intersection of arbitration and antitrust. As the highest tribunal as well as the final arbiter of the law in China, the SPC's mission is to ensure justice under law.[141] Firstly, China does not have a tradition of precedents, since it belongs to a civil law system, whereby the common law doctrine of stare decisis does not exist *stricto sensu*.[142] Secondly, the SPC's Judicial Interpretation plays a semi-statutory role in China.[143] The SPC has authority to issue its Judicial Interpretation, which plays a semi-legislative role, to some extent, in making law.[144] The unique SPC Judicial Interpretation constitutes *jurisprudence constante*, which has factual binding effect in China's judicial system.[145] In this regard, China may merely need a landmark case, like the EU's *Eco Swiss* and the US's *Mitsubishi*, which would establish a ground-breaking SPC Imprecation that enables antitrust disputes arbitrable thereafter. As Lemley and Leslie observed:

> "Old doctrines may give way in light of legal developments that change the underlying environment and undermine the original policy arguments upon which the old common law is based."[146]

This notion has been manifested in the US Supreme Court's ruling of *Mitsubishi*. The law's intrinsic development and resilience apply equally to the Chinese law's evolution in this arena, despite its traditional civil law system.

Despite the lack of precedent tradition, Chinese People's Courts will refuse to enforce contractual provisions mandating arbitration of antitrust disputes *ex post* the case of *Shell v Huili*. Arguably, the SPC focuses more on vertical restraints. Neither the Chinese AML 2018 nor the US Sherman Act expressly bars parties from arbitrating monopolistic conducts. But both China's SPC and the US Second Circuit concluded that antitrust disputes warranted public adjudication.[147] In such circumstances, public authorities may be inclined to step in to protect domestic distributors with less bargaining power against local subsidiaries of multinational corporations (MNCs).[148] Even so, the SPC still leaves room for distinguishing between contract and antitrust claims, in particular, between parties with more equal standing. The more a dispute is closely related to contractual performance, the more it is arbitrable.[149]

In sum, the divide between public and private enforcement is, to some extent, overread in antitrust disputes.[150] As long as a prospective litigant can effectively vindicate its statutory cause of action in arbitration, it should be free to refrain from addressing

[134] Siyou Zhou, "Arbitrability of Competition Claims in China-A Case Study of the EU, US and China" *Leiden Law Blog* (16 December 2019).
[135] *Claymore Dairies Ltd v Office of Fair Trading (Guidance on Conduct)* [2006] CAT 3; [2006] Comp. A.R. 360.
[136] Greg Olsen and Daniel Harrison, "Tightening the System: The Nature and Likely Effect of UK Competition Reforms *Antitrust*" (2012) 26 Antitrust 25, 29.
[137] Bruce Owen, Su Sun and Wentong Zheng, "China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond" (2008) 75 *Antitrust Law Journal* 231, 265.
[138] *American Safety* 391 F.2d 821 (2d Cir.1968).
[139] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[140] *American Safety* 391 F.2d 821 (2d Cir.1968).
[141] Ling Li, "The Chinese Communist Party and People's Courts: Judicial Dependence in China" (2016) 64 *The American Journal of Comparative Law* 37, 74.
[142] Mark Jia, "Chinese Common Law? Guiding Cases and Judicial Reform" (2016) 129 *Harvard Law Review* 2213, 2234.
[143] Shucheng Wang, "Guiding Cases and Bureaucratization of Judicial Precedents in China" (2019) 14 *University of Pennsylvania Asian Law Review* 96, 135.
[144] Taisu Zhang, "The Pragmatic Court: Reinterpreting the Supreme People's Court of China" (2012) 25 *Columbia Journal of Asian Law* 1, 61.
[145] Making Chinese Court Filings Public? Some Not-So-Foreign American Insights" (2020) 133 *Harvard Law Review* 1728, 1749.
[146] Mark Lemley and Christopher Leslie, "Antitrust Arbitration and Illinois Brick" (2015) 100 *Iowa Law Review* 2115, 2133.
[147] *American Safety* 391 F.2d 826, 828 (2d Cir.1968).
[148] Joseph Stiglitz, "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities" (2007) 23 *American University International Law Review* 451, 558.
[149] Kai-chieh Chan, "China's Top Court Says No to Arbitrability of Private Antitrust Actions" *Kluwer Arbitration Blog* (23 January 2020).
[150] Gus Van Harten, "The Public-Private Distinction in the International Arbitration of Individual Claims against the State" (2007) 56 *The International and Comparative Law Quarterly* 371, 394.

the claim by arbitration.[151] Following the second-look doctrine, the court can monitor the enforcement of arbitral awards, which ensures that public policy will be protected.[152]

Address the challenges in cross-border arbitrable antitrust disputes

Economies are inextricably interdependent despite the current debate on decoupling.[153] There is a place for arbitration, since competition law tolerates private enforcement.[154] Arbitrability of competition law, in substance, is only with respect to the civil aspect of antitrust law.[155] An arbitration tribunal seeks to issue an enforceable award, the goal of which is embodied in some institutional rules.[156] A challenge arises over how to protect fair competition, given potential conflict of laws across jurisdictions. Arguably, the global challenge does not rest with the issue of arbitrability, but with how to redefine the scope of public policy to avoid the triggering of the refutation by national courts.[157]

Safeguarding procedures embedded in the institutional designing

Public policy in relation to antitrust is a critical factor in vetoing the arbitrability of antitrust disputes in the SPC's reasoning.[158] Rights are not surrendered when a party agrees to arbitrate and that judicial review, though limited, is sufficient to ensure that arbitrators comply with the law.[159] Applying antitrust law has become mandatory for any arbitrator seeking to render an enforceable award.[160] Failure to do so would make an award susceptible to challenges on public policy grounds.[161] Arbitrators should be committed to applying bona fide applicable substantive law, and endeavouring to ensure procedural fairness and substantive justice.[162]

(a) Second-look doctrine

There are adequate legislations as well as international soft law in place to safeguard against abusing the use of arbitration.[163] The UNCITRAL Model Law explicitly provides that an award can be set aside where the court is of the opinion that the subject-matter of the dispute is not capable of settlement by arbitration.[164] It is similarly safeguarded under the New York Convention that recognition and enforcement of the award can be denied on the same ground.[165] At an enforcement stage, the New York Convention entails sufficient control on the observance of the public policy behind antitrust laws, which is viewed as a "second-look doctrine".[166] Public policy is one of the few grounds of the Convention which allows a court to refuse recognition and enforcement of an arbitral award.[167] The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country".[168] The national court, at the award-enforcement stage, has the opportunity to look at the award and determine if it comports with the state's public policy.[169] The ECJ also held that national courts were entitled to set aside an award which violates EU competition law on public policy grounds.[170] The US introduced the second look doctrine, due to the concern that antitrust disputes are too complex to be dealt with by arbitrators.[171] The doctrine allows the courts to review the antitrust dispute at the award-enforcement stage to ensure that any lawful interest had been properly addressed.[172]

[151] Robert Pitofsky, "Arbitration and Antitrust Enforcement" (1969) 44 *New York University Law Review* 1072, 1084.
[152] Catherine Rogers, "Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration" (2002) 39 *Stanford Journal of International Law* 1, 58.
[153] Lindsey Ford, "Refocusing the China Debate: American Allies and the Question of US-China 'Decoupling'" (Washington DC, Brookings, 7 February 2020), *https://www.brookings.edu/blog/order-from-chaos/2020/02/07/refocusing-the-china-debate-american-allies-and-the-question-of-us-china-decoupling/* [Accessed 7 July 2021].
[154] OECD, "OECD on 'Arbitration and Competition'" DAF/COMP (Paris, 2010), 40.
[155] Sotiris Dempegiotis, "EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003—Conceptual Conflicts, Common Ground, and Corresponding Legal Issues" (2008) 25 *Journal of International Arbitration* 365, 396.
[156] The ICC Rules art.41.
[157] David Horton, "Arbitration About Arbitration" (2018) 70 *Stanford Law Review* 363, 441.
[158] Alexandra K. Theobald, "Mandatory Antitrust Law and Multiparty International Arbitration" (2016) 37 *University of Pennsylvania Journal of International Law* 1059, 1089.
[159] Stephen Ware, "Vacating Legally-Erroneous Arbitration Awards" (2014) 6 *Arbitration Law Review* 56, 106.
[160] Phillip Landolt, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence" (2012) 28 *Arbitration International* 173, 224.
[161] Andrew Guzman, "Arbitrator Liability: Reconciling Arbitration and Mandatory Rules" (2000) 49 *Duke Law Journal* 1279, 1334.
[162] New York Convention art.V(I)(B).
[163] William W. Park, "Soft Law and Transnational Standards in Arbitration: The Challenge of Res Judicata" in Arthur W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015* (Leiden: BRILL, 2017), pp.52–71.
[164] UN Commission on International Trade Law (UNCITRAL), Model Law art.34.
[165] New York Convention art.5(2)(a).
[166] Pierre Mayer, "The Second Look Doctrine: The European Perspective" (2010) 21 *The American Review of International Arbitration* 201, 210.
[167] Vera Korzun, "International Arbitration and Domestic Antitrust: Natural Progression or Random Alliance?" *CPI Antitrust Chronicle* (July 2019).
[168] New York Convention art.5(2).
[169] New York Convention 1958 art.V(2)(b).
[170] *Eco Swiss* (C-126/97) [1999] 2 All E.R. (Comm) 44; [2000] 5 C.M.L.R. 816.
[171] Patrick Baron and Stefan Liniger, "A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany" (2003) 19 *Arbitration International* 27, 54.
[172] Hannah Buxbaumt, "The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation" (2001) 26 *The Yale Journal of International Law* 219, 263.

Recognition of arbitrability of antitrust disputes ≠ derogation of public policy

The recognition of the arbitrability of antitrust disputes does not deviate from the nature of public policy.[173] The US Supreme Court has stipulated that public policies shall not be grounds for prohibiting arbitration as an ADR settlement.[174] The current legal regimes provide adequate safeguards for arbitrators to resolve a variety of claims; after all, it is the court that has the power to enforce arbitral awards. Arbitration clauses impose a duty on arbitrators to identify and apply the law in good faith.[175] Arbitrators have a contractual duty to apply the law as courts would, in good faith and to the best of their ability.[176] As such, the inequality of economic power does not induce the inequality of legal subject status.[177] It could be concerned that arbitrators may not hold contractual parties to standards of substantive law as the court does, which would reduce the expected value of an antitrust claim.[178] Without the duty, arbitration would materially undermine the antitrust law's deterrent effect.[179] Given the second-look doctrine embedded into the regime, arbitrators' failure to satisfy their duties to apply the law in good faith would permit courts to overturn the resulting awards.[180] The judicial review ensures that an arbitration award will not be contrary to public policy, which would not be derogated thereof.

Concerns about SPC's reasoning

The Chinese SPC in *Shell v Huili* held, merely in an abstract way, that a public interest would be jeopardised if an antitrust dispute were to be arbitrable. An antitrust-related arbitral award rendered by a foreign arbitration institute is likely unenforceable in a Chinese court, on the ground of either the public policy discourse, or the non-arbitrability as argued above.[181] The hypothetical reasoning will be further complicated in a scenario where an arbitration involves Chinese parties, but is seated in a jurisdiction which allows arbitrability of antitrust issues. The New York Convention provides grounds to China, as a signatory State from 1986, for the merits of a case that may lead to the refusal of such enforcement.[182] This provision is embodied in China's Civil Procedure Law, which provides that a People's Court shall order to invalidate an award if the enforcement would potentially be against the public policy.[183] The Arbitration Law 2017 also provides that a court has exclusive jurisdiction over setting aside an arbitral award.[184] A Chinese People's Court will nullify an arbitral award if the court finds ex officio that the award is contrary to the social public interest. In view of the above EU and US practices, it can be inferred that rendering competition claims arbitrable may not necessarily involve elements that jeopardise a state's public policy.[185] Notably, neither art.V(2)(b) under the New York Convention, nor the ruling of *Eco Swiss* clarifies public policy elements that trigger a national court to refute the enforcement of an arbitral award.[186] As such, the challenge may switch to redefining the "tipping point" above which an arbitral award should be rejected. Furthermore, arbitration of monopolistic conducts does not affect the public interest by diminishing deterrence.[187] The foremost purpose behind antitrust law is deterrence,[188] to deter those wrongdoers from causing damage not only to individual entities, but also to the society as a whole.[189] Giving private parties the right to arbitrate to protect their own substantive rights lessens the government's burden in enforcing antitrust laws.[190]

Would the US/EU model be transplanted into China's legal regime?

Major jurisdictions, like the US and EU, have recognised the arbitrability of anti-monopoly disputes; refusing to recognise and enforce such arbitration awards may violate the principle of international comity.[191] The arbitrability of antitrust issues has been recognised in the EU via the

[173] Alexandra Theobald, "Mandatory Antitrust Law and Multiparty International Arbitration" (2016) 37 *University of Pennsylvania Journal of International Law* 1059, 1089.
[174] Lisa Sopata, "Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc: International Arbitration and Antitrust Claims" (1986) 7 *Northwestern Journal of International Law & Business* 595, 617.
[175] Andrew Guzman, "Arbitrator Liability: Reconciling Arbitration and Mandatory Rules" (2000) 49 *Duke Law Journal* 1279, 1334.
[176] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[177] Lina Khan and Sandeep Vaheesan, "Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents" (2017) 11 *Harvard Law & Policy Review* 235, 294.
[178] Salil Mehra, "Deterrence: The Private Remedy and International Antitrust Cases" (2002) 40 *Columbia Journal of Transnational Law* 275, 284.
[179] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[180] Philip McConnaughay, "The Risks and Virtues of Lawlessness: A 'Second Look' at International Commercial Arbitration" (1999) 93 *Northwestern University Law Review* 453, 524.
[181] Ellen Reinstein, "Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China" (2005) 16 *Indiana International & Comparative Law Review* 37, 72.
[182] New York Convention art.C(2).
[183] China Civil Procedure Law art.237.
[184] China Arbitration Law 2017 art.58.
[185] New York Convention art.C(2)(b)
[186] Margaret Moses, "Arbitration/Litigation Interface: The European Debate" (2014) 35 *Northwestern Journal of International Law and Business* 1, 47.
[187] Raul C. Loureiro, "Ineffective Vindication of Antitrust Rights" (2019) 21 *The University of Pennsylvania Journal of Business Law* 978, 1005.
[188] Jonathan B. Baker, "Private Information and the Deterrent Effect of Antitrust Damage Remedies" (1988) 4 *Journal of Law, Economics & Organization* 385, 408.
[189] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[190] James V. Hayes, "Arbitration as an Aid in the Enforcement of the Antitrust Laws" (1952) 17 *Law and Contemporary Problems* 504, 517.
[191] Alexandra K. Theobald, "Mandatory Antitrust Law and Multiparty International Arbitration" (2016) 37 *University of Pennsylvania Journal of International Law* 1059, 1089.

seminal judgement in *Eco Swiss*.[192] The ruling in Mitsubishi not only confirms the competence of arbitration, but also foresees its indispensable role in the transnational business disputes resolution.[193] The US Supreme Court interprets an arbitration clause expansively, allowing arbitrators to enforce federal antitrust law alongside judges.[194] After all, the professionalism of arbitration is sufficient to handle antitrust issues properly.[195] The landmark cases signal the start of a worldwide trend of recognising the arbitrability of certain antitrust disputes.[196]

According to the New York Convention, Chinese courts shall recognise and enforce the arbitration awards in disputes over "contractual and non-contractual commercial relations" in accordance with Chinese law.[197] In 1987, the SPC promulgated the Circular on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It defines "contractual and non-contractual commercial relations" as relations encompassed in relevant Chinese law.[198] In this Circular, anti-monopoly dispute is not excluded from the scope of arbitral awards that can be recognised and enforced in China.

On 2 July 2019, China signed the Convention on the Recognition and Enforcement of Foreign Civil and Commercial Judgments in the 22nd Session of the Hague Conference on Private International Law.[199] It stipulated that international civil and commercial judgments related to core cartel behaviours, such as price fixing, bid rigging and market allocation, will be recognised and enforced in China in the future.[200] However, both arbitration law and competition were transplanted from western jurisdictions to China only a decade ago. Due to the relative lack of legislative and judicial parameters in this area, it may take longer for the Chinese People's Court to address more proficiently the arbitrability of antitrust disputes. Like the US Supreme Court and the ECJ giving green light to antitrust arbitration, China may need to shake off the old judicial hostility to arbitration.[201] With China's anticompetition framework being further developed, arbitration is bound to be a preferable forum as an alternative to litigation. China may follow standards over antitrust issues during the judicial review of recognising and enforcing arbitration awards. The aim is to strike a delicate balance; after all, any addition to arbitration law's narrowly circumscribed grounds for review would seem at odds with the legislative intent.[202]

Potential evolution of the arbitrability of antitrust disputes

Competition policies always evolve with the development of a specific jurisdiction's legislation as well as its economy.[203] The growth of Chinese cross-border transactions will be compromised if China insists that all antitrust disputes must be resolved in people's courts.[204] The SPC's ruling in *Shell v Huili* confirms the court's jurisdiction, and seemingly draws a line for resolving antitrust disputes in commercial contracts containing arbitration agreements. It is worth noting that China is not a common law jurisdiction. The SPC judgments are not legally binding on lower courts, although they play a similar role to precedents in that they tend to be followed by lower-level courts in practice.[205]

The arbitrability of antitrust claims and enforceability of relevant domestic and foreign arbitral awards are still subject to further clarification.

Given the general trend, like the US and the EU's approaches in recognition of arbitrability of antitrust disputes, China may change its stance in future towards the issue. On 2 January 2020, the State Administration for Market Regulation (SAMR) issued the Announcement of the SAMR to Seek Public Comments on the Revised Draft of the Anti-Monopoly Law (hereinafter referred to as: SAMR Draft 2020). It is said that SAMR will be designated by the State Council to enforce the Antimonopoly Law (AML).[206] The SAMR Draft, however, remains silent on whether antitrust issues could be resolved by arbitration, but does not preclude the possible arbitrability. Despite the SPC's *Shell* decision, the inexplicitness demonstrates that it is inappropriate for the

[192] *Eco Swiss* (C-126/97) [1999] 2 All E.R. (Comm) 44; [2000] 5 C.M.L.R. 816.
[193] Hannah Buxbaumt, "The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation" (2001) 26 *The Yale Journal of International Law* 219, 263.
[194] David Horton, "Infinite Arbitration Clauses" (2020) 168 *University of Pennsylvania Law Review* 633, 688.
[195] Thomas Brewer, "The Arbitrability of Antitrust Disputes: Freedom to Contract for an Alternative Forum" (1997) 66 *Antitrust Law Journal* 91, 126.
[196] Lisa Sopata, "Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc: International Arbitration and Antitrust Claims" (1986) 7 *Northwestern Journal of International Law & Business* 595, 617.
[197] Leon Trakman, "Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection" (2018) 6 *The Chinese Journal of Comparative Law* 174, 227.
[198] Fiona D'Souza, "The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China" (2006) 30 *Fordham International Law Journal* 1318, 1359.
[199] Ronald A. Brand, "Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead" (2020) 67 *Netherlands International Law Review* 3, 17.
[200] HCCH, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague, 2 July 2019), *https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf* [Accessed 7 July 2021].
[201] *Mitsubishi Motors v Soler* 473 US 638 (1985).
[202] Michael Scodro, "Deterrence and Implied Limits on Arbitral Power" (2005) 55 *Duke Law Journal* 547, 607.
[203] Tembinkosi Bonakele, Eleanor Fox, and Liberty Mncube, *Competition Policy for the New Era: Insights from the BRICS Countries* (Oxford: Oxford University Press, 2017), pp.51–66.
[204] Laura Murray-Tjan, "Domestic Court Implementation of Coordinative Treaties: Formulating Rules for Determining the Seat of Arbitration Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (2001) 41 *Virginia Journal of International Law* 859, 921.
[205] Shucheng Wang, "Guiding Cases and Bureaucratization of Judicial Precedents in China" (2019) 14 *University of Pennsylvania Asian Law Review* 96, 135.
[206] SAMR Draft 2020 art.11.

SMAR to prohibit explicitly the arbitration of antitrust issues. With the increased use of arbitration in cross-border transactions, it is essential to interpret the resolution of anticompetition claims in a broadly framed arbitral framework.[207] There is no need for the courts to deny *ex ante* the arbitrability of antitrust disputes.[208]

Conclusion

Arbitration plays a significant role in antitrust disputes with a particular regard to public policy consideration. The Chinese Supreme People's Court (SPC) in *Shell v Huili* held that the antitrust disputes are not arbitrable and shall be settled by courts or administrative authorities, despite Shell's challenge of a court's jurisdiction based on a pre-existing arbitration agreement. The court justifies its ruling on the ground that antitrust law is designed to promote the national interest in a competitive economy. Paradoxically, such a ruling is untenable given the lack of adequate statutory basis. The Chinese AML 2008 and Arbitration Law 2017 do not refer to resolving anti-monopoly issues by arbitration, neither do they explicitly preclude ADR. The SPC has seemingly addressed the inquiry concerning the arbitrability of competition claims in China. Nevertheless, this does not mean the end of the nexus between antitrust issues and arbitration in China. The SPC's stance contrasts with the US and the EU, which have accepted the arbitrability of antitrust issues. The introduction of the "second-look doctrine" ensures the efficient operation of the safeguarding mechanism. In view of the evolution in the intersectional debate, the public nature of a given law is no longer regarded as the determinant of the arbitrability of antitrust disputes in major western jurisdictions.

Considering the pace of development, and the ever-increasing inflow of cross-border investments, it is imperative that China changes its stance and adopt practices that are consistent with other primary jurisdictions, such as the EU and the US. This will also respond to the nature of interoperation required in resolving transnational antitrust disputes. Arbitration is increasingly advocated by parties in cross-border transactions in China; there should be leeway for competition issues falling within the purview of arbitration. It is worth exploring the possibility of whether there is room for arbitration on the ground of public policy, particularly where the enforcement of a foreign arbitral award is concerned. Thus, the SPC should initiate a ground-breaking approach, launching a milestone Judicial Interpretation, which will facilitate integration of Chinese law reform into the global dispute resolution regimes.

[207] Pamela Bookman, "The Arbitration-Litigation Paradox" (2019) 72 *Vanderbilt Law Review* 1119, 1196.

[208] Lisa Sopata, "Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc: International Arbitration and Antitrust Claims" (1986) 7 *Northwestern Journal of International Law & Business* 595, 617.

Are Unfair Commercial Practices as Dangerous as Cartels? The Recent Fining Policy of the Hungarian Competition Authority

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Cartels; Fines; Hungary; Unfair commercial practices

Introduction

Enforcing the rules prohibiting unfair commercial practices, mostly misleading advertising, has always been an important part of the Hungarian Competition Authority's (*Gazdasági Versenyhivatal*: the GVH) efforts to maintain fair and free competition in Hungary. Even though substantial rules are fully harmonised at EU level, the general prohibitions of the directive on unfair commercial practices (UCPD)[1] left sufficient room for interpretation so that practice may vary from country to country. Moreover, since institutions and sanctions are not sufficiently harmonised by the UCPD, the same rules, applied in divergent legal settings, with varying frequency, with different legal consequences, have had different impact on the conduct of companies promoting their products and services in the European single market. In practice, a European wide advertising campaign may run untouched in most countries, while some Member States' enforcers prohibit the allegedly misleading or otherwise unfair communication.

In this paper, I intend to give an overview about the recent practice of one of these active enforcers', the GVH, resulting in record braking fines, matching those imposed in hard-core cartel cases. Since December 2019, financial penalties in the range of HUF 1 billion have become normal practice, signaling a significant increase compared to the previous years. The HUF 2.5 billion (€6.9 million) penalty imposed on *booking.com* in 2020 set a record fine: before this, only one bank engaged in a serious infringements of cartel rules had to pay a fine higher than that in Hungary.[2] In the first part of this paper, I will present the hard and soft law rules on calculating fines, then I will summarise the cases which resulted in significant fines, at least in terms of their nominal value.[3] Analysing the reasons behind this new wave of high fines, the changes in the fining guidelines should be presented first. I will briefly look at other possible sanctions, including the under-enforced criminal law sanctions. The paper will conclude that Unfair Competition Practice (UCP) cases are not only dominating the landscape by their number, but are also competing neck-to-neck with cartel cases as regards the severity of sanctions. One may wonder whether this reflects that misleading advertising practices cause harms similar to secret cartels, or it will just take some more time for antitrust cases to witness a similar increase is fines.

The UCP Directive

One of the goals of the European internal market project has been to achieve a minimum level of protection for European consumers enjoying the benefits of the free movement of goods and services. Rules setting the framework for advertising not only protect consumers, but also competitors promoting their goods lawfully, and thus ultimately the existence of fair competition. For this reason, rules on misleading advertising could be enforced both as part of consumer law and of competition law. Unlike in antitrust, the EU Commission was not given enforcement powers against unfair commercial practices, thus the policy choice exercised by Members States which authority to entrust this job to had significant implications on the extent companies take these rules into account when deciding about their marketing campaigns.

Misleading advertising has been subject to European directives since the mid 80s.[4] The novelty of the UCPD, adopted in 2005, was its more elaborate regulation of what actually constitutes unfair commercial practices. In addition to a rather broadly worded prohibition of unfair commercial practices capable of materially diverting optimal consumer transactions (art.5), and the express outlawing of misleading actions (art.6), omissions (art.7), as well as aggressive marketing techniques (art.8), the Directive included a fairly long list of conduct held unlawful. These black-listed commercial practices are unacceptable regardless of their actual or potential effect on consumer behaviour. Or, to be more precise, law

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[1] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council,

[2] OTP Bank had to pay a fine of HUF 3.9 billion in 2013 for participating in unlawful information exchange. In 2018, following the court review procedure, the GVH had to recalculate the fine which resulted in only HUF 1.43 billion.

[3] It is important to emphasise that large nominal fines reaching billions of HUF imposed on a multinational corporation could in effect be smaller than a much smaller fine levied on a medium sized company, often reaching the 10% maximum of that smaller company's turnover. Yet, the news about "billion HUF" fines are those which attract public attention, not those relatively more serious fines which include much fewer zeros.

[4] Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising. It was repealed by Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

makers presumed that these activities to be of such a type that they influence transactional decisions by their very nature.

In contrast to substantial rules, the UCPD, just like the previous directives, allowed Member States to lay down their own rules on institutions, procedures and sanctions. In accordance with general principles of EU law, national sanctions are expected to be effective, proportionate and dissuasive (art.13). Whether existing national institutional and rules comply with these expectations in reality, it is hard to tell in the absence of relevant judicial case law. Yet, it is fair to assume that in those countries that opted for an administrative model involving the competition authority, companies are subject to more credible legal challenges. Some countries are convinced that the goals of consumer and competition protection are so closely intertwined that law enforcement is best entrusted to the one and same institution. In the EU, Denmark, Ireland, Finland, Hungary, Italy, the Netherlands, Luxembourg and Poland this path is followed.[5] Outside the EU, the US Federal Trade Commission provides a good example of an enforcer combining the antitrust and consumer protection functions. As far as private enforcement is concerned, the lack of opt-out class actions makes judicial law enforcement a suboptimal solution, even in Member States where consumer protections associations have established fame for going after the illicit practices of big business. Their scarce resources, lack of self-interest and the, often complex. civil procedural rules result in less frequent and less visible law enforcement. Yet, both factors, the probability of prosecution and some forms of the name and shame effect, are essential to achieve general deterrence.

The different national approaches to enforcing UCPD rules resulted in legislative actions at European level. I should mention first the new regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws (the CPC Regulation from 2017) which sets the framework for a cooperation of national authorities in the European Economic Area. Another step was the adoption of a directive on harmonising the enforcement of consumer law, including the UCPD.[6] As a result, once the harmonisation process has been completed, the maximum amount of the fine should reach at least four per cent of the turnover of the businesses in the Member States concerned.[7] The Directive also lists a number of factors which shall be taken into account when setting the amount of the fine. The implementation of the directive is not likely to bring about significant changes in those Member States where the UCPD is enforced by competition authorities, but may reshape the landscape in those countries which preferred private enforcement or consumer protection public enforcement so far.

Hungarian hard and soft rules on setting fines

The provisions of the Competition Act

Since misleading advertising rules are enforced by the competition authority in Hungary, the sanction rules have always been the same as for antitrust infringements. The Competition Act includes general rules on fining applicable to both antitrust and misleading advertising cases. According to s.78, the maximum level of fines may reach 10 per cent of the previous business year. According to the provision, the GVH may choose whether to calculate this figure based on the company's turnover or that of the group of companies to which it belongs (the equivalent of the term "undertaking" under EU competition law). The law does not regulate whether this should include turnover achieved in Hungary, or may also include global turnover. Section 78 also provides a non-exhaustive list of relevant circumstances which should be considered, such as the length, the seriousness and repeat and frequent nature of the infringement, the compensation of consumers, the benefit gained by the infringement, the market position of the company, the culpability of the conduct, the cooperation of the undertaking during the proceeding and the repetition and frequency of the infringement.[8] The Directive amending the UCPD's art.13 includes only one additional factor that should be considered, if information is available: penalties imposed on the trader for the same infringement in other Member States in cross-border cases.[9]

The law does not prescribe fines as a mandatory form of sanction. The acting competition council may, in the case of a first infringement issue a warning instead of imposing a fine, to a micro, small or medium-sized enterprise (SME) if it can be reasonably assumed that the company will refrain from infringements in the future. This SME exception does not apply to serious infringements when the affected consumers, due to their age, gullibility, mental or physical disability, were especially vulnerable to the unfair commercial practice.

There is another avenue for companies prepared to actively co-operate with the GVH. Although leniency and settlement are available only in antitrust investigations, commitments can be offered in UCP related procedures as well. Many cases are thus terminated

[5] See the GVH's Flash Report of 2020, available also in English at *https://www.gvh.hu/pfile/file?path=/gvh/gyorsjelentesek/gvh_gyorsjelentes_2020&inline=true* [Accessed 9 July 2021].

[6] Article 3 of Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of EU consumer protection rules; OJ L 328, 18 December 2019, pp.7–28. Member States shall adopt the measures necessary to comply with this directive by 28 November 2021. Importantly, the directive also amends some substantial rules, including the Black List of the UCPD.

[7] Just to compare, this level is still much less than the 10% of global turnover used as a ceiling in antitrust matters. The directive certianly allows the application of higher maximum fines, like those applied in Hungary, but the message is still ambiguous: are consumer law infringements less harmful than antitrust issues?

[8] Section 78 (3) lists the gravity of the violation, the duration of the unlawful situation, the benefit gained by the infringement, the market positions of the parties violating the law, the imputability of the conduct, the effective cooperation by the undertaking during the proceeding and the repeated display of unlawful conduct as relevant factors.

[9] The likely aim of this provision is to avoid double sanctioning of the same cross-border conduct by several authoroties.

by making the commitment of the company obligatory. These decisions routinely include the introduction of a genuine compliance policy and compensation mechanism for consumers who were harmed by the allegedly unfair commercial practice. The reasoning of such decisions may also indicate the amount of the commitment package, often reaching the level of a potential significant fine.[10]

The fining guidelines of 2007

Fining guidelines applicable to misleading advertising cases were first published in 2007, signed by the president of the GVH and the chairman of its Competition Council.[11] The fining guidelines to a Supreme Court opinion shared by the GVH according to which, the aim of fining is to deter market players from committing unfair commercial practices that could endanger fair competition. That requires fines that are proportionate but still put substantial burden upon the company and thus deter them, and other market players, from committing infringements.[12] The GVH identified the following goals which influence its fining policy: in addition to special and general deterrence, the punishment of misbehaviour is mentioned, just like the confirmation of law-abiding companies that they did it right when they obeyed the rules.[13]

The starting point of the calculation follows the logic of the antitrust guidelines[14] by selecting a basic amount that is further corrected by other relevant factors. In UCP cases, the starting point is usually the relevant costs of publishing the misleading or otherwise unfair communication. The wider and the more intensive the campaign was, the higher the fine could be. There were many discussions whether the relevant marketing budget is an objective starting point, or not. First, it can be manipulated by the contracting parties with a long term and complex relationship. Second, since usually only parts of the marketing campaigns are found to be misleading, the GVH makes a subjective correction, i.e. taking just 50 per cent of the budget as a starting point for the calculation of fines, if only about half of the messages coded in the advertisement were found to be unlawful. Yet, this is still the best starting point. The guidelines envisage an alternative, more objective basis to calculate fines: the competition council could have chosen a certain percentage of up to five per cent of the turnover related to the product or service during the period of the infringement and then amend it in light of the relevant circumstances of the case.[15]

When the GVH follows the marketing budget based approach, the next step is to take into account the aggravating and mitigating circumstances. By the end of this second step the amount of the fine could have increased by 100 per cent. If the misleading practice related to credence products[16] or expensive products, where the mistake caused by the misleading act cannot be corrected in the course of frequent similar purchases, the amount of the fine could be increased. Other negative factors were the intensity of the campaign, including the temporal scope and geographical coverage. Market impacts can also be relevant, composed of the size and market share of the company, the intensity of competition in the relevant market and also roll-on effects on other related markets. Among the circumstances that could help companies to reduce the fine was, for example, the availability of other—this time correct and complete—pieces of information the consumer may acquire before the buying decision.

The attitude of the undertaking can also influence the size of the fines. The notice emphasised that, even though competition law infringements are decided on an objective legal basis, subjective intent and attitude may have a role to play in the calculation of fines. Correcting the mistakes made, providing compensation to the victims are the signs of a true will to change behaviour for the future. On the other hand, if an undertaking commits several different types of unfair actions, it may deserve a harsher penalty.

The third step of the fining process was to consider recidivism and the effectiveness of the sanction. According to the guidelines, the amount of the fine can be adjusted in the light of the size of the undertaking to achieve the right level of deterrence. It may be increased if the calculated fine seems to be too small for a big company and can be decreased if a single product company is caught with an unlawful behaviour. Furthermore, if an undertaking commits similar infringements for the second, third, etc. times, its fine may be multiplied by that number. It is important that only infringements of the past five years were taken into account for this calculation. Review courts had disagreed

[10] There have been so many UCP commitment cases that the GVH issued guidelines about commitments pertaining to these infingements only and not including anitrust matters in 2012 (replaced by another notice in 2014).

[11] Notice No. 1/2007. Section 36(6) of the Competition Act empowers the president of the GVH and the chairman of the Competition Council (being one of the two vice-presidents of the GVH) to issue jointly notices summarising the basic principles of the law enforcement practice of the authority. These notices should have no legal binding force, their function is to increase the predictability of law enforcement. Despite this clear wording, the Constitutional Court, and also the Supreme Court, held that the GVH should act in line with its own notices, unless it provides a clear explanation for not doing so. For further details see my paper in Hungarian: Tihamér Tóth, "Az Alkotmánybíróság határozata a Gazdasági Versenyhivatal közleménykiadási jogáról" (2010) 1 *Jogesetek Magyarázata* 12–19 (explaining the Constitutional Court's decision on the competition authority's competence to issue guidelines, noting the unintended impact it may have on the independence of the members of the decision-making Competition Council).

[12] Judgments quoted are Kf.III.27.599/1995/3., Kf. I.25.217/1993/3. és Kf.II.27.096/1995/4. However, it is fair to mention that there were other cases where the Supreme Court expressly denied the role of deterrence in competition law stating that this is an attribute of criminal law.

[13] See point 4 of the Guidelines. Interestingly, the antitrust guidelines of the GVH mention just two aims. Point 10 of the Guidelines No. 2/2012 states that beyond punishment the aim is special and general deterrence (also the previous antitrust guidelines included these two objects).

[14] The first antitrust guidelines were included in Notice No. 2/3003. The actual antitrust fining document is Notice No. 1/2012.

[15] This is a rarely used option. If it was to be applied, the first and second step of the calculation process will merge: the right level of percentage is determined on the basis of the relevant aggravating and mitigating circumstances. In case Vj-67/2006 focusing on misleading labeling of Chappy dog food products the competition council imposed fines reaching 1.5% of the related turnover. This was further reduced to take into account the costs related to the required new package labels.

[16] Products whose qualities are difficult to judge even after consumption. The notice is based on an extensive reading of this phrase when it mentions not only health care products, but also financial services or services provided to elderly people.

whether it was lawful to apply such a multiplier in the course of the complex weighing of pros and cons by a public agency. Finally, a ruling of the Supreme Court confirmed the use of mathematical formula like this if the facts of that case are strong enough to support this strict approach.[17]

There were some cases, decided before the publication of the guidelines, where the principles of the new fining policy were tested by the competition council. In February 2006 the GVH imposed a huge fine on Colgate's "your doctor's choice" campaign also claiming that Colgate's toothpaste can provide the solution to the 12 teeth related problems.[18] The reasoning followed a three step approach. First, the costs of the campaign were chosen as a basis for the calculation. Second, the relevant aggravating and mitigating circumstances were listed, each measured with an appropriate percentage totaling 100 per cent.[19]Third, it was considered whether the calculated fine was high enough to deter, i.e. whether the application of a multiplier was needed to reflect recidivism. In this case the competition council raised the starting amount by 43 per cent. It was not further increased, since the GVH considered that a fine reaching 2.5 per cent of the previous business year's turnover was deterrent enough.

One problem with the application of these original guidelines was that the reasoning of decisions was not detailed enough, they often omitted even the reference of this notice. It was hard to track how the GVH came to the final amount, since the reasonings did not mention the size of the relevant marketing expenses, being sensitive information, and listed the various factors taken into account without adding a certain weight or percentage to them. Consequently, a significant part of general deterrence may have been lost.

The fining guidelines of 2017

The text of the consumer law fining guidelines was not often reviewed, in contrast to the antitrust fining soft rules. Not even the adoption of the implementing measures of the UCPD served as a momentum to rethink and refresh the notice. The currently applicable Fining Guidelines No.12/2017 were adopted in December 2017. The revised document, together with the similarly structured renewed antitrust fining guidelines, is both a summary of the previous practice and also includes some new elements, the application of which should be tested before review courts in forthcoming cases.[20]

The competition council has a choice how to set the starting amount of the fine. It can be either the marketing budget of the unlawful commercial practice, or, if this does not provide an appropriate basis for the calculation, 10 per cent of the turnover achieved in the relevant market. A new, third option is that in those cases, where a turnover can be allocated to the unfair commercial practice itself, this turnover will provide the basis of the calculation. Compared to the previous guidelines, these turnover based approaches represented a significant increase which could have been understood as a hidden message from the GVH envisaging a significant increase in the amount of fines. This increase of the ceiling of the alternative starting amount calculation made the GVH's choice between the two methods even more significant. Further cases are needed to clarify this important legal issue, to what extent the acting competition council is entitled to choose, at its own discretion, between the two starting amounts, resulting in significantly different fines.

The next step is the calculation of the so-called basic amount of the fine. This relevant attenuating and mitigating circumstances are ordered into three groups, diverting the amount of the fine by a percentage of between 0–5 per cent (small), 5–15 per cent (medium) and 15–25 per cent (serious). At this point, the starting amount may be increased by 50 per cent and decreased by 100 per cent (basically, resulting in 0 fines). The notice does not grade the usual relevant circumstances according to these categories. It mentions, by way of example, that unfounded health or weight loss claims are serious infringements.

Third, the basic amount may be corrected according to several factors. Just like the previous guidelines, recidivism is taken into account in the form of a multiplying factor. For each similar repeat infringement, the competition council may increase the basic amount by up to 100 per cent. However, according to the new rules, the period taken into account increased from five years to 10. This again could be regarded a change resulting in higher fines for the future. The benefits of the unfair commercial practice, if they could be enumerated, could also lead to the adjustment of the fine. If it can be calculated, the fines should reach at least threefold thereof. The GVH also takes into account a separate deterrence factor: this could increase the basic amount of the fine if the company belongs to a large group of companies, or decrease, if the company is a single-product undertaking. Finally, it is at this point that the 10 per cent maximum fine level is taken into account as well.

Fourth, co-operation efforts by the investigated company may reduce the amount of the fine. If the company actively co-operates, including not contesting the facts of the case, it may benefit from a 20 per cent decrease. Acknowledging the unlawfulness of the conduct

[17] See my paper in Hungarian: Tihamér Tóth, "A Legfelsobb Bíróság ítélete az OTP Bank Nyrt. és a GVH közötti perben" (2010) 4 *Jogesetek Magyarázata* (analysing the practice of the GVH and review courts in applying mathematical formula).
[18] Vj-148/2005. The fine was HUF 257 million.
[19] This mirrored the structure of the antitrust fining guidelines: consumer harm up to 30%, competition harm up to 30%, attitude of the undertaking up to 20% and other factors up to 20%.
[20] Strictly speaking, the GVH is authorised to publish guidelines summarising its practice. It can be debated to what extent guidelines are meant to change the existing practice. Anyway, legal interpretations not supported by administratice courts will lose their weight, even if published in guidelines.

may add another 10 per cent, making it 30 per cent.[21] A novelty of the guidelines is the detailed regulation of when compliance programmes can result is reduced fines. Unlike in the antitrust notice, no distinction is made between programmes adopted before or after the infringement. Nor is the percentage of the reduction carved into stone. Ex ante compliance efforts are considered genuine by the GVH if the company sought legal advice from an independent attorney or a professional organisation (it could be, for example, the advertising self-regulatory authority) and the advice given was not obviously contrary to the practice followed by the GVH.

The practice of the GVH

Shifting average fine levels

During the 90s, with a few exceptions, fines were not serious, especially compared to the size of the undertakings misleading their consumers. This was also reflected in the short reasonings of infringement decisions. The two-three sentence long texts simply listed the relevant factors taken into account, usually not even expressly mentioning which of those were aggravating and which attenuating.

The millennium witnessed important changes for the development of the GVH's fining policy. The Competition Council seemed to be prepared to adopt higher fines in both antitrust and consumer protection cases. The amendment of the Competition Act introduced a 10 per cent turnover-based ceiling for fines[22] which was also used as an orientation point for the GVH and the review courts to set fines proportionate to the gravity of the infringement. Also, higher consumer protection fines were a side-effect of increased fines in cartel cases concluded in the first decade of 21the century. Although the legislative framework has not changed over the past almost two decades, the level of fines did fluctuate. Fines imposed during most of the second decade of the 2000s rarely reached the symbolic amount of HUF 100 million. There had been some cases, before the UCPD was implemented, when the GVH followed a stricter approach calculating and imposing fines in the range of HUF 100–300 million. Soon, however, this trend changed and the GVH followed a modest fining strategy again. The reasons behind such changes can be complex: the cases investigated might have involved smaller marketing budgets, or smaller markets, there were changes in the leadership of the GVH, members of the decision-making Competition Council were replaced over time, and also the importance of UCP cases was evaluated differently.[23] One decisive reason, due to the multiplier factor, is the extent to which repeat infringements were taken into consideration. In addition to the turnover-based new starting points, this was the main factor moving fines into a new dimension during 2020.

Table 1 shows the trend of GVH fines imposed in UCP cases since 2010.[24]

Table 1

Year	Number of fining decisions	Total fines imposed (million HUF)	Average fine per case (million HUF)	Number of fines at or above HUF 100 million	Companies paying HUF 100 million or more
2010	38	755	20	3	Free Choice 100 million OTP Bank 100 million Telekom 200 million
2011	33	423	13	2	OTP Bank 100 million Vodafone 100 million
2012	45	533	12	1	Telekom 100 million
2013	50	587	12	0	-
2014	48	1.375	29	4	Impulser 100 million L'Oreal 100 million Vodafone 125 million Vodafone 110 million
2015	38	584	15	0[25]	-
2016	33	769	23	3	Freshnapf 100 million Éremkibocsátó 140 million Merck 150 million
2017	17	1.178	69	3	Sandoz 105 million Vodafone 200 million

[21] The relevant reductions in the antitrust guidelines are much smaller. This is consistent with the difference regarding the co-operation tools: in a cartel case, a company supporting the GVH may apply for leniency and also benefit from a settlement reduction.
[22] More precisely, the turnover achieved by the group of undertakings can be taken into account if the reasoning of the decision clearly identifies that group.
[23] To add a rather personal viewpoint, during my chairmanship of the Competition Council between 2003 and 2009, the reason for relatively modest fines were the often times subjective legal evaluation of UCP cases (the test whether an advertisement was capable of misleading an average consumer and distort competition was a matter of subjective judgement, so the composition of the acting competition councils had an impact on the level of fines), and also miseleading advertising cases were not as highly ranked as cartels or abuse of dominance cases.
[24] The table relies on the figures published in the GVH'S annual report to Parliament, as available on the website of the competition authority. For the year 2020, in the absence of a published report, I collected the figures based on the GVH's press releases and its Flash Report of 2020. The figures are not corrected based on court rulings to reflect the policy of the GVH.
[25] One company, 4Life, came close with a fine of HUF 99 million.

Year	Number of fining decisions	Total fines imposed (million HUF)	Average fine per case (million HUF)	Number of fines at or above HUF 100 million	Companies paying HUF 100 million or more
					Telekom 600 million
2018	9	462	51	1	Apple 100 million
2019	13	4.891	376	5	(see table below)
2020	17	7.093	417	8	(see table below)

The wave of record fines

Between December 2019 and 2020, the GVH imposed fines of hundreds of millions in about a dozen cases, including five instances with financial penalties exceeding HUF 1 billion.[26] In the table below I mention those cases in which the GVH imposed fines higher than the symbolic HUF 100 million during this period.

Table 2

Name of the case	Date of the decision	Fine in HUF	Fine in €[27]
booking.com NV	28 April 2020	2.5 billion	6.9 million
Telenor Hungary Kft.	20 December 2019	1.8 billion	5.45 million
be2 S.à.r.l.	17 August 2020	1.6 billion	4.4 million
Facebook Ltd.	6 December 2019	1.2 billion	3.6 million
Vodafone Hungary	14 December 2019	1.176 billion	3.36 million
Alza.hu and Alza.cz a.s.	5 August 2020	892 million	2.548 million
Magyar Telekom	19 February 2020	670 million	1.914 million
Emporia Style Kft.	28 September 2020	480 million	1.371 million
Magyar Telekom	28 January 2020	350 million[28]	1 million
Biotech USA Kft. and JLM Powerline Kft	10 July 2020	150 million	429,000
Telemarketing International Kft. and Mediashop GmbH	17 January 2020	125 million	357,000

When Facebook was hit with a fine of HUF 1.2 billion on 6 December 2019, stakeholders could not have known that this signalled the advent of a new era.[29] One could have thought that the case is exceptional due to the identity of the global company and due to the length of the practice considered. Also, given Facebook's significant market position in social media and the related advertising markets, the issue investigated could have been subject of an "unorthodox" antitrust procedure as well.[30] The subject matter of the investigation affected a widely known feature of the social networking company. It was not a specific marketing campaign that was challenged by the competition authority, but general information provided by Facebook's homepage and Help Centre between 2010 and 2019. Statements like "It's free and anyone can join" and "Free and always will be" allegedly distracted its users' attention from the fact that they are indirectly paying for the use of its services in the form of the transmission of their data.

When determining the fine, the GVH considered approximately 10 per cent of the advertising income of Facebook Ireland Ltd realised in Hungary. In the absence of a relevant marketing budget, the competition council argued that

> "it is still appropriate to start from the [advertising] turnover as described above in the present case because, in view of the practice and business model investigated, it is a good reflection of the magnitude

[26] Interestingly, no huge fines were imposed during the first 4 months of 2021.

[27] During this year, the exchange rate fluctuated between 330–360 HUF/EUR. For the purpose of this table, I used 350 HUF/EUR, except for the first four cases where I used the rate available on the date of the decision.

[28] In this case the GVH used a creative and unprecedented way of ordering the payment of fine. Of the HUF 350 million, only 100 million was required to be paid by the market leading company, another 100 and a 150 million only if the company fails to meet its commitments offered during the procedure. Yet, this is not a formal commitment decision where the GVH does not establish the unlawfulness of the conduct.

[29] Vj/85/2016 *Facebook Ireland*. Unusually, the whole decision is available also in English: *https://www.gvh.hu/pfile/file?path=/en/resolutions/resolutions_of_the_gvh/resolutions-documents/resolutons_2016/vjj085_2016_a&inline=true* [Accessed 9 July 2021]

[30] The GVH's press release emphasises that "similar decisions had been made in both the US and Europe in relation to the conduct of Facebook. In April 2019 Facebook updated its conditions of use and services due to the pressure that was being exerted by the European Commission and Consumer Protection Authorities of Member States. The new conditions explain how Facebook uses its users' data for profiling activities and targeted advertisements, in order to finance itself. *https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/gvh-imposed-a-fine-of-eur-3.6-m-on-facebook* [Accessed 9 July 2021]. We should also recall that the German Bundeskartellamt, a few months before, had targeted Facebook's data handling policy as a form of abuse of dominance, although refraining from imposing monetary sanctions on the US based corporation. See the press release of the German competition authority: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html [Accessed 9 July 2021]. The decision was confirmed, overruling the Regional Court, by the Supreme Court in June 2020.

of the consideration or countervalue obtained from consumers […], and thus it can be considered as the relevant turnover".[31]

Since this basic amount might have been shockingly high (we do not know this, since the figures were deleted as business secrets), the competition council expressly deviated from the fining guidelines and took into account only the last year's figures, instead of the whole period of the infringement. The 10 per cent of this was further "slightly" reduced since some of the revenues originated from users other than natural persons protected by the UCPD. It seems that even this reduced amount was rather high for the decision makers, so that the rest of the decision's reasoning mentions only one mitigating circumstance in order to cut back the rather high starting point. The GVH took into consideration the fact that the undertaking had globally modified the slogans suggesting free usage of its services. This resulted in a rather significant reduction of 50 per cent, not expressly foreseen by the fining guidelines. In sum, although the GVH's acting competition council formally relied on the GVH's fining guidelines, it departed from it for the benefit of the company in such a way that in the end it is questionable whether the guidelines have influenced the decision at all.

Sadly, the decision does not even mention the potential maximum that could have been imposed on Facebook; its Hungarian turnovers were deleted in the published version of the decision. So, even if the fine was record high, it is difficult to evaluate the extent to which it actually hit the global company's European subsidiary. Expressing the HUF 1 billion fine in euros gives a more modest figure of €3.6 million. Yet the, then record, fine provided significant media coverage for the competition authority, and even though later decisions were price tagged with even higher fines, this decision undoubtedly marked the start of a new era in the sanctioning of unfair commercial practices in Hungary.

The commercial practices of *booking.com* were subject to inquiries in many EU Member States.[32] The Hungarian competition authority (GVH) imposed a fine of HUF 2.5 billion (about €6.9 million) on the Dutch company on 28 April 2020. *Booking.com B.V.* mislead its consumers by advertising some accommodations with a free cancellation option.[33] Yet, consumers paid a higher price than for the same accommodation without the option of "free cancellation". Second, the platform company exerted undue psychological pressure on consumers during the search and booking process to make early bookings, a form of aggressive selling also prohibited by the UCPD. This took the form of the use of attention grabbing information (e.g. "32 more people are also watching"; "One person is considering booking this accommodation right now", "Highly sought after! Booked 17 times in the last 24 hours"), which gave consumers the impression that the accommodation they were viewing was subject to high demand and limited availability. Relying on behavioural economic science evidence, the GVH argues that this practice disrupted the consumers' decision-making process, as it subconsciously evoked emotions and fears. The third infringement, qualified as a general infringement of professional care and diligence was a Hungarian specific issue: *booking.com* displayed the offers of Hungarian accommodation providers when listing the Széchenyi Recreation Card (SZÉP Kártya) as a widely used means of payment. The availability of this payment method was not displayed to consumers in the same way for all of the accommodation establishments accepting the SZÉP Kártya which could have had an effect on the choice of consumers.

In regards to the calculation of the fine, the reasoning recalls the main provisions of the fining guidelines. The turnover realised through commissions received from the owners of the accommodations was taken as a starting point, since the costs of the communication were not significant enough (most of the communication related to the website or app). Just like in the Facebook case, the acting competition council expressly deviated from the fining guidelines, in as much it took into account 10 per cent of the relevant turnover achieved during the last financial year, and not the turnover achieved during the years of the unlawful commercial practices. As a next step, unlike in the *Facebook* case, the GVH identified two aggravating circumstances: it was a significant factor that the length of the unlawful conduct covered many years, whereas the combination of three unlawful activities was a medium aggravating factor. The termination of the infringement related to SZÉP Kártya was taken into account as a medium-level mitigating factor. Unfortunately, the reader of the decision cannot learn either about the size of the starting point, or the exact percentage used during the calculation of the basic amount. No other circumstances were taken into account.

One more reference point the decision mentions, is that the HUF 2.5 billion fine, however high it seems, was way below the maximum: it was just 0.017 per cent of the *booking.com* group's total turnover achieved in 2019. In my view, statements like this may seem to please the representatives of the company subject to the fine, but they do not add too much to the weight of the reasoning. On the contrary, from a sanctioning policy perspective, the message is ambiguous: if the conduct was really as serious as judged by the GVH, then, in the light of the size of the relevant turnover and the size of *booking.com*,

[31] Point 294 of the decision.

[32] The Dutch competition authority acted on behalf of a number of consumer protection authorities against the manipulative techniques of the platform. The GVH did not participate in this co-ordinated action, arguing that the subject matter and the time periods of the investigation, and the characteristics of the various national procedures were not the same (point 379 of the booking.com decision). See, for example the EU Commission's press release: *https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6812* [Accessed 9 July 2021].

[33] VJ/17/2018. *Bookin.com BV*; unlike the *Facebook* case, this decision is only available in Hungarian.

the level of the fine imposed is fairly low, even if the competition authority's international press release heralds it as a "gigantic fine".[34]

The second highest fine was imposed on Telenor, the third largest mobile operator in Hungary.[35] In December 2020, the GVH set a fine of HUF 1.8 billion (about €5.45 million) on the company owned by the Czech PPF group. The undertaking's TV ads, fliers, and Facebook communication promoted mobile devices for free or at a reduced price as part of Telenor's Blue tariff package. The unlawful activity covered one year between 2016 and 2017. The message was misleading since the "free", or cheap device triggered a higher monthly subscription payable over two years. Customers thus incurred additional costs if they opted for the allegedly free device.

In this case, the GVH chose the relevant marketing costs of the unfair commercial practice as a starting amount. The GVH identified two factors qualified as significantly aggravating: the message of the unlawful commercial practice was robust, and the effects of the one year long practice were also significant. There was only one significantly mitigating factor the GVH took into account: the company modified its communication practice in the spirit of cooperation. Just like in the previous decisions, neither the figure of the basic ammount, nor the percentage of the attenuating and mitigating circumstances are published in the decision. In another step of the fine calculation process, recidivism was considered. In the last 10 years, Telenor committed similar unlawful commercial practices on four occasions. On this basis, the GVH more than doubled the amount of the fine. Finally, Telenor received a four per cent reduction acknowledging that its compliance programme was developed in light of the experience gained during the procedure. As a final step in the long calculation process, the acting competition council rounded up the figure, somewhat reducing the fine to the benefit of Telenor.

Telenor's fine was nominally lower than the *booking.com* fine, however, it was more significant if compared to the size of the undertaking. According to the decision, the maximum amount of the fine could have been HUF 17 billion, thus the fine takes about one per cent of the last annual turnover (it was 0.017 per cent in booking com, involving a much longer unfair commercial practice). It is also important to emphasise that when calculating the fine ceiling, the acting competition council referred to Telenor's Hungarian revenues, not considering the whole group's turnover, as was done in the *booking.com* case. Indeed, the Competition Act is not clear on this point. Whether the GVH relies on the company's local turnover, or is free to add the whole group's global turnover, does make a difference.

The bronze medalist with HUF 1.6 billion (about €4.4 milliom) is a Luxembourg based company, whose *be2.hu* and *academicsingles.hu* dating websites had carried out a number of unfair commercial practices between 2017 and 2020.[36] The investigation revealed that be2 S.à.r.l.'s practice was based on confusing and misleading communication about the most important conditions, i.e. prices, duration, and automatic renewal. In particular, the decision establised that although the use of the websites was advertised as free of charge, it was not possible to access the essence of the services free of charge, i.e. the sending of messages was charged by the company.

The fine was based on the company's sales revenue realised in Hungary between the end of 2017 and the end of the investigation. this basic amount was proportionate as the unfairness characterised the whole business model of the company.

The base fine chosen by the GVH in the form of the total domestic revenues, although foreseen in the new guidelines, is unprecedented in the practice. Even in serious cartel cases, this base amount is not larger than 30 per cent of the relevant turnover. Consequently, in order to set the fine in this dimension, the GVH had to interpret the law as permitting to set a fine capped at ten per cent of the group of companies' global turnover. Had the GVH applied the same method in the *booking.com* case, that fine would have been much higher. The GVH was also not cognisant in considering the the turnover realised during the period of the whole infringement. In *Facebook* and *booking.com*, only one business year was taken into account.

Putting these huge fines into another perspective, we should not forget that imposing fines above HUF 100 million, catching the attention of the media is one thing, and achieving special deterrence is another. In many cases, fines with fewer zeroes may have a much larger impact on the company found to have infringed the competition and consumer law rules. Reporting about the relative size of the fine, compared to the turnover of the company, could serve as, not only a special, but as a general deterrence. For example, a Hungarian owned micro-undertaking engaged in the production and distribution of food supplements was fined HUF 46.878 million in 2020.[37] This is just about €130,000, yet it equalled the maximum amount that can be levied under the Competition Act. Due to the length of the marketing campaign, recidivism and the seriousness of misleading health claims, the calculated fine could have been higher. However, even this reduced fine hurt the company much more than the record breaking fine imposed on *booking.com*. Using the ratio calculated for *booking.com*, the small undertaking should have received only a HUF 8 million fine.

[34] *https://www.gvh.hu/en/press_room/press_releases/press-releases-2020/gigantic-fine-imposed-on-booking.com-by-the-gvh* [Accessed 9 July 2021].
[35] Vj/13/2018. I should add that the other two operators, Telekom, and Vodafone were also hit by significant fines during this review period.
[36] VJ/19/2018.
[37] Vj/21/2019 *Innovelle Pharma Kft.*

Finally, a brief international comparison is also useful to evaluate the Hungarian record breaking fines properly. Examples from two other jurisdictions with active UCP enforcement show that these fines would be “business as usual” in Italy, and would also blend in well with fines imposed in Poland. The highest fine set in Poland is €26.6 million against VW in 2020—previously, the record holders were Polkomtel with €11.2 million (2019) and Aflofa Farmacia with €7.7 million (2017). In Italy, the AGCM has a long history of imposing significant penalties. In 2021, Facebook received €7 million, one year earlier Apple and HP each €10 million, Sky €7 million in 2019, Facebook and Apple €10 million each in 2018. In addition, there were 18 other cases with fines equal to, or above €1 million in 2020, 19 cases in 2019 and 11 decisions in 2018.[38] Just to recall, the Hungarian record is *booking.com* with €6.9 million, with eight other fining decision exceeding €1 million. Taking into account the largely different sizes of these countries, Hungarian fines have truly become enormous.[39]

Conclusion

At the end of 2019, the GVH started to impose relatively huge fines on companies engaging in unfair commercial practices. It can be a fairly complex exercise to evaluate whether these fines are really significant. Compared to other EU countries, the Hungarian fines have just started catching up with those imposed by the Italian or Polish competition authorities. However, if we upgrade these fines with reference to the smaller size of the Hungarian economy, then these fines look significant. On the other hand, these nominally huge HUF fines, exchanged to euros, become relatively modest, especially compared to the turnovers achieved by global companies, which means that their deterrent effect is far from obvious. Yet, these figures are telling as regards the priorities of a competition authority. Not only do UCP cases represent the majority of cases decided by the Hungarian Competition Authority, recently, the fines imposed in these cases have become as significant as those applied in cartel investigations. The message is clear: consumer protection infringements are not second class cases, companies using creative marketing tools in Hungary should carefully check whether their practice complies with the UCP rules as interpreted by the GVH.

The fining decisions adopted since December 2019 are the fruits of the new fining guidelines published at the end of 2017. The higher fines are due to the higher starting point of the calculation, and/or due to making repeat infringements an outstanding factor in the calculation process. It would take one or two years to see how review courts react to these new figures: imposing such high fines is unprecedented in other fields of Hungarian administrative or even criminal law.

The reasonings of the decisions, regarding the amount of the fines, have become more detailed, yet there are still points where the practice of the GVH merits some improvement. First, if the marketing budget is applied as a starting point, deleting this amount from the published decision does not serve general deterrence. The somewhat arbitrary choice of whether to start the multi-level calculation process with the marketing costs or relying on 10 per cent (or the whole) of the relevant turnover results in considerable differences. Companies relying on less costly marketing techniques are put at a disadvantage. Second, claims arguing business secrets should be handled more critically, taking into account the public interest related to deterrence. Third, the percentage used to increase/decrease the basic amount should be reflected in the decision, it does make a difference whether the acting competition council applies the lower or upper end of the scale. Finally, there is the problem of how to interpret the Competition Act’s provision concerning the 10 per cent maximum fine. The GVH should be cognisant in its decisions whether the legal entity’s Hungarian turnover, the group of companies’ (in EU terms: the undertaking) Hungarian turnover, or the group of companies global turnover is the relevant point of reference. Choosing this last would create consistency with antitrust fines, but would also tempt the GVH to impose even higher fines, especially on global companies.

[38] The author is indebted to Monika Namyslowska (University of Lodz) and Antonio Mancini (AGCM) for reporting these figures. Press releases are available at the website of the competition authorities, i.e. for the *Polish VW* case: *https://www.uokik.gov.pl/news.php?news_id=16127* [Accessed 9 July 2021]. About the strengths and weaknesses of the Polish consumer law enforcement system, see: Monika Namyslowska and Agnieszka Jablonowska: Enforcement and Effectiveness of Competition Law in Poland, in: H.-W. Micklitz, G. Saumier (eds), *Enforcement and Effectiveness of Consumer Law* (Springer AG, 2018), p.433.

[39] If we looked at these fines considering the different size of the economies expressed in GDP, more or less giving an estimate about the different sizes of the affected markets, the Hungarian figures need to be multiplied by more than 10, resulting in country GDP specific fines of around €10–70 million.

Third Party Funding—Impact on Privilege in Litigation and International Arbitration

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☞ Disclosure; Germany; International arbitration; Legal professional privilege; Litigation funding agreements; United States

Introduction

"Third party funding is a feature of modern litigation." These opening words of the judgment of the English Court of Appeal in *Excalibur*[1] reflected the reality that over the course of the last 20 years the role of third party funding in major litigation, including competition litigation, has become pervasive in many jurisdictions, including England, the US and Germany, and in international arbitration. Indeed, funders find competition litigation particularly attractive as an investment opportunity, where often the litigation arises as the result of a conclusive finding of a breach of competition law by a local or regional regulator. Breach has already been established, leaving only causation and quantum to be determined. But the involvement of an additional entity in the assessment of the merits of a claim can lead to questions about the application of privilege.

The underlying purpose of privilege is to allow candid and transparent communications between lawyers and clients without concerns about disclosure of those communications to other parties in litigation. The impact of third party funding on privilege remains an area with some uncertainty, in particular, how privilege can be protected when communicating with and providing documents to a third party funder.

Before deciding to fund a claim, a funder will usually conduct comprehensive due diligence in order to evaluate the strengths and weaknesses of the claim and the potential return on its investment. As part of the due diligence process, the funded party will often be required to provide information and documents to the funder that would otherwise be typically protected by privilege.

This raises an important concern: would a party that discloses privileged documents or communication to a third party funder to secure funding risk waiving the privilege? In this article we address this issue through the lens of common and civil law jurisdictions, namely the US, England and Wales, and Germany. We also examine the impact of third party funding on international arbitration.

The US

The US: attorney-client privilege and the work product doctrine

In the US, attorney-client privilege protects communications between attorney and client made in confidence and created for the purpose of seeking, obtaining or providing legal assistance. The doctrine of attorney work product ensures that "opinion" documents (which reflect an attorney's opinion) created in anticipation of litigation and prepared by an attorney or their agent are protected from disclosure.

Most US states do not regulate litigation funding companies. Among the few states that have enacted any statutory regulation, only three specify that disclosures of otherwise-protected communications to a third party funder do not constitute a waiver of claims to attorney-client privilege or work product protection.[2] Therefore, the current landscape of discoverability of information shared with third party funders has been drawn by the courts. Prior to 2014, only a relatively small number of courts had considered the issue. *Miller*, decided that year, provided the first extensive discussion of, and has become the leading decision on, the applicability of these discovery protections in the third party litigation context.[3] As the issue has been addressed with increasing frequency in recent years, the picture has come more clearly into focus, with consistent themes emerging in more recent decisions.

As is discussed below, courts are divided on whether the shared interest of clients and third party funders in the successful outcome of a litigation is sufficient to sustain claims of attorney-client privilege under the common interest doctrine. However, courts have held

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[1] *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144; [2017] 1 W.L.R. 2221; [2017] C.P. Rep. 13.

[2] See Ind. Code s.24–12-8-1; Neb. Rev. St. s.25-3306; Vt. Stat. tit. 8, s.2255.

[3] *Miller UK Ltd v Caterpillar Inc* 17 F. Supp. 3d 711 (N.D. Ill. 2014).

with great consistency that work product protection can apply to funding agreements and due diligence documents, even in cases in which the attorney-client privilege is found to have been waived.[4]

Attorney-client privilege and "common interest" analysis

Under US common law, the attorney-client privilege protects confidential communications between a lawyer and client for the purpose of providing legal advice.[5] Because the purpose of the attorney-client privilege is to encourage frank communication between lawyer and client by assuring confidentiality, disclosure to a third party that eliminates that confidentiality constitutes a waiver of the privilege.[6] The common interest doctrine is an exception to that general principle, and allows communications that are already privileged to be shared with third parties that have a "common legal interest" without a resultant waiver.[7]

Attorneys' legal analysis can be central to a third party funder's due diligence when investing in the pursuit of a legal claim. Thus, the common interest doctrine is commonly invoked as an exemption from normal waiver rules in the litigation funding context. However, there is no consensus among US courts as to how narrowly "common interest" should be construed.

Some courts have interpreted the common interest doctrine to require a common legal interest between the client and the third party funder and not simply a commercial interest. The court in *Miller* held that a client's relationship to a litigation funder was merely "a shared rooting interest in the successful outcome of a case", and thus not a common legal interest, in which

> "there was no legal planning with third party funders … litigation was not to be averted, as it was well underway, and Miller was looking for money from prospective funders, not legal advice or litigation strategies".[8]

Similarly, another widely-referenced case, *Leader*, held that a plaintiff and litigation funder did not share a common legal interest sufficient to extend the privilege—in spite of an executed common interest agreement—because the court held common interests must be "identical, not similar, and be legal, not solely commercial", and "there should be a demonstration that the disclosures would not have been made *but for* the sake of securing, advancing, or supplying legal representation".[9] Thus, courts requiring identical legal interests often find that communications between funders and clients are not protected by attorney-client privilege.[10]

However, a number of other courts have construed the doctrine more broadly, requiring only a "substantially similar" legal interest or a "common enterprise" between the third party and the privilege holder. For example, in *Rembrandt*, the court found a common legal interest among a patent holder and consultants. There, an agreement to enforce and monetise certain patents through litigation was sufficient to invoke the common interest doctrine, and attorney-client communications which were shared among the community of interest were shielded from discovery.[11] More recently, a bankruptcy court in Florida considered and declined to follow *Leader*, holding that the common interest doctrine applied to communications with a litigation funder that financed an action to pursue plaintiff's claim against a debtor. The court instead adopted the "more expansive" common enterprise approach, which requires only that the "third party and the privilege holder are engaged in some type of common enterprise and that the legal advice relates to the goal of that enterprise".[12]

Thus, no consensus exists as to whether the common interest exception to the attorney-client privilege applies to documents shared with litigation funders, and parties should not rely on such protection. Notably, however, even courts that are reluctant to extend the attorney-client privilege to third party litigation funders under the

[4] Note that to be discoverable, information must be relevant to some party's claims or defenses. Fed. R. Civ. P. 26(b)(1). Assertions of attorney-client privilege or work product protection should be evaluated only for any information found to be relevant. *Miller* 17 F. Supp. 3d at 722 (quoting *Oppenheimer Fund Inc v Sanders* 437 US 340, 352 (1978)). Often, terms and content of the funding agreement have no bearing on the claims or defenses in a case. See *United Access Technologies LLC v AT&T Corp* 2020 WL 3128269 (D. Del. 12 Jun 2020).

[5] See, e.g. *Re Teleglobe Communications Corp* 493 F.3d at 345, 359 (3d Cir. 2007) (quoting Restatement (Third) of the Law Governing Lawyers, s.68 (Am. Law. Inst. 2000)).

[6] See *Miller* 17 F. Supp. at [731]; *Upjohn Co v United States* 449 US at [383], [389] (1981).

[7] *Miller* 17 F. Supp. at [383], [389].

[8] *Miller* 17 F. Supp. at [732]–[733].

[9] *Leader Technologies Inc v Facebook* 719 F.Supp.2d at 373, 376 (D. Del. 2010) (finding no clear error in a magistrate's finding of no common interest between plaintiff and funder, so common interest doctrine did not apply and attorney-client privilege was waived). The District of Delaware followed *Leader* in a 2018 decision, *Acceleration Bay LLC v Activision Blizzard Inc*, finding the plaintiff and a prospective funder did not possess identical legal interests in certain patents, and were not otherwise "allied in a common legal cause" at the time of the communications, before an agreement was reached and before any litigation had been filed. *Acceleration Bay* Nos 16-453-RGA, 16-454-RGA, 16-455-RGA, 2018 WL 798731 at p.3 (D. Del. 9 February 2018). However, in a later opinion, the judge who decided *Acceleration Bay* appeared to limit the reading of that decision, stating *Acceleration Bay* "did not set a firm rule that parties must have a written agreement or have filed suit to share a legal interest. Rather, I merely considered the lack of an agreement or suit as evidence of the lack of a shared interest". *TC Technology LLC v Sprint Corp* 16-CV-153-RGA, 2018 WL 6584122 at p.5 (D. Del. 13 December 2018).

[10] Although two brief orders decided in 2012 and 2013 found sufficient commonality under this more stringent standard in which non-disclosure and confidentiality agreements were in place between the parties, neither case has been widely cited. See *Walker Digital v Google*, No. 11-309-SLR, ECF No. 280, 2013 WL 9600775 (D. Del. 12 February 2013) (holding that a patent monetisation consultant and the plaintiff had a "common legal interest", even though the consultant was "not a law firm and was not retained to provide legal services"); *Devon It Inc v IBM Corp* No. CIV.A. 10-2899, 2012 WL 4748160 (E.D. Pa. 27 September 2012) (holding that the common interest doctrine, which requires "a shared common interest in litigation strategy," applies when the funder and plaintiff have a common interest in the successful outcome of the case).

[11] *Rembrandt Technologies. L.P. v Harris Corp* No. 07C-09-059, 2009 WL 402332 at p.7 (Del. Super., 12 February 2009) (citing *Re Teleglobe* 493 F.3d 345, 365 (3d Cir. 2007) and *Re Regents of the University of California* 101 F.3d 1386, 1390 (9th Cir. 1996) for the "substantially similar legal interest standard").

[12] *Re International Oil Trading Co* 548 B.R. 825, 832–833 (Bankr. S.D. Fla. 2016) (citing *Rembrandt* 2009 WL 402332 at p.7).

common interest doctrine are likely to find that the work product doctrine (discussed below) applies and shields such material from discovery.

Documents are often protected by the work product doctrine

Strong arguments support application of the work product doctrine to protect funding agreements and diligence documents shared with third party funders from discovery. While assertions of attorney-client privilege are met with mixed results, the vast majority of courts have held that most material shared with third party funders constitutes attorney work product and is therefore protected from disclosure.[13]

The work product doctrine protects

> "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent)".[14]

Several courts have noted that attorneys' thought processes and mental impressions are integral to many documents and communications that may be shared between a party, its attorneys and actual or prospective litigation funders. Such communications necessarily contain and reflect "opinions by plaintiff's counsel regarding the strength of … claims, the existence and merit of … defenses, and other observations and impressions regarding issues that [arise in litigation]".[15] In addition, "the terms of the final agreement—such as the financing premium or acceptable settlement conditions" similarly "reflect an analysis of the merits of the case".[16]

"Prepared in anticipation of litigation"

Most federal courts addressing the work product doctrine in the context of litigation finance apply a broad interpretation of the requirement that materials be "prepared in anticipation of litigation".[17] Such courts hold that funding materials that were prepared "because of" litigation qualify as work product. A small minority of federal courts take a narrower view and require that litigation be the "primary motivating purpose" for the creation of documents over which work product protection is claimed.[18]

Courts applying the majority view hold that documents and information shared by attorneys with third party funders to secure financing have been prepared "because of" the prospect of litigation, even if they also serve a business purpose, and are thus eligible for work product protection.[19] The *Miller* court held that

> "materials that contain counsel's theories and mental impressions created to analyze [the plaintiff's] case do not necessarily cease to be protected because they may also have been prepared or used to help [the plaintiff] obtain financing",

noting that such material is "precisely the type of discovery that the Supreme Court refused to permit in *Hickman [v Taylor]*", the Supreme Court decision establishing the work product doctrine.[20] In addition, certain decisions have highlighted the interconnection between third party litigation funding and plaintiffs' access to legal services and the courts, finding that because plaintiffs required third party funds to pursue their claims, documents shared with third party funders to secure the funds were created "because of" the litigation.[21] Finally, note that it is not disqualifying that litigation was not filed at the time the documents were

[13] See, e.g. *Miller* 17 F. Supp. at [735]; *Odyssey Wireless Inc v Samsung Electronics Co Ltd* No. 3:15-cv-01738, 2016 WL 7665898 at p.4–5 (S.D. Cal. 20 September 2016); *Viamedia Inc v Comcast Corp* No. 1:16-cv-05486, 2017 WL 2834535 (N.D. Ill. 30 June 2017); *Ioengine, LLC v Interactive Media Corp* 1:14-cv-01571 (D. Del. 3 August 2016); *US ex rel. Fisher v Homeward Residential Inc* No. 4:12-cv-461, 2016 WL 1031154 at p.6 (E.D. Tex. 15 March 2016); *US ex rel. Fisher v Ocwen Loan Servicing LLC* No. 4:12-CV-543, 2016 WL 1031157 at p.6 (E.D. Tex. 15 March 2016); *Morley v Square Inc* No. 4:10-cv-02243, 2015 WL 7273318 (E.D. Mo. 18 November 2015); *Doe v Society of Missionaries of Sacred Heart* No. 11-cv-02518, 2014 WL 1715376 (N.D. Ill. 1 May 2014); *Mondis Technology Ltd v LG Electronics Inc* No. 2:07—CV-565—TJW—CE, 2:08—CV-478—TJW, 2011 WL 1714304 at p.3 (E.D. Tex. 4 May 2011); *Impact Engine LLC v Google Inc* 3:19-cv-01301-CAB-DEB (S.D. Cal., 20 October 2020); but see *Leader* 719 F. Supp. 2d at [376]–[377] (concluding with limited explanation that work product doctrine did not apply).

[14] Fed. R. Civ. P. 26(b)(3)(a).

[15] *Doe v Society of Missionaries of the Sacred Heart* 2014 WL 1715376 at p.3; see also *Devon IT* 2012 WL 4748160 at p.1 (E.D. Pa. 27 September 2012) ("Litigation strategy, matters concerning merits of claims and defenses and damages would be revealed if the documents were produced. The matters directly involve the mental impressions of counsel and are protected from disclosure as work-product."); *Re International Oil Trading Co* 548 B.R. 838 ("There is little doubt that the communications … concern 'mental impressions, conclusions, opinions or legal theories'. These are communications between a client, the client's attorney, and a litigation funder whose participation depends on assessments of the merits of litigation.")

[16] *Carlyle Investment Management v Moonmouth Co* C.A. No. 7841-VCP, 2015 WL 778846 at p.9–10 (Del. Ch. 24 February 2015).

[17] Michele DeStefano Beardslee, "Taking the Business Out of Work Product" (2011) 79 Fordham L. Rev. 1869, 1903, fn.191 (noting the majority of federal courts apply the "because of test", including the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits).

[18] Grace M. Giesel, "Alternative Litigation Finance and the Work-Product Doctrine" (2015–2016) 12 N.Y.U. J.L. & Bus. 911, 1101; *United States v Textron* 577 F.3d 21, 32 (1st Cir. 2009) (Torruella J dissenting) (noting the "widely rejected 'primary motivating purpose' test used in the Fifth Circuit").

[19] See, e.g. *Continental Circuits LLC v Intel Corp* 435 F.Supp.3d 1014, 1020 (2020) (D. Ariz. 2020), quoting *Re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)* 357 F.3d 900, 907 (9th Cir. 2004) ("The 'because of' standard does not consider whether litigation was a primary or secondary motive behind the creation of a document. Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]"); *Carlyle* 2015 WL 778846 at p.8 (despite overlap between business and litigation purposes in the context of third party funding documents, work product protection is appropriate because such documents involve lawyers' mental impressions, theories, and strategies of the case); *Lambeth Magnetic Structures LLC v Seagate Technology (US) Holdings Inc* Nos 16-538, 16-541, 2018 WL 466045 at p.5 (W.D. Pa. 18 January 2018) ("Even if the Court were to … consider the relationships to be commercial, the materials nonetheless fall within work product immunity because they were communications with plaintiff's agents and in anticipation of litigation."); *Odyssey Wireless Inc* 2016 WL 7665898 at p.5.

[20] See *Miller* 17 F. Supp. 3d at [735].

[21] *Continental Circuits LLC* at [2021] ("the Court concludes that any business-sustaining purpose of the litigation funding agreements in this case is 'profoundly interconnected' with the purpose of funding the litigation"); *Re International Oil Trading Co LLC* 548 B.R. at [836] (client pursuing a claim, retaining counsel and paying counsel are links "in same chain … Each link in that chain is in furtherance of rendering legal services …"); *Carlyle* 2015 WL 778846 at p.9 ("In those instances where a claim cannot proceed without third party financing, one element of preparing a client's case for trial will be securing the requisite funding …").

generated, as some courts have held that the protection can apply when the materials were created for future possible litigation.[22]

Even courts applying the "primary motivating purpose" test—which requires that the documents have been created specifically to assist in pending or anticipated litigation—have held the work product doctrine protected materials shared with third party funders.

For example, in *Mondis*, the US District Court for the Eastern District of Texas held that work product protections applied to documents reflecting patent "licensing and litigation strategies and also estimates of licensing and litigation revenues", which were shared with potential investors, because the documents were prepared "with the intention of coordinating potential investors to aid in future possible litigation".[23] The Eastern District of Texas reached the same conclusion several years later in two related cases, *Homeward Residential* and *Ocwen Loan Servicing*.[24]

In addition, the court that decided in *Re International Oil Trading Co* found that the primary purpose test was satisfied by communications between the claimant and a third party funder which were made in pursuit of legal services—i.e., to secure funding to pay an attorney—and the motivating factor in creating the documents was not purely financial.[25] The court noted the primary purpose rule examines the claimant's intent, rather than the funder's, and the claimant's disclosure of materials, which allowed the funder to assess the merits of the litigation, were made in furtherance of facilitating the rendition of legal services on his behalf.[26]

To date, it appears that only one court has applied the "primary motivating purpose" test and declined to find work product protection for the material in question.[27] In *Acceleration Bay*, the District of Delaware—applying the Fifth Circuit's "primary purpose" test, rather than the "because of litigation" test used in the Third Circuit—denied work product protection for funding documents and other diligence-related communications with a funder.[28]

There, the court correctly identified the applicable test in the Third Circuit as whether "the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation", citing a prior Third Circuit decision in *Rockwell*.[29] However, because the *Rockwell* decision characterised the Fifth Circuit's "primary purpose" test as "analogous" with the "because of" standard[30]—which it is not—the *Acceleration Bay* court, following *Rockwell*, then determined that work product protection did not apply to information shared by *Acceleration Bay* with a potential funder. The court reasoned that because the

> "[p]laintiff has characterized the communications as being created 'for the purpose of obtaining funding to assert [the] patents' … The documents were thus prepared with a 'primary' purpose of obtaining a loan, as opposed to aiding in possible future litigation."[31]

Because the court did not identify a distinction between the two different standards, it did not discuss or distinguish either (a) cases within the Third Circuit and Delaware that applied the "because of test"—e.g. *Carlyle* or *Lambeth*—or (b) the cases which found that such communications satisfied even the more stringent Fifth Circuit test—e.g. *Mondis*, *Homeward Residential* and *Ocwen Loan Servicing*.

However, *Acceleration Bay* appears to be an outlier, and in the handful of other cases when courts applied the "primary motivating purpose" test, communications and documents shared with third party funders were still found to satisfy the narrower test for work product protection.

Exceptions to work product protection: waiver and substantial need

Waiver Unlike the confidentiality requirements of the attorney-client privilege, the "disclosure of a document to third persons does not waive the work product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information".[32] Most courts have held that work product

[22] *Lambeth Magnetic Structures LLC* 2018 WL 466045 at p.5 (pre-litigation communications with potential funders for the purpose of preparing for litigation were protected by work-product doctrine because the communications "took place during a period when Lambeth actually and reasonably foresaw litigation"); *Mondis* 2011 WL 1714304 (E.D. Tex. 4 May 2011) ("Although the [funding] documents may not have been prepared in connection with ongoing litigation, the documents were at a minimum created for possible future litigation."); *Rembrandt* 2009 WL 402332 at p.9 ("application of the 'work product immunity does not require the existence of an actual pending lawsuit, but only that materials be written specifically in preparation for threatened or anticipated litigation"); *Alabama Aircraft Industries v Boeing Co* No. 2:16-mc-01216-RDP at p.49 (N.D. Ala. 9 February 2018) (citing *Miller* and holding a draft complaint shared with a funder was protected work-product).

[23] *Mondis Technology Ltd v LG Electronics Inc* 2011 WL 1714304 at p.3.

[24] *U.S. ex rel. Fisher v Homeward Residential Inc* 2016 WL 1031154 at p.6; *U.S. ex rel. Fisher v Ocwen Loan Servicing* 2016 WL 1031157 at p.6 (E.D. Tex. 15 March 2016).

[25] *Re International Oil Trading Co LLC* 548 B.R. at [836]–[837].

[26] *Re International Oil Trading Co* 548 B.R. at [836]–[837].

[27] Although the court in *Leader* upheld a magistrate's order denying work product protection to documents shared with funders as not clearly erroneous, it did not analyse the work-product doctrine apart from claims of attorney-client privilege, *Leader* 719 F. Supp. 2d at [376].

[28] *Acceleration Bay LLC v Activision Blizzard Inc* Nos 16-453-RGA, 16-454-RGA, 16-455-RGA, 2018 WL 798731 at p.3 (D. Del. 9 February 2018).

[29] *Acceleration Bay* Nos 16-453-RGA, 16-454-RGA, 16-455-RGA, 2018 WL 798731 at p.3 (emphasis added), citing *US v Rockwell International* 897 F.2d 1255, 1265–66 (3d Cir. 1990).

[30] *Rockwell* 897 F.2d 1255 at [1266].

[31] *Acceleration Bay* Nos 16-453-RGA, 16-454-RGA, 16-455-RGA, 2018 WL 798731 at p.3.

[32] *Miller UK Ltd v Caterpillar Inc* 17 F. Supp. 3d at 737. See also *Odyssey Wireless* 2016 WL 7665898 at p.6 ("In the context of work product, common interest is more broadly construed to include disclosure to third parties."); *Viamedia Inc v Comcast Corp* 2017 WL 2834535 at p.2–3 ("the point of the protection is not to keep information secret from the world at large but to keep it out of the hands of one's adversary in litigation", and disclosure to third party funders pursuant to an NDA did not result in a waiver because it did not make it "substantially more likely that its work-product protected information would fall in the hands of its adversaries").

protection is not waived by disclosure to third party litigation funders when the party had an expectation of confidentiality when disclosing the material.[33] Further, the absence of a confidentiality agreement, oral or written, "may not be fatal to a finding of non-waiver" because "a prospective funder would hardly advance his business interests by gratuitously" sharing due diligence materials with the litigation adversary.[34] However, establishment of a non-disclosure or confidentiality agreement significantly strengthens the argument against waiver.

Substantial need Work product protection may be overcome if a party can show that it has a "substantial need for the materials" and cannot "obtain their substantial equivalent by other means".[35] Even if the party can make this showing, it cannot obtain "opinion" work product—information revealing "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation".[36] In two cases, courts have found parties to have demonstrated substantial need for portions of the funding agreement, and ordered production of the agreement with redactions of portions reflecting work product.[37] Neither court permitted discovery of any other documents, which one court referred to as "rarely discoverable" opinion work product.[38]

Financing agreements

The large majority of courts do not require disclosure of the existence of third party funding arrangements, or the agreements themselves.[39] A small but growing number of jurisdictions and courts require disclosure of litigation funding arrangements to identify and avoid potential conflicts a judge may have.[40] In the few cases in which courts ordered discovery of the funding agreements, the disclosure was typically limited and allowed for redactions of information and terms, such as how counsel valued the case, that reflected counsel's mental impressions.[41][42]

England and Wales

Privilege: an overview under English law

Third party funding has grown into a flourishing industry over the past decade or so. In contrast to the period before the enactment of the Criminal Law Act 1967, where maintenance and champerty were seen as crimes and torts, the English courts today have taken into account the progressive role played by funders in facilitating access to justice. Lord Justice Tomlinson in *Excalibur*[43] commented that "litigation funding is an accepted and judicially sanctioned activity perceived to be in the public interest". The heightened prevalence of third party funding arrangements raises interesting questions about the interaction between the important role played by funders, on the one hand, and the traditional parameters of privilege under English law, on the other.

Current position on legal professional privilege

Generally speaking, in England and Wales, "legal advice" and "litigation" privilege protect confidential communications created by a lawyer when acting for a client. Legal advice privilege applies to confidential communications between a lawyer and client created for the dominant purpose of giving or receiving legal advice about what should prudently and sensibly be done in the

[33] See, e.g. *Ocwen Loan Servicing LLC* 2016 WL 1031157 at p.6 (litigation funders have an inherent interest in maintaining the confidentiality of potential clients' information); *Homeward Residential* 2016 WL 1031154 at p.6; *Odyssey Wireless* 2016 WL 7665898 at p.6 (documents sent to litigation funders were protected by work product doctrine because they were subject to confidentiality agreements and expectation of confidentiality); *Mondis* 2011 WL 1714304 at p.3; *Morley v Square* 2015 WL 7273318 at p.2 (plaintiff had an expectation of confidentiality with third party investors when it shared documents related to litigation funding and therefore did not waive work production protection); *Doe* 2014 WL 1715376 at p.4 ("It is significant that these litigation financing companies entered into written nondisclosure agreements that agreed not to divulge any of the information supplied to them by Plaintiff's counsel. This fact militates against a finding of waiver."); *Miller* 17 F. Supp. 3d at 736–38 (oral and written confidentiality agreement with prospective funders demonstrated precautions taken to avoid risk of disclosure to adversarial party); *Impact Engine LLC v Google Inc* 3:19-cv-01301-CAB-DEB (S.D. Cal., 20 October 2020).

[34] *Miller* 17 F. Supp. 3d at [738].

[35] Fed. R. Civ. P. 26(b)(3)(A).

[36] Fed. R. Civ. P. 26(b)(3)(A). But note that at least one court has allowed discovery of underlying facts conveyed to litigation funders. See *Morley* 2015 WL 7273318 at p.2–3 (holding without discussion that, although work product doctrine protected portions of 21 documents shared with litigation funders, defendants were still entitled to a redacted production sufficient to reveal the underlying facts conveyed to funders).

[37] *Re International Oil Trading Co* 548 B.R. at 837–838 (substantial need for the funding agreement because the party seeking the communications argued it was key to determining whether plaintiff/creditor was the "real party in interest," or instead had transferred some or all of his claim in exchange for financing); *Odyssey Wireless* 2016 WL 7665898 at p.7 (ordering production where funding agreement was only indication of value of patent-in-suit, a substantial factor in calculating patent damages). But see *Charge Injection Technologies Inc v E.I. DuPont De Nemours & Co* 2015 WL 1540520 at p.5 (Del. Super. Ct. 2015) (no substantial need for the payment terms in the plaintiff's funding agreement).

[38] *Re International Oil Trading Co* 548 B.R. at [838].

[39] No federal rule requires disclosure, and 48 out of 50 states do not require disclosure in commercial matters. In Wisconsin and West Virginia, a funded party is required to provide to all other parties any third party litigation agreement. However, parties may agree, or a court may order, that this information need not be disclosed. See Wis. Stat. s.804.01(2) (bg); W. Va. Code Ann. s.46A-6N-6.

[40] See, e.g. Standing Order for all Judges of the Northern District of California, Contents of the Joint Case Management Statement (adopted 23 January 2017) at [19]; D.N.J. L. Civ. R. 7.1.1, Disclosure of Third-Party Litigation Funding (adopted 21 June 2021); see also Memorandum from Patrick A. Tighe, Rules Law Clerk to Advisory Committee on Civil Rules re Survey of Federal and State Disclosure Rules Regarding Litigation Funding (7 February 2018) at 209, available at *https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf* [Accessed 14 July 2021].

[41] See, e.g. *Re International Oil Trading Co LLC* 548 B.R. at 832; *Security Point Holdings Inc v United States* No. 1:11-CV-00268, 2019 WL 1751194 at p.5–6 (Fed. Cl. 16 April 2019) (recognising both work-product protection and an objection that the discovery request was not relevant to a claim or defense); *Carlyle Investment Management LLC* 2015 WL 778846 at p.9–10.

[42] In three cases of limited applicability, courts have ordered discovery of the entire, unredacted funding agreement, but in two of those cases work product objections were either not raised or not discussed by the court. *SeeGbarabe v Chevron Corp* No. 14-CV-00173-SI, 2016 WL 4154849 (N.D. Cal. 5 August 2016); *Cobra International Inc v BCNY International Inc* No. 05-61225-CIV, 2013 WL 11311345 (S.D. Fla. 4 November 2013). In the third, the funder was a witness in the case. *Berger v Seyfarth Shaw LLP* 2008 WL 4681834 at p.2–3 (N.D. Cal. 22 October 2008); see also *Miller* 17 F. Supp. 3d at 723 (distinguishing *Berger v Seyfarth Shaw LLP*).

[43] *Excalibur* [2017] 1 W.L.R. 2221; [2017] C.P. Rep. 13 at [31].

relevant legal context, whereas litigation privilege applies between a client and the client's lawyer, or between either of them and a third party, made for the dominant purpose of litigation which is pending, reasonably contemplated or existing. If privilege can be established, an absolute right to withhold the relevant communication from inspection arises in favour of the client.

Three Rivers (No. 5)[44] is the long-standing English authority on the scope of legal advice privilege, in particular with regard to the definition of "client". In this case, the claimant appealed a decision granting legal professional privilege over documents prepared by employees or ex-employees of the Bank of England (the Bank). The Bank had claimed legal advice privilege for numerous documents it had sent to its lawyers. The Court of Appeal held that internal documents supplied by employees or ex-employees of a bank to their lawyers were not protected under legal advice privilege because they were not prepared for the dominant purpose of obtaining legal advice and were merely created with the intention of presenting evidence in submissions "in an orderly and attractive fashion" to (and in response to requests during) an inquiry set up by the government.[45] Longmore LJ went on to describe this documentary material as "raw material for presentation to the inquiry" with the dominant purpose being "so that the Bank could comply with its primary duty of putting all relevant factual material before Lord Justice Bingham" in the inquiry.[46] "The continuum of communication … as to what should prudently and sensibly be done in the relevant legal context" had not yet begun.[47] In a separate disclosure application in *Three Rivers (No. 6)*,[48] the House of Lords declined the Bank's invitation to reconsider the Court of Appeal's decision. The Court of Appeal also considered who was the client for the purposes of the test. It held that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client.

However, in *Serious Fraud*,[49] the Court of Appeal indicated it would (if it had been open to it to do so) have been in favour of departing from the Court of Appeal's decision in *Three Rivers (No. 5)* regarding the definition of client for the purposes of the test.[50] The Court of Appeal noted that the position in *Three Rivers (No. 5)* is out of step with the international common law on this issue and that cases such as *Enskilda Bank* in the Singapore Court of Appeal had widened the definition of "client" to encompass employees "since a company can only act through its employees".[51] In addition, *Three Rivers (No. 5)* put large corporations at a disadvantage, as the information upon which legal advice is sought is unlikely to be in the hands of the main board or those it appoints to seek and receive legal advice.[52] Ultimately, the Court of Appeal considered that any change to the position in *Three Rivers (No. 5)* would need to be determined by the Supreme Court. The Court of Appeal in *Jet2.com*[53] agreed with the discussion in *Serious Fraud* on the overly narrow definition of client in *Three Rivers (No. 5)*. The court also clarified that a party claiming legal advice privilege must show that the relevant document or communication was created or sent for the dominant purpose of obtaining legal advice.

With regard to litigation privilege, the Court of Appeal in *Serious Fraud* also considered the question, among other things, as to when litigation was in reasonable contemplation. The Court of Appeal expressed the view that the courts should take a "realistic, indeed commercial, view of the facts".[54] The case involved the SFO (Serious Fraud Office) issuing notices compelling a company to produce documents to enable it to investigate the company following disclosure of information by a whistleblower. The Court of Appeal reversed the High Court's strict approach, stating that litigation privilege applies not only to legal advice given regarding resisting or defending proceedings, but also to the avoidance or settling of proceedings.[55] In this case, privilege applied from the moment the company hired lawyers to conduct an internal investigation as the SFO had clearly indicated that it would consider criminal proceedings.

[44] *Three Rivers DC v Bank of England (No. 5)* [2003] EWCA Civ 474; [2003] Q.B. 1556; [2003] 3 W.L.R. 667.
[45] *Three Rivers (No. 5)* [2003] Q.B. 1556; [2003] 3 W.L.R. 667 at [32] and [37].
[46] *Three Rivers (No. 5)* [2003] Q.B. 1556; [2003] 3 W.L.R. 667 at [35].
[47] Longmore LJ in *Three Rivers (No. 5)* [2003] Q.B. 1556; [2003] 3 W.L.R. 667 at [35] citing Taylor LJ in *Balabel v Air India* [1988] Ch. 317; [1988] 2 W.L.R. 1036; [1988] 2 All E.R. 246 at 330 D-G.
[48] *Three Rivers DC v Bank of England (No. 6)* [2004] UKHL 48; [2005] 1 A.C. 610; [2004] 3 W.L.R. 1274.
[49] *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006; [2019] 1 W.L.R. 791; (2019) 35 Const. L.J. 99.
[50] *Serious Fraud* [2019] 1 W.L.R. 791; (2019) 35 Const. L.J. 99 at [123]–[124] and [130].
[51] *Serious Fraud* [2019] 1 W.L.R. 791; (2019) 35 Const. L.J. 99 at [128]–[129], citing Andrew Phang Boon Leong JA in *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR 367.
[52] *Serious Fraud* [2019] 1 W.L.R. 791; (2019) 35 Const. L.J. 99 at [127].
[53] *R. (on the application of Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35; [2020] Q.B. 1027; [2020] 2 W.L.R. 1215.
[54] *Serious Fraud* [2019] 1 W.L.R. 791; (2019) 35 Const. L.J. 99 at [104].
[55] This was relied upon in a civil litigation context in *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652. In *WH Holding*, the judge held that documents would be protected by litigation privilege if they are "prepared for the dominant purpose of formulating and proposing the settlement of litigation that is in reasonable contemplation (or in existence)". A document does not need to be concerned with obtaining advice or information for use in litigation to be protected by privilege. However, the judge emphasised that the document must have been created for the "sole or dominant purpose of the litigation" and that a document purely "created in connection with the litigation" would not fall under litigation privilege. The judge gave a couple of examples. Documents which are created for "other purposes, such as the general management of the business" would not fall under litigation privilege. Litigation privilege would not apply to a projected cashflow which has a bearing on the terms of an offer because the document was not created "because of the litigation" but "because prudent management of the business requires cash flow projections". In any case, the judge held that the court could only inspect disputed documents if it was "reasonably certain" that the party claiming privilege had misrepresented, erroneously represented or misconceived their character (at [56]).

Common interest privilege

Where there is litigation privilege or legal advice privilege, "common interest" privilege may apply if a communication or document is shared confidentially with a third party with the intention of furthering common legal interests. Recent case law suggests that the scope of "common interest" privilege has broadened to encompass communications involving third party funders since the idea was introduced by Lord Denning in *Buttes Gas (No. 3)*.[56] For example, it has been held to apply in an insurance relationship where an insured provides documents to an insurer.[57] It has also been held to apply where privileged documents are provided to a regulator, even though the regulator could in some circumstances make the material public or share it with third parties.[58] When extended to a third party funding scenario, privilege is arguably not waived by the party supplying documents to the third party funder because of the funder's common interest in the documents and the success of the litigation itself. Aikens J (as he was then) set out the requirements for common interest privilege to apply in *Winterthur*, as follows

> "where a communication is produced by or at the instance of one party for the purpose of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party. The basis for the right to assert this 'common interest privilege' must be the common interest in the confidentiality of the communication."[59]

Treatment by English courts of documents/communications shared with third party funders

In *Excalibur Ventures LLC v Keystone Inc*,[60] Popplewell J had to consider a claim to privilege in relation to a party's attempts to obtain litigation funding. He held that the documents in question were not the subject of litigation privilege (because the discussions with funders were not for the purpose of conducting litigation) and that not all documents brought into existence for the purposes of actual or contemplated litigation will be protected by such. Popplewell J held that

> "insofar as the disclosure of the funding arrangements would or might give the other side an indication of the advice which was being sought or the advice which was being given, it would be covered by legal advice privilege."

Popplewell J also clarified the common interest privilege principles set out in *Winterthur*[61] and *Dadourian Group*[62] by holding that it is "the use of the document or its contents in the conduct of the litigation which is what attracts the privilege". In *Excalibur*, the defendants were given access to copies of any funding agreements that were not privileged and directly relevant to the claims and defences, subject to redactions for certain terms.

Further clarification on the status of interactions with third party funders was provided in *Estera*,[63] which considered an application made by the respondents for (i) a declaration that the petitioners, by failing to give inspection of litigation funding documents, had failed to comply with an earlier order for disclosure and inspection of documents; and (ii) an order to inspect the petitioners' litigation funding documents, which had been redacted. Part of the respondents' defence in the underlying unfair prejudice proceedings was that the petitioners should be denied all relief because of their alleged delay in issuing the petition. In reply, the petitioners asserted that there had been no improper delay because, among other reasons, during the relevant period the petitioners, through their solicitors, had been actively, but unsuccessfully seeking funding to commence the litigation. Following an order to give standard disclosure, the petitioners made available for inspection a number of communications with potential funders in a redacted form which showed back and forth correspondence with funders and brokers. It was accepted by the respondents that references to the petitioners' legal advice as to the merits and/or strategy were protected by legal advice privilege, but they argued that the discussions as to the terms of funding, the reasons for those terms and the acceptance or rejection of those terms were not so protected. It was the petitioners' position that this latter category of redactions should remain because they "reproduce, summarise, embody or otherwise reveal directly or indirectly the nature, content, or effect of privileged communications",[64] i.e., they revealed the content or trend of legal advice the petitioners had received. Relying on *Financial Services Compensation Scheme*,[65] the respondents submitted that

[56] *Buttes Gas and Oil v Hammer (No. 3)* [1981] Q.B. 223: [1980] 3 W.L.R. 668; [1980] 3 All E.R. 475.
[57] See *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027 at 1027; [1987] 2 All E.R. 716; 38 B.L.R. 57. See also *Svenska Handelsbanken v Sun Alliance and London Insurance Plc (No. 1)* [1995] 2 Lloyd's Rep. 84.
[58] *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2015] EWHC 1557 (Ch); [2016] 1 W.L.R. 361; [2015] 2 B.C.L.C. 401.
[59] *Winterthur Swiss Insurance Co v AG (Manchester) Ltd* [2006] EWHC 839 (Comm) at [78].
[60] *Excalibur Ventures LLC v Keystone Inc* unreported, 14 March 2012.
[61] *Winterthur* [2006] EWHC 839 (Comm).
[62] *Dadourian Group International Inc v Paul Simms* [2008] EWHC 1784 (Ch). The case established the principle that: "Litigation privilege … can include a communication between a client and his lawyer or between one of them and a third party which comes into existence after litigation is commenced or contemplated for the dominant purpose of obtaining information or advice in connection with such litigation or of obtaining evidence (or information which might lead to evidence) for use in the conduct of such litigation." At [86].
[63] *Estera Trust (Jersey) Ltd v Singh* [2017] EWHC 2805 (Ch).
[64] *Estera Trust* [2017] EWHC 2805 (Ch) at [7].
[65] *Financial Services Compensation Scheme Plc* [2007] EWHC 2868 (Ch).

the ability to infer the substance of a party's legal advice from documents does not make a communication privileged.

Morgan J held in favour of the petitioners, finding that *Financial Services Compensation Scheme* was not consistent with a number of other binding authorities and that after that judgment had been given there had been a number of cases in which it was assumed that the relevant test to be applied was the test stated in *Lyell*[66] or *Ventouris*,[67] i.e., that a document or part thereof will be privileged if it gives "a clue as to the legal advice given" (to satisfy the test in *Lyell*[68]), or "betrays the trend of the legal advice"[69] (to satisfy the test in *Ventouris*[70]). Morgan J considered this to be the correct test to apply in respect of the funding documents. Morgan J also considered some Australian authorities on the point and followed the distinction established in *AWB*,[71] between

> "a case where there is a definite and reasonable foundation in the contents of the document for the suggested inference as to the substance of the legal advice given and merely something which would allow one to wonder or speculate whether legal advice had been obtained and as to the substance of that advice".[72]

Privilege would only apply to the former situation.[73]

Citing *West London Pipeline*[74] in some detail, Morgan J also pointed out in *Estera* that a witness statement supporting a claim for privilege[75] cannot be easily challenged unless it is "reasonably certain" from the statement made by the party making it that they have erroneously represented or misconceived the character of the documents in respect of which privilege is claimed, or the evidence indicates that the statement is incorrect or incomplete. In *Estera*, the judge held that this test was not met. In the event that he had been "reasonably certain" that the witness statement supporting the petitioners' claim for privilege was in any way deficient, Morgan J noted that, of the options available to him (those listed in detail in *West London Pipeline*[76]), he would have opted to order an additional and more detailed witness statement from the petitioners' legal adviser, rather than to make an order for inspection of the documents.

Notwithstanding the decisions in *Excalibur* and *Estera*, it remains prudent for firms to obtain a client's informed consent before disclosing any documents to a litigation funder. Undertakings reflecting this consent should be included in confidentiality and common interest agreements, e.g. undertakings that all disclosed documents will not be disclosed to other persons and that the documents will be held in complete confidence. There should also be an undertaking that the parties intend to have a common interest in the litigation and later enter into a litigation funding agreement, to assist as far as possible in obtaining the protection of common interest privilege.

Communications originating from the funder must be distinguished from communications originating from the lawyer that are provided to the third party funder only with litigation or arbitration in mind. The question in relation to the former is not which head of privilege applies, but whether such communications are protected by privilege at all. Very little precedent exists on this category of communications.

The most significant cases to date are largely limited to communications in the context of litigation insurance. In *Arroyo*,[77] BP applied for an order compelling the claimants to disclose details of their after-the-event (ATE) insurance policy. The court concluded that it had no jurisdiction to order the disclosure of the claimants' ATE policy because it had no relevance to the substantive issues in dispute. The court went on, however, to consider the issue of privilege and followed the decision in *Lyell*[78] by holding that anything which gives a clue to the parties' thinking (the ATE policy in this case) is subject to legal advice privilege. The ATE policy was subject to litigation privilege in any event as the policy had been created for the purpose of supporting litigation.[79] In addition, the court made a distinction between insurance policies which were bespoke (which would attract privilege) and those which were on wholly standard terms (which would not attract privilege). The claimants' policies in this case had been the subject of individual and detailed negotiations, "brought into existence for the dominant purpose [of] conducting litigation and also…likely to reflect legal advice",[80] meaning that "by its nature, knowledge of the terms of an ATE policy would be of tactical advantage to the opposing party in the litigation"[81] and cause inequality of arms.

In *Re RBS Rights Issue Litigation*[82] the High Court, as in *Arroyo*, declined to order disclosure of the substantive details of the claimants' ATE insurance. However,

[66] *Lyell v Kennedy (No. 3)* (1884) 27 Ch. D. 1.
[67] *Ventouris v Mountain (The Italia Express)* [1991] 1 W.L.R. 607; [1991] 3 All E.R. 472; [1991] 1 Lloyd's Rep. 441.
[68] *Lyell* (1884) 27 Ch. D. 1.
[69] *Estera Trust* [2017] EWHC 2805 (Ch) at [39].
[70] *Ventouris* [1991] 1 W.L.R. 607; [1991] 3 All E.R. 472.
[71] *AWB v Terence Cole* [2006] FCA 571.
[72] *Estera Trust* [2017] EWHC 2805 (Ch) at [37].
[73] *Estera Trust* [2017] EWHC 2805 (Ch) at [62].
[74] *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm); [2008] 2 C.L.C. 258.
[75] In *West London Pipeline* [2008] 2 C.L.C. 258, Beatson J opined that "a claim for privilege is an unusual claim in the sense that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause".
[76] *West London Pipeline* [2008] 2 C.L.C. 258 at [86].
[77] *Arroyo v BP Exploration Co (Colombia) Ltd* [2010] EWHC 1643 (QB).
[78] *Lyell* (1884) 27 Ch. D. 1 at [59].
[79] *Arroyo* [2010] EWHC 1643 (QB) at [51].
[80] *Arroyo* [2010] EWHC 1643 (QB) at [69].
[81] *Arroyo* [2010] EWHC 1643 (QB) at [60]. See also, [48] for more detail on why preserving confidentiality is important in relation to the detail of a CFA or ATE policy.
[82] *Re RBS Rights Issue Litigation* [2017] EWHC 463 (Ch); [2017] 1 W.L.R. 3539.

Hildyard J criticised the decision in *Arroyo* for being too general in its approach to how litigation and legal advice privilege attach to ATE policies:

> "I cannot agree with the … conclusion (contrary to the previous decisions) that an ATE policy is privileged from disclosure on the ground that the policy and communications antecedent to its finalisation must be for the dominant purpose of conducting litigation, and thus attracts litigation privilege; and in my view the … general proposition that such a policy also attracts legal advice privilege because 'it is likely to reflect legal advice given as to prospects and tactics' (see para. 67) is too broadly stated."[83]

Instead, Hildyard J proposed that "ATE policies are [not] by their nature privileged, although some appropriate redactions may be justified and necessary to preserve legal advice privilege".[84] Specific parts of a policy, such as the amount of premium, as in *Barr v Biffa*, "may attract legal advice privilege and require redaction on the basis that the relevant part might allow the reader to work out what legal advice had been given (see *Barr v Biffa* at para. 48)".[85] By analogy, this suggests that the English court is highly likely to regard specific sections within a third party funding agreement as privileged.

Germany

Privilege, an overview under German law

The concept of legal privilege as known in the UK, US or other common-law jurisdictions, does not exist in Germany. German law is based on the civil law system, and in German civil procedure, the concept of legal privilege is less relevant. Since broad disclosure of documents is not available, a privilege against such disclosure or discovery is therefore not necessary in German civil litigation. Instead, Germany follows a different approach and provides secrecy provisions to protect the attorney-client relationship.

Civil litigation in Germany is based on the principle that each party has to submit facts and evidence in support of its claim or defence, the so-called *Beibringungsgrundsatz*, the principle to produce evidence. Under the German Civil Code of Civil Procedure (ZPO), it is incumbent upon the parties to present all relevant facts in a timely manner, on the basis of which the court then makes a decision (s.282 ZPO).

An attorney practicing in Germany owes a duty of confidentiality towards their client, based on statutory obligations imposed on German attorneys. Like other civil law jurisdictions, Germany adopted a professional secrecy obligation, which applies to all members of the Bar. Pursuant to s.43a (2) German Federal Attorney Regulation (BRAO) and s.2 of the German Rules of Professional Practice (BORA), this obligation relates to everything that has become known to the lawyer in professional practice. In case a lawyer is summoned as a witness, they have the right to refuse testimony, with regard to all facts which fall under the scope of their secrecy obligation, in civil court proceedings s.383 (1) no. 6 ZPO applies, in criminal court proceedings pursuant to s.53 (1) (no. 3) of the German Code of Criminal Procedure (StPO). In addition, and pursuant to s.203 (1) German Criminal Code (StGB),[86] the breach of professional secrecy is punishable under German criminal law. These secrecy obligations create a functional equivalent to legal professional privilege, at least in so far as it relates to documents and information in the possession of the lawyer.

There are, however, limited discovery obligations under German law, which parties have to comply with in civil litigation. While the first two exceptions are not of great significance in practice, it remains to be seen if the third exception will be of greater significance in competition cases going forward.

First, pursuant to s.142 ZPO, the civil court may, at its own discretion, direct one of the parties or a third party to produce documents or records, as well as any other material, that are in its possession and to which one of the parties has made reference. The court has to take into account whether the requested documents contain any confidential correspondence between a party and its lawyer within the meaning of s.43a (2) BRAO. Second, additional requests can be made pursuant to s.421–444. ZPO in relation to a specific document. And third, special rules apply in IP and competition cases. In disputes concerning patents or trademarks, a party may have certain rights to request the production of documents and things. Such disclosure rights may apply, for instance, concerning information on origin and distribution channels (s.140b Patent Act (PatG) and s.19 Trademark Act (MarkenG)), concerning the presentation and inspection of things (s.140c PatG, s.19a MarkenG), and with regards to third parties, which may have the obligation to report as well (s.140 (2) PatG, s.19 (2) MarkenG). In relation to competition law cases, the German legislature introduced a limited disclosure

[83] *RBS* [2017] 1 W.L.R. 3539 at [111].
[84] *RBS* [2017] 1 W.L.R. 3539 at [119].
[85] *RBS* [2017] 1 W.L.R. 3539 at [112].
[86] Non-binding convenience translation provided by Prof. Dr M. Bohlander: s.203 (1) StGB: "Whoever unlawfully discloses another's secret, in particular a secret relating to that person's personal sphere of life or to a business or trade secret which was revealed or otherwise made known to them in their capacity as […] (No. 3) a lawyer, non-lawyer provider of legal services who has been admitted to a bar association, patent attorney, notary, defense counsel in statutorily regulated proceedings, certified public accountant, sworn auditor, tax consultant, tax representative, or organ or member of an organ of a law, patent law, accounting, auditing or tax consulting firm, […] incurs a penalty of imprisonment for a term not exceeding one year or a fine" (available at *https://www.gesetze-im-internet.de/englisch_stgb/index.html* [Accessed 14 July 2021]).

procedure pursuant to s.33g of the German Act against Restraints of Competition (GWB), to implement the rules of the European Damages Directive[87] in German law, among other changes. Under s.33g GWB, both plaintiffs and defendants can request access to information held by other parties, except leniency statements and admissions in connection with settlement discussions with competition authorities. Pursuant to s.33g (6) GWB, however, documents in the possession of the defendant's outside counsel are protected and cannot be seized. Business and trade secrets are generally not privileged under German civil procedure law. Nevertheless, confidentiality aspects must be considered in the context of a request for information under s.33g GWB. If access to the information is granted, the court must ensure that business or trade secrets are protected, e.g. by redactions.

The impact of third party funding on privilege issues in Germany

In Germany, third party funding has grown into an important industry. Besides legal expense insurance and legal aid,[88] which have both been available in Germany for decades, professional third party funding has recently gained in importance. There are no regulatory obstacles to the use of third party funding in Germany, and common law doctrines such as maintenance and champerty do not apply.[89] Moreover, there is no obligation to disclose the details of the funding.

With regard to the impact of third party funding and privilege, the general rules of secrecy apply. The client must release the attorney from their duty to maintain confidentiality to enable the attorney to communicate with the insurer or third party funder accordingly, but this does not run the risk of waiving the attorney's duty to maintain confidentiality towards others. It therefore seems highly unlikely that the German courts will allow disclosure of information shared with third party funders for the purposes of obtaining funding for litigation. However, given how recently disclosure has been adopted, there have as yet been no judgments on this point.

Privilege in international arbitration

For several years now, third party funding has also become increasingly popular in both international commercial and investment arbitration as more and more parties are seeking financial assistance and access to arbitral justice.[90] Since international arbitration cases generally involve high legal costs, a party's ability to bring a claim and prevail may be restricted by the availability of funds. In this scenario, a third party funder can play a key role in financing the claim, thereby, easing the burden on the funded party while simultaneously generating profit for itself. Although third party funding has considerable advantages which includes increasing access to justice, it also carries certain risks and uncertainties. Further, there are concerns on the disclosure obligations for third party funding in international arbitration.

The question of whether a party who discloses privileged documents or communication to a third party funder in order to secure funding risks waiving privilege is particularly challenging in the context of international arbitration, where the limited formal rules and authority on the application of privilege make it difficult to predict how the tribunal will deal with the issue of privilege. The section below explores the different implications of the issue.

Privilege issues in international commercial arbitration

The issue of privilege typically arises in international arbitration when a party seeks to obtain evidence from another party and is met with an objection on the grounds that the requested evidence is subject to privilege.[91] When a party refuses to provide the requested evidence based on a privilege, the arbitrators have to determine whether to compel the party to provide the requested evidence or whether to accept the ground of a privilege.

Evidentiary privileges are recognised and applied in international commercial arbitration but the law relating to privilege is far from being internationally systemised and even on a national level, it varies significantly from jurisdiction to jurisdiction.[92] The global nature of international commercial contracts means that parties come to arbitration from different legal systems—common, civil, or mixed—and have different approaches on how to resolve privilege issues. As a result, it is not always clear which national or international norms should govern privilege. Scholars like Klaus Peter Berger have remarked that, when it comes to privilege in international arbitration, the "only thing that is clear is that nothing is clear" and there is "very little authority addressing how international arbitrators should proceed" on privilege questions.[93] We will examine institutional rules as well as current national laws on international arbitration in order to discern how much guidance parties and arbitrators can expect from the existing laws and rules.

[87] 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 EU, OJ L 349 dated 5 December 2014, pp.1–19.
[88] Parties in need may request legal aid pursuant to s.114–127. ZPO. Pursuant to s.114 (1) ZPO, a party in need shall receive legal aid if the intended legal action or legal defense offers sufficient prospect of success and does not appear to be willful.
[89] Under the German litigation cost regime and pursuant to s.91 ZPO, the loser has to pay all legal costs, including the legal fees and expenses of the winning party (while such reimbursement is based on the German Act on the Remuneration of Lawyers, RVG).
[90] William Stone, "Third Party Funding in International Arbitration: A Case for Mandatory Disclosure" (2015) 17 Asian Disp Rev. 69.
[91] Gary B. Born, *International Commercial Arbitration*, 2nd edn (2014), pp.2375–6.
[92] Born, *International Commercial Arbitration* (2014), p.2377.
[93] Klaus Peter Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion" (2006) 22 Arb.Int'l 501, 501.

Institutional rules

At the institutional level, almost all institutional rules give arbitral tribunals wide discretion to decide procedural and evidentiary matters for themselves. However, there is very limited express guidance on how tribunals should determine issues of privilege. In an analysis of 88 different international and regional arbitration rules, 86 per cent of the rules analysed were utterly silent on the issue of privilege and determining the law applicable to privilege.[94]

For example, the International Chamber of Commerce (ICC) Rules provide that the tribunal

> "may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information",[95]

but do not elaborate on the kind of information and communications that fall within the scope of this protection. Similarly, the American Arbitration Association (AAA) Rules provide that the tribunal shall determine what evidence shall be admitted, and state that "the tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client".[96] This rule, however, provides no guidance on what "principles of legal privilege" are applicable.

More recently, however, the 2018 Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, expressly permit disclosure of information to third party funders.[97] While the general rule, under art.45 provides that

> "unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration",

an exception is set forth in art.45.3(e) that parties may disclose information related to the arbitration to "a person for the purpose of having, or seeking, third party funding of arbitration". Such a provision is unique in that they directly refer to third party funding and issues of disclosure.

National laws

Similar to institutional rules, few national arbitration legislations expressly address the issue of legal privilege in international arbitration, let alone provide guidance as to identifying the applicable law and its potential application. For example, while the The United Nations Commission on International Trade Law (UNCITRAL) Model Law, which has been adopted by many countries, gives the tribunal full discretion to determine "the admissibility, relevance, materiality, and weight of any evidence",[98] it provides no guidance on how to best exercise this authority.

National legislations in civil law countries, such as France,[99] give arbitral tribunals wide discretion regarding how they should deal with evidentiary considerations, but do not directly address the issue of privilege. Similar examples can be found in common law countries such as the UK where, for example, the English Arbitration Act 1996, gives tribunals power to decide "whether any and if so which documents or classes of documents should be disclosed between and produced by the parties",[100] but does not elaborate on how the tribunal shall make such decisions on document production or how it should deal with different party expectations about privilege.

The IBA Guidelines on the taking of evidence

Along with institutional rules and national laws, we can also take a look at the International Bar Association (IBA) Guidelines on the Taking of Evidence in International Arbitration which are unique in that they expressly deal with privilege issues and offer tribunals some guidance on how to determine the law applicable to privilege. First, art.9(1) confers the usual power upon the tribunal to "determine the admissibility, relevance, materiality and weight of evidence". Article 9(2)(b) then expressly addresses issues of privilege and confidentiality, granting arbitrators the power to "exclude from evidence or production any [d]ocument [because of] legal impediment or privilege under the legal or ethical rules determined by the … [t]ribunal to be applicable". Finally, the IBA Guidelines identify multiple factors that tribunals may address when analysing issues of privilege, including: (a) the need to protect confidentiality in order to receive legal advice or in connection with settlement negotiations, (b) party expectations when the privilege was created, (c) possible waiver of privilege, and (d) the need to maintain fairness and party equality, "particularly if they are subject to different legal or ethical rules".

[94] S.D. Franck, "International Arbitration and Attorney-Client Privilege—A Conflict of Laws Approach" (1 December 2019) (2019) 51 *Arizona State Law Journal* 951 (available at *https://ssrn.com/abstract=3496817* [Accessed 14 July 2021]).
[95] 2017 ICC Rules art.22(3).
[96] 2013 AAA Rules art.34(c).
[97] HKIAC, "2018 Administered Arbitration Rules—1 November" (2020), *Hkiac.org*, *https://www.hkiac.org/news/2018-administered-arbitration-rules-1-november* [Accessed 14 July 2021].
[98] UNCITRAL Model Law (Adopted 2006) art.19(B).
[99] The Code of Civil Procedure, France art.1467.
[100] The English Arbitration Act 1996 art.34(2)(d).

While the IBA Guidelines provide tribunals with some direction to follow, they fail to enhance predictability when it comes to the law applicable to privilege issues. The Guidelines are non-mandatory and do not create an obligation for the tribunal to use the identified factors in decision-making which essentially means that the tribunal continues to have immense discretion over these issues. In addition, there is no guidance given on how to best use the identified factors to resolve concerns about the applicable privilege. Instead, the Guidelines merely encourage the tribunal to take into account "the expectations of the Parties and their advisors at the time that the legal impediment or privilege is said to have arisen"[101] and "the need to maintain fairness and equality between the parties if they are subject to different legal or ethical rules".[102]

Determining the proper law governing privilege

The lack of guidance from institutional, national, and evidentiary rules generally means that the tribunal has broad discretion to determine the application of evidentiary privileges and it does not have to follow any strict rules. There are three approaches that a tribunal can adopt—these include: closest connection, most favoured nation, and least favored nation approach.

Choice of law approach

In order to subject privilege to autonomous national law, it must be first classified as either a matter of substantive or procedural law.[103] However, practically speaking, it is quite difficult to label privilege as a matter of procedural or substantive law, since privilege is categorised differently according to different jurisdictions. While civil law jurisdictions generally regard privilege as an issue of procedural law, some common law, such as the US, deal with it as substantive law.[104] Despite this uncertainty, it is important to distinguish between privilege as a matter of procedure or as a matter of substance because different laws are applicable to privilege claims in each case.[105] Traditionally, if evidence rules are considered procedural in nature, the tribunal will resort to the law of the seat of arbitration since it is usually the law applicable to the procedure.[106] But if the evidence rules are considered substantive then the governing law of the contract would apply and the arbitrator must engage in a choice-of-law analysis.

International arbitration agreements generally specify a governing substantive law; hence, it may seem obvious to apply the law of the contract to govern privilege issues. However, in practice, it is very rare for parties to have chosen the law that is to apply to privilege claims specifically.[107] If a tribunal chooses to apply the law of the contract to privilege issues, it could risk violating the parties' legitimate expectations. For example, while a party to arbitration may have chosen French law as the substantive law of the contract, that does not mean that they expect to give up their domestic privileges in favour of those of French law. In fact, it may be the case that neither party to the dispute is familiar with attorney-client privilege under French law and might not choose French law to govern these issues.

In absence of a choice of law by the parties, most tribunals choose to apply the "closest connection test"[108] which requires the tribunal to apply the law of the jurisdiction with which the document or communication is most closely connected.[109] In other words, it "will need to establish an objective connection between a particular law and the privilege claimed".[110] The tribunal can take into account factors in deciding which law is most relevant to the given document or communication. These include: (a) the domicile of the parties and their lawyers, (b) the nationality of the arbitrators, (c) how many different laws are applicable in terms of the law of the seat, (d) the law governing the arbitration agreement, (e) the law governing the contract, and (f) where enforcement is likely to be sought, and the like. However, the problem with applying the law with the "closest connection" to questions of privilege in international arbitration is that there is an abundance of potentially applicable laws that have to be assessed.[111] This not only increases the workload for the arbitrators but also leads to a certain degree of subjectivity, which makes it difficult for the parties to predict the applicable law.

Most favoured nation approach

The "most favoured nation" approach requires the tribunal to assess the potentially applicable rules and apply the law of the jurisdiction with the broadest privilege protections to both parties, even though it would ordinarily only apply to one party.[112] For example, in a dispute involving two parties, if the US standard of privilege is more protective than the French, the tribunal would allow the French entity to protect those documents that would be privileged under US law.

[101] IBA Rules art.9.3(c).
[102] IBA Rules art.9.3(e).
[103] Franco Ferrari and Stefan Kroll (eds), "Conflict of Laws in International Arbitration" (Sellier European Law Publishers, 2011), p.250.
[104] Klaus Peter Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion" (2006) 22 *Arbitration International* 507.
[105] Diana Kuitkowski, "The Law Applicable to Privilege Claims in International Arbitration" (2015) 32 J Int'l Arb. .122.
[106] D. Kuitkowski, "The Law Applicable to Privilege Claims in International Arbitration" 123.
[107] Klaus Peter Berger, "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion" (2006) 22 *Arbitration International* 500.
[108] Klaus Peter Berger, *International Economic Arbitration* (Kluwer Law and Taxation Publishers, 1993), p.503.
[109] Berger, *International Economic Arbitration* (1993), p.511.
[110] Diana Kuitkowski, "The Law Applicable to Privilege Claims in International Arbitration" (2015) 32 J Int'l Arb. 92.
[111] Craig Tevendale and Ula Cartwright-Finch, "Privilege in International Arbitration: Is It Time to Recognize the Consensus?" (2009) 26 J. Int'l Arb. 832.
[112] Richard M. Mosk and Tom Ginsburg, "Evidentiary Privileges in International Arbitration" (2001) 50 *International and Comparative Law Quarterly* 384.

This approach has two main advantages. First, it provides a large degree of certainty to the parties and ensures that their minimum expectations as to what constitutes "privileged" are met.[113] Hence, a party, with higher privilege protection expectations can be ensured that it will not be requested to produce a document or communication that would be privileged under its own laws.[114] Second, since it adopts the same standard for all parties, they will be treated fairly during arbitration. However, this approach does raise issues in a scenario in which a party had not expected a stricter standard of privilege to apply, and hence did not keep communications confidential because of such an expectation.[115] Likewise, a party with low privilege protection may also

> "perceive this standard as providing illegitimate protection from disclosure to documents or communications which are highly relevant to the matters at issue. This can be problematic because a tribunal has a duty to establish all the facts of a case and to allow the parties a fair opportunity to present their case".[116]

Least favoured nation approach

In contrast to the "most favoured nation" approach, the "least favoured nation" approach requires the tribunal to apply the law with the least protective standard evenly to both parties.[117] Since a lower standard of privilege would apply, one or more of the parties would be requested to bring forth the evidence that they expected to keep confidential. While this approach, like the "most favoured nation" approach, applies the chosen standard equally to both parties, it is different in that it is more likely to run contrary to party expectation and creates issues of unfairness and uncertainty. If the tribunal applies a lower standard of privilege, it is almost guaranteed that this will violate the legitimate expectations of at least one of the parties. It can also create ethical issues for legal advisors, who might be committing a serious violation in their home jurisdiction if they are forced to disclose information revealed to them by their clients. Due to these complications, tribunals prefer the "most favoured nation approach" over the "least favoured nation approach".[118] However, this avenue exists and may be appropriate in certain situations.

International investment arbitration

International investment arbitrations are typically conducted under the institutional rules of the International Centre for the Settlement of Investment Disputes (ICSID) or the ad hoc rules of UNCITRAL. Both of these rules are silent on the issues of privilege. Article 15 of the UNCITRAL Rules provides that

> "the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case".

Likewise, art.34(1) of the ICSID Arbitration Rules makes the tribunal the judge of the admissibility of any evidence adduced and its probative value and ICSID Arbitration r.34(2)3 empowers the tribunal, at any stage of the proceedings, to call upon the parties to produce documents, witnesses and experts. Since the applicable law gives the tribunal immense discretion in determining the standard for assessing privilege claims, we must look at case law on this issue for further guidance.

In some cases, investment arbitration tribunals have applied national laws to issues of privilege. For example, in *Glamis Gold* (a North American Free Trade Agreement (NAFTA) case under the UNCITRAL Arbitration Rules),[119] the parties agreed that the US rules of privilege would apply to any privilege issues that may arise and the tribunal agreed. This meant that certain documents would be withheld from disclosure based on the US privilege rules. Likewise, in *Gallo* (a NAFTA case under the UNCITRAL Arbitration Rules), the Tribunal noted that solicitor-client privilege and work product privilege are applicable in international law and cannot be disregarded on the ground that domestic law is not the governing law.[120] The tribunal also noted that a document is protected by solicitor-client privilege if "the lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation"[121] and it would be unreasonable for an international tribunal to dispense with such a fundamental privilege.

In other cases, however, the investment arbitration tribunals have confirmed that national laws do not apply and the tribunal is free to choose its own privilege rules. In *Apotex*, a NAFTA case under the ICSID Additional Facility Rules, the claimants invoked attorney-client privilege and the work product doctrine.[122] While the

[113] Javier Rubinstein and Britton Guerrina, "The Attorney-Client Privilege and International Arbitration" (2001) 18 J. Int'l Arb. 599.
[114] Rubinstein and Guerrina, "The Attorney-Client Privilege and International Arbitration" (2001) 18 J. Int'l Arb. 599.
[115] Patricia Shaughnessy, "Dealing with Privileges in International Commercial Arbitration" (2009) 792 PLI/LIT 278.
[116] Diana Kuitkowski, "Law Applicable to Privilege Claims in International Arbitration" (2015) 32 J Int'l Arb. 97.
[117] Craig Tevendale and Ula Cartwright-Finch, "Privilege in International Arbitration: Is It Time to Recognize the Consensus?" (2009) 26 J. Int'l Arb. 834.
[118] Tevendale and Cartwright-Finch, "Privilege in International Arbitration: Is It Time to Recognize the Consensus?" (2009) 26 J. Int'l Arb. 834.
[119] *Glamis Gold Ltd v United States of America*, UNCITRAL, Decision on the Parties' Requests for Production of Documents Withheld on Grounds of Privilege (17 November 2005) at [16]–[20].
[120] *Vito G. Gallo v Canada*, Procedural Order No.3, dated 8 April 2009 at [13].
[121] *Gallo*, Procedural Order No. 3, dated 8 April 2009 at [47].
[122] *Apotex Holdings Inc and Apotex Inc v United States of America* ICSID Case No ARB(AF)/12/1, Procedural Order on Document Production Regarding Parties' Respective Claims to Privilege and Privilege Logs (5 July 2013) at [20]–[21].

tribunal recognised that the "parties' reliance on US law" suggested that both parties had an expectation that US law would apply

> "as an international arbitration tribunal, the Tribunal bases its decision directly upon the exercise of its discretional powers under the IBA Rules and the ICSID Arbitration (Additional Facility) Rules, rather than national rules of law".[123]

Similarly, in *Biwater Gauff*, the tribunal made it clear that States will not be allowed to rely on their national laws to evade international obligations. It stated that

> "if a State were permitted to deploy its own national law in this way, it would, in effect, be avoiding its obligation to produce documents in so far as called upon to do so by this Tribunal. This, in itself, is an international legal obligation arising from the State's consent by way of the BIT to ICSID arbitration. It may also thereby stifle the evaluation of its own conduct and responsibility. As such, this would be to undermine the well-established rule that no State may have recourse to its own internal law as a means of avoiding its international responsibilities".[124]

In the *United Parcel Service*,[125] Canada claimed cabinet privilege for hundreds of documents. The tribunal opined that, while such a privilege may apply domestically, the claim for cabinet privilege "would have to be assessed not under the law of Canada but under the law governing the Tribunal. That law does not in this context refer the Tribunal to national law".[126] While Canadian national law merely requires the Clerk of the Privy Council to declare a document to be privileged, the tribunal made it clear that it would require a more rigorous analysis before it decided that privilege may be applicable to certain documents. Therefore, the tribunal directed Canada to (a) make an explicit initial judgment regarding the privileges to be protected with respect to each individual document, (b) then explicitly weigh each judgment against the public's interest in disclosure.[127] Once these steps were complied with, the tribunal could decide whether the Cabinet privilege applied. Hence, the ultimate authority lay with the tribunal which decided that the claim to a Cabinet privilege was applicable in this case and failure to disclose might lead to the tribunal drawing adverse inferences.[128]

Conclusion

The position on privilege in the context of third party funding arrangements has certainly developed and been clarified over recent years, but a number of uncertainties are yet to be resolved as more novel issues come before the courts.

Jurisdiction	Summary of Issues
US	As courts have gained familiarity with the privilege issues raised by litigation financing, attorney-client privilege protection for communications and information shared with third party litigation funders has remained inconsistent, but the conclusion that such documents are protected by the work product doctrine appears to be solidifying.
	Since the 2014 decision in *Miller* and its discussion of privilege and work product issues in the litigation funding context, in only one case has a court ordered significant discovery over work product assertions by the objecting party. And, *Acceleration Bay* involved unusual facts and questionable analysis of the standard for establishing work product and appears likely to remain an outlier.
England and Wales	The Court of Appeal has indicated in recent cases that the definition of client in *Three Rivers (No. 5)* for the purposes of legal professional privilege over documents prepared by employees or ex-employees is too narrow and in need of an update in light of the growth of large corporations. It is also now clear that litigation privilege has broadened to apply not only to legal advice given regarding resisting or defending proceedings, but also to the avoidance or settling of proceedings.
	In relation to documents/communications shared with third party funders, *Estera* clarified that privilege applies if the document or part thereof gives a sense of the legal advice given. The jurisdiction still lacks significant cases on privilege in third party funding, with the most important cases being in the sphere of litigation insurance. However, the insurance cases suggest that the court will consider different sections of a funding agreement separately in respect of privilege.
Germany	Although the concept of legal privilege is less relevant as broad disclosure of documents is unavailable, on rare occasions the court may direct documents to be produced.
	German courts will likely allow disclosure of information shared with third party funders for purposes of obtaining funding for litigation, but there is yet to be judgment on this.
International Arbitration	The law on privilege has not been harmonised on an international level and varies significantly between jurisdictions. This leaves the position somewhat unclear on communications with third party funders.
	Absent an agreement in the arbitration agreement itself regarding the scope of discovery, the parties will need to consider carefully which countries' privilege laws might be applicable and how they might apply to communications with funders.

[123] *Apotex* ICSID Case No ARB(AF)/12/1 at [21].
[124] *Biwater Gauff v Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2, p.8.
[125] *United Parcel Service of America Inc v Government of Canada* ICSID Case No. UNCT/02/1, Tribunal Decision Relating to Canada's Claim of Cabinet Privilege (8 October 2004).
[126] *United Parcel v Government of Canada* ICSID Case No. UNCT/02/1at [7].
[127] *United Parcel* ICSID Case No. UNCT/02/1at [14].
[128] Stop Press: In May 2021, UNCITRAL Working Group III issued a note for comments to address third party funding in investment arbitration. This draft document has defined "third-party funding" as "any provision of direct or indirect funding or equivalent support to a party to a dispute by a natural or legal person who is not a party to the dispute through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding". The draft document also identifies different models to either "prohibit" third party funding or "restrict" third party funding. It remains to be seen what model will ultimately be adopted.

More generally, parties seeking litigation funding should prioritise preservation of applicable privileges when sharing information with potential third party funders. First, parties should not share—or should critically evaluate the necessity and risks of sharing—information reflecting confidential attorney-client communications, at least until a funding agreement is executed. Most significantly, parties should avoid sharing any information with third party funders without non-disclosure and common interest agreements in place.

These safeguards are of particular relevance in the context of competition litigation where prospective funders typically require a detailed assessment of the issues of causation and quantum to allow them to assess the claim as a candidate for funding. Without effective non-disclosure and common interest agreements being in place before that information is shared, there is a risk that a claimant's assessment of the strength and weaknesses of its claim will not be protected by privilege and may be disclosable to the defendant.

"Up and Down-Stream" Liability Within the Economic Unit: Children are Liable for their Parents!

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Junior Professor Dr. Jannik Otto[*]

Competition law; Corporate liability; EU law; Private enforcement; Subsidiary companies

Comment on AG Pitruzzella, Opinion of 15 April 2021, Case C- 882/19—Sumal

The ECJ clarified in *Skanska* (C-724/17) that it is the undertaking itself, i.e. the economic unit, that infringes competition law. This led the court to the conclusion that there is also successor liability, meaning that the legal successor of the infringer is liable for cartel damages. Understood correctly, this means that the economic unit itself is liable—both for cartel fines and for cartel damages. It is settled case law that the parent company is liable for competition law infringements of its subsidiaries. The next milestone judgment coming up will be the court's decision in *Sumal* (C-882/19). The ECJ will have to decide whether the subsidiary can be held liable for the parent company's competition law infringement. On 15 April 2021 AG Pitruzzella delivered his opinion. He follows the path taken by the ECJ and answers the question in the affirmative.

Introduction

Liability for cartel fines and cartel damages under competition law has been under discussion for some time. In the *Sumal* case, the ECJ now has to decide whether, and if so, under what conditions, the "doctrine of the economic unit" justifies the subsidiary being held liable for the parent company's competition law infringement.[1] Advocate General Pitruzzella[2] delivered his opinion on 15 April 2021. He proposes that art.101 of the Treaty on the Functioning of the European Union (TFEU) must be interpreted as meaning that, in addition to the parent company, a subsidiary is liable for the cartel damage

> "if on the one hand with regard to the economic, administrative and legal relationship between both entities it can be proven that, at the time of the competition law infringement, they form an economic unit and on the other hand the subsidiary's conduct contributed to the realisation of the aim pursued by the parent company's unlawful conduct on the cartelised market and to its effects".[3]

The Advocate General has followed, both in his reasoning and in his result, the lead author's long held opinion on competition law group liability.[4] Moreover, he has adopted the thesis of both authors on their understanding of the economic unit as market-related, meaning that the economic unit has to be defined with a view to the relevant market.[5] However, his proposed decision goes beyond his own reasoning and therefore requires clarification.

Establishing liability by forming the economic unit

The Advocate General analyses the ECJ's case law and argues that the "attribution of liability for the subsidiary's competition law infringement to the parent company" could be based on the latter's decisive influence on the subsidiary or on the responsibility of the economic unit itself for the competition law infringement.[6] Convincingly, AG Pitruzzella sees the basis of liability—for both public and private enforcement alike[7]—in the formation of an economic unit and its uniform conduct on the market.[8] The economic unit itself infringes competition law. The economic unit itself is liable. There is no attribution of liability amongst its legal entities. Instead they are

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[1] *Sumal* (C-882/19), reference for preliminary ruling in OJ 2020 C 87, p.7.

[2] The opinion is not available in English. All exact quotes are our own translations.

[3] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [78].

[4] C. Kersting, "Liability of sister companies and subsidiaries in European competition law" (2020) 41 E.C.L.R. p.124 ("Haftung von Schwester-und Tochtergesellschaften im europäischen Kartellrecht", ZHR 182 (2018), pp.8, 12–31, (in German, earlier version)); see as well (in German) C. Kersting, "Wettbewerbliche Haftung im Konzern", Der Konzern 2011, pp.445, 448–459.; C. Kersting, "Die Rechtsprechung des EuGH zur Bußgeldhaftung in der wirtschaftlichen Einheit", WuW 2014, pp.1156, 1158–1173.; Kersting, in: LMRKM-L, KartellR, 4th edn (2020), s.33a paras 22–36.

[5] Kersting and Otto, "Die Marktbezogenheit der wirtschaftlichen Einheit", FS Wiedemann, 2020, pp.235–250.

[6] As already explained by Kersting, "Liability of sister companies and subsidiaries in European competition law" (2020) 41 E.C.L.R. 124, "Haftung von Schwester- und Tochtergesellschaften im europäischen Kartellrecht", ZHR 182 (2018), pp.8–30. (in German, earlier version). Subsequent to General Court, Judgment of 12 December 2018, Case T-677/14, ECLI:EU:T:2018:910—*Biogaran* (now case C-207/19 P) see also Schweitzer and Woeste, "Die Haftung von Konzerngesellschaften im europäischen Wettbewerbsrecht", ZGR 2020, pp.141, 157–160.

[7] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [63]–[67].

[8] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [40]–[59].

(jointly) liable because they constitute the economic unit which infringed competition law. The Advocate General thus recognises the legal capacity of the economic unit (under competition law).[9] The fact that the parent company exercises a decisive influence on its subsidiaries is a criterion that only serves the purpose of determining and delineating the economic unit, not of establishing liability.[10] The liability of the legal entities constituting the economic unit is then derived from the responsibility of the economic unit.[11]

According to this understanding of the concept of the undertaking, establishing liability within the economic unit is therefore, logically, not a one-way street. It justifies both the "liability of the parent company for its subsidiary" and equally the "liability of the subsidiary for its parent company".[12] The legal rationale is that in both cases the economic unit itself infringes competition law and is therefore liable. Its liability extends to all its legal entities, i.e. its constituent parts. This holds true for both administrative liability (cartel fines) and civil liability (cartel damages).[13]

Requirements of liability

Since the attribution of liability within the economic unit is grounded (solely) upon the fact that the legal entity constitutes, together with other legal entities, the economic unit, this fact becomes a prerequisite for liability. Therefore, the determination of the legal entities that form the economic unit is key to determine liability. At this point, the Advocate General remains tied to a misleading differentiation between the parent company and the subsidiary which, however, is not wrong in the result: the liability of the parent company is already established, if it exercises decisive influence on the subsidiary's market conduct.[14] For the subsidiary, in addition to the decisive influence of the parent company, according to the Advocate General, "the subsidiary's conduct must, to a certain extent, be necessary for the realisation of the anti-competitive behaviour".[15] The Advocate General has cases in mind in which the subsidiary sells the cartelised product.[16] He considers these conditions to be met, if

> "the subsidiary is active in the same sector in which the parent company has engaged in the anti-competitive conduct and that it has by means of its market conduct enabled the concrete effects of the infringement".[17]

Stipulating this additional prerequisite, the Advocate General loses sight of his correct initial position that the economic unit itself commits the competition law infringement. The conditions for liability can therefore be spelled out shorter and easier: The legal entities that form the economic unit are liable. Thus, all legal entities within the economic unit are liable. A legal entity is a constituent part of an economic unit, if it is, together with others, subject to a uniform decision-making regarding its market conduct and if it is active on the same market on which the natural person acted, who triggered the cartel infringement of the economic unit.[18] By means of exercising decisive influence the parent company is always active on the cartelised market.[19] For every subsidiary it needs a closer and independent examination if it also acted on the cartelised market in question. This understanding of the economic unit as market-related restricts the attribution of liability within groups.[20] The last half-sentence of the proposed decision can therefore be clarified and simplified with the Advocate General's own reasoning: The subsidiary is jointly liable for the infringement of the economic unit, if it belongs to the same economic unit, which is the case if the subsidiary is subject to the decisive influence of the parent company and is active on the cartelised market. Within a corporate group there may therefore be several economic units, which all include the parent company, but different subsets of subsidiaries.[21] This has an impact on the question of sister companies' liability: a sister company is not liable for another sister company's competition law infringement if they are active on different markets and thus do not belong to the same economic unit (even though they still belong to the same corporate group).[22]

The wording of the Advocate General and its linguistic ties to a subsidiary's own contribution to the parent company's competition law infringement is based on a misleading ruling of the General Court. The Advocate General refers to the ruling in the *Biogaran* case (appeal still pending),[23] which he understands as meaning that the General Court considers it a prerequisite for liability

[9] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [35], [46].
[10] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [49].
[11] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [51].
[12] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [52].
[13] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [51]–[69]; Kersting, "Wettbewerbliche Haftung im Konzern", Der Konzern 2011, 445, 448–459.; Otto, "Die wirtschaftliche Einheit und ihre Träger in der Rechtsanwendung – Teil I", NZKart 2020, pp.285, 286–287.; Schweitzer and Woeste, "Die Haftung von Konzerngesellschaften im europäischen Wettbewerbsrecht", ZGR 2020, pp.141, 149–160.
[14] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [56]–[59].
[15] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [57].
[16] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [57].
[17] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [59].
[18] See already Kersting and Otto, "Die Marktbezogenheit der wirtschaftlichen Einheit", FS Wiedemann, 2020, pp.235–250. For a possibly broader "context-specific manifestation of the economic unit", Schweitzer and Woeste, "Die Haftung von Konzerngesellschaften im europäischen Wettbewerbsrecht", ZGR 2020, pp.141, 160–163.
[19] Kersting and Otto, "Die Marktbezogenheit der wirtschaftlichen Einheit", FS Wiedemann, 2020, pp.235, 242.
[20] Kersting and Otto, "Die Marktbezogenheit der wirtschaftlichen Einheit", FS Wiedemann, 2020, pp.235, 241–243.
[21] Kersting and Otto, "Die Marktbezogenheit der wirtschaftlichen Einheit", FS Wiedemann, 2020, pp.235, 241, 245.
[22] See already Kersting, "Wettbewerbliche Haftung im Konzern", Der Konzern 2011, pp.445, 454; cf. also Kersting and Otto, "Die Marktbezogenheit der wirtschaftlichen Einheit", FS Wiedemann, 2020, pp.235, 243.
[23] General Court, Judgment of 12 December 2018, *Biogaran* (T-677/14) (now C-207/19 P) ECLI:EU:T:2018:910.

within the economic unit that each legal entity contributed to the implementation of the cartel.[24] Contrary to the assumptions of the General Court,[25] however, this does not follow from the ECJ's case law. The decisions cited refer to the allocation of responsibility in the context of the legal concept of a single, complex and continuous infringement.[26] This concept, however, deals with the attribution between undertakings, i.e. at the level of different economic units. It does not deal with the attribution of liability within the economic unit. For the reasons mentioned, a sufficient "contribution" of the individual legal entity consists solely of being part of the economic unit, which is established by a uniform decision making regarding its market conduct and its participation on the relevant market. The term "contribution" or "conduct (giving rise to liability)" of the individual legal entity within the economic unit should therefore be abandoned in this context.

Conclusions

Despite the ECJ's decision in the *Skanska* case[27], the opposition in Germany to competition law group liability within the economic unit remains strong. Only a few German courts have recognised that times are changing and that under EU law the economic unit itself infringes competition law which necessarily leads to group liability within the economic unit.[28] Others try to resist.[29] It is to be hoped that the ECJ will position itself as clearly as the Advocate General and will urge the national courts to enforce cartel law effectively. Looking at Germany, if one correctly takes the application of the same rule to both liability for cartel fines and liability for cartel damages seriously, it becomes clear that the recently amended Act against Restraints of Competition (GWB) needs another revision. The criterion of "decisive influence" which establishes administrative liability (cartel fines) only "up-stream" for parent companies in ss.81a (1) and 81e (1) GWB is at odds with the broader concept of liability under EU law.[30] The same is true for a number of other jurisdictions regarding administrative and civil liability.[31]

[24] AG Pitruzzella, Opinion of 15 April 2021, *Sumal* (C-882/19) ECLI:EU:C:2021:293 at [53].
[25] General Court, Judgment of 12 December 2018, *Biogaran* (T-677/14) (now C-207/19 P) ECLI:EU:T:2018:910, at [225].
[26] Judgment of 26 January 2017, *Duravit v Commission* (C-609/13 P) EU:C:2017:46 at [117]–[126]; General Court (sic), Judgment 8 July 2008, *AC-Treuhand v Commission* (T-99/04) EU:T:2008:256 at [133].
[27] ECJ, Judgment of 14 April 2019, *Skanska* (C-724/17) ECLI:EU:C:2019:204.
[28] LG Dortmund, Judgment of 8 July 2020 (8 O 75/10 (Kart)), NZKart 2020, p.450; Judgment of 9 September 2020 (8 O 42/18) NZKart 2020, pp.553, 554.
[29] LG Stuttgart, Judgment of 28 November 2019 (30 O 269/17), BeckRS 2019, 32749, para.33; LG Munich I, Judgment of 7 June 2019 (37 O 6039/18), NZKart 2019, p.392; LG Mannheim, Judgment of 24 April 2019 (14 O 117/18 Kart), NZKart 2019, pp.389–390.
[30] Cf. already Kersting and Preuß, "Umsetzung der Kartellschadensersatzrichtlinie durch die 9. GWB-Novelle", WuW Online 1211285, L1, L13–L14.; Otto, "Die wirtschaftliche Einheit und ihre Träger in der Rechtsanwendung – Teil II", NZKart 2020, pp.355, 358.
[31] See e.g. for Spain art.71.2(b) Ley de Defensa de la Competencia; for Portugal see art.3(2) Lei n.º 23/2018. Cf. also for *England Sainsbury's Ltd v MasterCard Inc*, (1241/5/7/15 (T)) [2016] CAT 11; [2016] Comp. A.R. 33 at [363].

Need for the Legislation of FRAND Terms for Standard Essential Patents in the Indian Competition Regime—An Analysis Through the FTC v Qualcomm Controversy

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☞ Fair reasonable and non-discriminatory terms; India; Licensing; Mobile telephony; Standard-essential patents; United States

Introduction

The Indian Antitrust watchdog, still in its nascent stage, acts largely on the jurisprudence developed in the EU and the US. Although the EU has settled its application of antitrust violation on Standard Essential Patent's (SEP) through various precedents, the question for the need of FRAND terms for SEP in the US have thrown a murky picture with the recent controversial judgment of the US District Court for the Northern District of California (District Court) in the *FTC* case.

The Competition Law Review Committee (CLRC), with the task of bridging the gap of antitrust inadequacy and promoting fair competition in the market, has created more complication than it could solve, through the introduction of s.4A, which gives a wider exemption in the exercise of IP rights to the dominant market players. There presently remains an inadequacy in the legislation of regulation of SEPs in the Indian jurisdiction, despite the unceasing growth of dispute in the tech market. The antitrust authorities need to understand the pro-competitive benefits of standardisation and the determination of FRAND terms with an elaborate recourse mechanism for the exploited licensees.

Background

On 11 August 2020, the US Court of Appeals for the Ninth Circuit, in a unanimous decision, reversed the controversial judgment of the US District Court for the Northern District of California in *FTC*.[1] The District Court found Qualcomm's licensing practice for SEPs in cellular technology to be anti-competitive. The FTC alleged that Qualcomm's patent licensing practice harmed competition in the modern chips market, as it excluded its competitors, thereby violating the provisions of the Sherman Act and the Federal Trade Commission (FTC) Act.

The District Court observed that Qualcomm:

1) refused to license its SEP to its rival chipmakers;
2) imposed excessive royalty rates; and
3) entered into an exclusive dealing arrangement with Apple.

Thus, the District Court held that the acts of Qualcomm contravened the federal antitrust laws. The Ninth Circuit, however, refused to delve into the breach of FRAND commitments, as it believed that there was no antitrust liability on Qualcomm to license its SEP to the rival chipmakers. Interestingly, the Ninth Circuit held that such breach does not create antitrust liability, rather the remedy will lie under the contract or patent law. Notably, the Ninth Circuit distinguished from *Boradcom*,[2] wherein the US Court of Appeals for the Third Circuit ruled that breach of Standard Setting Organisation's (SSO) commitment might constitute an antitrust violation.

In another noteworthy case concerning licensing terms of SEPs, the UK Supreme Court in *Unwired Planet*,[3] upheld the jurisdiction of English courts to determine FRAND licensing disputes. Huawei had argued before the Court of Appeals that Unwired abused its dominant position by bringing a claim for an injunction against infringement of its SEP thus, infringing art.102 of the Treaty on the Functioning of the European Union (TFEU). The Supreme Court confirmed that bringing an action for a prohibitory injunction without notice or prior consultation with the alleged infringer will violate art.102.

Be that as it may, the Ninth Circuit's decision does beg the question: what does the judgment mean for the Indian competition regime? Especially, when the *Ericsson*[4] case is still pending before the Division Bench of the Delhi High Court.

Global trend

The question of the application of antitrust law on patent rights has been settled by the European Commission (EC) long ago, in 1987. The EC in *Eurofix-Bauco*,[5] held that demanding excessive royalty to block or unreasonably

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[1] *Federal Trade Commission v Qualcomm Inc* No.19-16122.

[2] *Boradcom Corp v Qualcomm Inc* 501 F.3d 297.

[3] *Unwired Planet International v Huawei Technologies (UK) Ltd* [2020] UKSC 37; [2021] 1 All E.R. 1141; [2020] Bus. L.R. 2422.

[4] *Telefonaktiebolaget LM Ericsson v Competition Commission of India* W.P. (C) 464/2014.

[5] *Eurofix-Bauco v Hilti* 88/138/EEC.

deny license would constitute an abuse of dominant position. Further, the EC has time and again held that exercise of Intellectual Property Rights in exceptional circumstances may constitute abusive conduct for purposes of art.102 TFEU.[6]

An early European case on the application of antitrust law on the actions of a SEP holder is the *Orange-Book*[7] case. The German Federal Supreme Court in the aforementioned case held that a defendant facing a claim for an injunction may successfully plead abuse of dominant position against a patentee if the patentee denies entering into the patent license agreement on non-discriminatory and non-restrictive terms and conditions. Further, in the *Motorola* case,[8] the EC ruled that Motorola abused its dominant position by seeking and enforcing an injunction before the German court based on a smartphone standard-essential patent. The commission reasoned that seeking an injunction would constitute an abuse of dominant position when the company against which injunction is sought has agreed to license the agreement on FRAND terms. Similarly, in the *Samsung* case,,[9] the EC in its preliminary findings concluded that Samsung had abused its dominant position by seeking preliminary and permanent injunctions against Apple, based on its SEPs. However, on account of the commitments offered by Samsung: to not seek injunctions against potential licensees willing to enter license agreements on FRAND terms, the Commission ultimately decided not to proceed with any action. Later, in the rather landmark case of *Huawei Technologies v ZTE*,[10] Europe's highest court, the European Court of Justice held that refusal by an SEP holder to grant license on FRAND terms may constitute an abuse within the meaning of art.102 TFEU. The Court of Justice held that "a refusal by the proprietor of the SEP to grant a licence on [FRAND] terms may, in principle, constitute an abuse within the meaning of article 102".

In the US, the Supreme Court in the 1965 case of *Walker Process Equipment*[11] held that a patentee may be liable for the violation of antitrust laws in cases where the patent is obtained by knowing and wilful fraud and on satisfying the other requirements under s.2 of the Sherman Act. Further, the courts in the US have held that although the aims and objective of patent law and antitrust laws may seem at odds at first, the two bodies are complementary and aimed at encouraging innovation, industry, and competition.[12]*In the matter of Rambus Inc*[13], the US antitrust watchdog, the Federal Trade Commission (FTC) found that Rambus had engaged in anti-competitive practice by not disclosing its intellectual property right (IPR), which was considered essential for the implementation of computer monetary standards and thereby deceiving and misleading the SSO. Further, *In the Matter of Google Inc*,[14] the FTC found Google to have indulged in an unfair method of competition since Google reneged on its FRAND commitments by seeking injunctions against companies that needed the SEPs and were willing to license them in FRAND terms.

In the renowned case of *Broadcomm*,[15] it was alleged that Qualcomm falsely promised to license its patent on FRAND terms thereby inducing the SSO to include its technology as an essential part of Universal Mobile Telecommunications System (UMTS) Standard. Thereafter, Qualcomm reneged on its promise to offer its SEP on FRAND terms and abused its monopoly by charging an unreasonably excessive fee. Further, it was alleged that Qualcomm indulged in the anti-competitive conduct of tying, by demanding royalty on parts of the UMTS chipsets for which it did not own patents. The Court of Appeals upholding the allegations against Qualcomm, observed that

> "in a consensus-oriented private standard-setting environment, a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, coupled with an SDO's reliance on that promise when including the technology in a standard, and the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct".

Further, Qualcomm's conduct was found to violate s.2 of the Sherman Act.

Be that as it may, the US courts have on numerous occasions deemed fit to apply competition law on FRAND-encumbered SEPs.[16]

Induction of section 4A—curtailing the competition flexibility in the Indian scenario

With the rapid, exponential growth of AI-based technology and the adaption to change to the modern digital platform for trade and commerce, it has now become imperative for the Indian fair-trade regulator to keep a check on the abuses relating to monopolisation by

[6] See, to that effect, judgments in *Volvo AB v Erik Veng (UK) Ltd* (238/87) EU:C:1988:477; [1988] E.C.R. 6211; [1989] 4 C.M.L.R. 122 at [9]; *RTE v Commission of the European Communities* (Joined cases C-241/91 P and C-242/91 P), EU:C:1995:98; [1995] 4 C.M.L.R. 718; [1995] All E.R. (E.C.) 416 at [50]; and *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (C-418/01) EU:C:2004:257; [2004] 4 C.M.L.R. 28; [2004] All E.R. (EC) 813 at [35]).
[7] *Orange-Book-Standard* KZR 39/06.
[8] European Commission, *Case AT.39985—Motorola—Enforcement GPRS standard essential patents* (4 April 2014), *https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf* [Accessed 7 July 2021].
[9] European Commission, *Case AT.39939—Samsung—Enforcement of UMTS Standard Essential Patents* (4 April 2014), *https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf* [Accessed 7 July 2021].
[10] *Huawei Technologies Co Ltd v ZTE Corp* (C-170/13) EU:C:2015:477; [2015] Bus. L.R. 1261; [2015] 5 C.M.L.R. 14.
[11] *Walker Process Equipment v Food Machinery & Chemical Corp.*382 US 172 (1965).
[12] *Atari Games Corp v Nintendo of America Inc* 897 F.2d 1572, 1576 (Fed. Cir. 1990).
[13] *In the matter of Rambus Inc* No. 9302, at 4 (F.T.C. 2 August 2006).
[14] FTC, Statement *In the Matter of Google Inc*, FTC File No.121-0120, 3 January 2013.
[15] *Broadcomm* 501 F.3d 297.
[16] See, Research in *Motion v Motorola* 644 F. Supp. 2d 788 (N.D. Tex. 2008); *Microsoft Mobile v Interdigital* 2016 WL 1464545 (D. Del. 13 April 2016).

the dominant tech and other e-commerce companies. Therefore, the Indian antitrust authorities have also kept their jurisdiction reserved in matters relating to IP rights.

Lately, the Competition Law Review Committee (CLRC), with its new induction of s.4A in its Draft Competition Amendment Bill 2020, tried striking a balance between free competition and protecting IP rights. This, however, seemed to have an apprehension of more harm than good to the competition itself as it overly protects the IP holders and exempts the exercise of IP rights, viz seeking of an injunction for infringement or imposition of reasonable conditions by SEP holders from both anti-competitive and abuse of dominance, where earlier, the exemption was only restricted to the anti-competitive agreements under s.3(5) of the Act.

A proper examination of the basic nature of IPR and competition law reveals that both aim at producing efficiency in the market.[17] While each is complementary to the other, they have been designed to achieve reciprocal goals. Where Competition Law maximises social welfare by condemning the abuse of dominance, IPR does the same by granting temporary monopolies. In contrast, the induction of s.4A in the Draft Competition Amendment Bill 2020 might act as a major failure in promoting market harmony because the wide extension in the IPR exemption would justify the abusive practices by the dominant enterprises such as imposing restrictive licensing or arbitrary franchise clauses on a pretence of protecting its IP rights.

Section 4A of the bill does not just raise doubt concerning the understanding of the violation of the "rule of reason method" in determining abuse of dominance case, but also digs a hole to the other areas, such as the Essential Facilities Doctrine, determination of the relevant market and most importantly, the alarming concern to address the issue of licensing SEPs with FRAND terms as all of such would give an undefined meaning to the exemption threshold, which the IP companies may objectively use as a defence to strategise their monopoly.

Though India is one of the world's largest wireless cellular technology markets, the Indian jurisprudence on FRAND licensing practices for SEPs is still facing a murky scrimmage. The jurisprudence evolved with the *Ericsson* case[18] reported before the Competition Commission of India (CCI) where the Commission noted the importance of FRAND terms as a mechanism to prevent the issued patent hold up and royalty stacking. The Commission also observed Ericsson to be dominating and found that its licensing practices adopted were discriminatory, since royalties were being charged on the price of the end device (EMVR) as opposed to the chipset where the technology is implemented (SSPPU). The Commission further noted that the implementers were forced to sign the Non-Disclosure Agreements (NDA) which was indicative of discriminatory licensing Practices and a breach of FRAND obligations of applying FRAND terms fairly and uniformly to similar placed players.[19] A similar complaint was filed by Intex Technologies (India) Ltd[20] and Best IT World (India) Private Ltd (iBall)[21] against Ericsson, which focused on parallel allegations against charging "exorbitant" licensing rates, thus constituting an abuse to its dominant position which also forced Intex to sign the NDA that unreasonably restricted Intex from discussing the infringement of Ericsson's patents with its vendors whom Intex needed to rely on, to make representations regarding non-infringement.[22]

The Department for Promotion of Industry and Internal Trade (DIPP) on April 2016 released a discussion paper[23] on SEPs and their availability on FRAND terms, where it specifically ventilated the much-needed resolution for effective policymaking in FRAND. The paper comprehensively discussed issues pertaining to the adequacy of legislation both in the IPR (especially the Patent Act, 1970) and the Antitrust in addressing the subject related to SEPs and their availability on FRAND terms. It also discussed whether the practice of NDAs leads to misuse of dominant position and is against FRAND terms which remained unanswered by the Indian fair-trade authorities in the *Intext Technology Ltd* case.

Conclusion

The issues in all the FRAND related cases evolving in India are directly related to the broader issues and developments that are currently being debated globally on advanced jurisdictions, such as the US and EU. Since the Indian Competition regime, still acting in its nascent stage, is based largely on the jurisprudence developed in the EU and US it would be interesting to see how the unanswered quandary of SEPs and their availability on FRAND terms is to be treated when the *Ericsson* case is already pending before the Delhi High Court. The Indian Antitrust Authority, following the US approach in dealing with a matter relating to Standard Development Organisation (SDO), has always evaluated with a rule of reason standard, but the recent draft in the competition bill might give a fair opportunity to objectively justify the abuse done by dominant entities with unreasonable terms in the field of transfer licensing.

Additionally, there also remains a need for designing an appropriate IP law with general considerations of transfer and dissemination of technology to address the foreign manufacturers' dispute on anti-competitive practices in technology licensing.

[17] Abir Roy and Jayant Kumar, *Competition Law in India*, 2nd edn (2019), pp.506–7.
[18] *Telefonaktiebolaget LM Ericsson v Micromax Informatics Ltd* Case No.50/2013, *http://infojustice.org/wp-content/uploads/2013/12/CCI-Case-no-50-2013.pdf* [Accessed 7 July 2021].
[19] *Telefonaktiebolaget LM Ericsson v Micromax Informatics Ltd* Case No.50/2013 at [17].
[20] *Intex Technologies (India) Ltd v Telefonaktiebolaget LM Ericsson (Publ.)*, Case No.76/2013.
[21] *M/s Best IT World (India) Private Ltd (iBall) v M/s Telefonaktiebolaget LM Ericsson (Publ.)* Case No.04/2015.
[22] *Intex Technologies* Case No.76/2013 at [9], *http://cci.gov.in/sites/default/files/762013_0.pdf* [Accessed 7 July 2021].
[23] Discussion Paper on Standard Essential Patent (SEP's) and their availability on FRAND, Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry. *https://dipp.gov.in/sites/default/files/standardEssentialPaper_01March2016_0.pdf* [Accessed 7 July 2021].

Regional Developments

INDIA

SUPREME COURT OF INDIA CLARIFIES THAT NO LOCUS -STANDI IS REQUIRED TO FILE INFORMATION ON ANTI COMPETITIVE AGREEMENTS UNDER THE COMPETITION ACT

Cartels; India; Locus standi

The Supreme Court of India, vide its judgment dated 15 December 2020, passed in the matter of *Samir Agrawal v Competition Commission of India* set aside the finding of the National Company Law Appellant Tribunal (NCLAT) observing that Samir Agrawal (appellant) had no locus-standi to move the Competition Commission of India (CCI).

The appellant had initially filed an information under the Competition Act 2002 (the Act) against ANI Technologies Pvt Ltd (Ola) and Uber India System Pvt Ltd, Uber B.V. and Uber Technologies Inc (Collectively as "Uber") alleging contravention of s.3 of the Act i.e., price-fixing agreement and resale price maintenance. The CCI vide its order dated 6 November 2018 had held that there was no contravention of s.3 of the Act, as there was no agreement or meeting of minds between the Cab Aggregators (i.e., Ola and Uber) and their respective drivers, nor between the drivers inter se.

Aggrieved by the Order of the CCI, the appellant filed an appeal before the NCLAT. The NCLAT vide its order dated 29 May 2020, dismissed the appeal on two grounds. First, the NCLAT observed that the appellant had no locus standi to maintain the action under s.19 of the Act as only persons who had suffered legal injury as a consumer had the right to approach the CCI. Second, the Cab Aggregators operating through their respective app were not an association of drivers and acted separately as such this activity could not be termed as a cartel.

Subsequently, the appellant approached the Supreme Court of India, challenging the decision of the NCLAT. The Supreme Court upheld the findings of the CCI and NCLAT with respect to the fact that Cab Aggregators did not facilitate cartelisation or anti-competitive practices. Thus, the Supreme Court did not find any reason to interfere with the findings. However, the Supreme Court rejected the narrow construction by NCLAT of s.19 of the Act. The court observed that s.19 of the Act after the 2007 amendment substituted the expression "receipt of a complaint" with "receipt of any information" which meant that information may be received from any person, even though they had not suffered any legal injury. The Supreme Court further observed that the CCI, while exercising its *sou-moto* powers, may receive information from any person and not merely from an aggrieved person. Supreme Court also took note of the wordings used in s.35 of the Act in which the expression "complainant or defendant" had been substituted with "person or an enterprise" which, thus allows informants to file information before the CCI.

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INDIA

INVESTIGATION BY THE CCI OF THE UPDATED TERMS OF SERVICE AND PRIVACY POLICY FOR WHATSAPP USERS

☞ Abuse of dominant position; India; Privacy; Social media

The Competition Commission of India (CCI) has *suo-moto* taken cognisance in the matter of the 2021 update to the Privacy Policy of WhatsApp. The said update allows WhatsApp to share all data of its users with its Facebook family of Companies. It was observed by the CCI that in an earlier matter (titled *Vinod Kumar Gupta v WhatsApp Inc*) in the year 2017 in respect of the Privacy Policy of WhatsApp, the Privacy Policy provided an option to its users to "opt out" of sharing user account information with Facebook within 30 days of agreeing to the updated Privacy Policy and Terms of Service whereas the present update does not provide any such option to the users.

The CCI observed that many of the information categories described in the Privacy Policy as well as the Terms of Service were too broad, vague and unintelligible. The CCI further observed that it was not clear from the Privacy Policy whether the historical data of users would also be shared with Facebook companies and whether the historical data of users would be shared in respect of those WhatsApp users who were not present on other apps of Facebook. The users as per the present Privacy Policy did not have any "opt-out" option as compared to the same being available in the previous updates to opt-out of sharing their details within 30 days. The CCI also came to a conclusion that users were required to accept the present policy of WhatsApp as a unilaterally dictated "take-it-or-leave-it" terms if the users wished to avail of said services. The consent of the users, thus, could not be termed to be a voluntary consent. The CCI was of the view that the conduct of WhatsApp in sharing of user's personal data with other Facebook companies in a manner that was neither fully transparent nor based on voluntary or specific user content was prima facie unfair to users. The CCI finally concluded that the privacy policy of WhatsApp was prima facie in contravention of provisions of s.4 of the Act, relating to abuse of dominant position, through its exploitative and exclusionary conduct in the garb of policy update and therefore the CCI vide its order of 24 March 2021 directed the Director General (DG) to cause an investigation to be made into the matter in accordance with the provisions of the Act.

The above order of the CCI was challenged by WhatsApp before the Single Bench of the Delhi High Court by way of a Writ Petition. In the said challenge, WhatsApp sought stay of proceedings before the DG, on the ground that the issue of whether the Privacy Policy announced by WhatsApp in any manner infringed upon the Right of Privacy of the users guaranteed under art.21 of the Constitution of India was pending adjudication before the Delhi High Court and the Supreme Court of India. However, the Single Judge of the Delhi High Court while dismissing the petition filed by WhatsApp observed in its order dated 22 April 2021 that mere pendency of reference before a larger bench did not denude the other courts of their jurisdiction to decide on the issues before them. Therefore, pendency of proceedings before the Supreme Court of India and Delhi High Court could not bind the CCI from not exercising its jurisdiction otherwise vested in it under the statute.

The order dated 22 April 2021 passed by the Single Judge was again challenged by WhatsApp by filing a Letters Patent Appeal (LPA) before the Division Bench of the Delhi High Court. Even though the Division Bench of the Delhi High Court issued a notice in the matter, no stay of proceedings has been granted by the Division Bench.

As per the latest news reports, Whatsapp has informed the Division Bench of the Delhi High Court during the hearing on 9 July 2021 that it will keep the implementation of the updated Privacy Policy on hold till the new Personal

Data Protection Bill is enacted by the Parliament of India as law and the same is enforced. The matter is still pending adjudication before the Division Bench of the Delhi High Court.

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Arbitration and Alternative Dispute Resolution

Arbitration/ADR

SPC CONFIRMS ARBITRABILITY OF ANTITRUST CLAIMS UNDER CHINESE LAW

Abuse of dominant position; Arbitrability; China; Private enforcement

In a ruling of 10 June 2020,[1] the Supreme People's Court of the People's Republic of China (PRC) (the SPC) confirmed the arbitrability of antitrust claims under Chinese law. This ruling comes as a surprise as just last year the SPC declined the arbitrability of antitrust law in *Huili v. Shell*[2].

By way of background, the dispute in the present case arose between Shell (China) Co. Ltd. (Shell) and Shanxi Changlin Industrial Co. (Shanxi), one of its distributors, with the context of a distribution agreement (the Distribution Agreement) that contained a broad-form arbitration clause referring "any dispute arising from the agreement"[3] to arbitration (the Arbitration Clause). Irrespective of the existence of the Arbitration Clause, Shanxi filed an action for abuse of dominance by Shell before the Beijing Intellectual Property Court (the BIPC), by which it sought an order from the BIPC requesting Shell to cease its anti-competitive behaviour. In defense, Shell raised an arbitration defense, which was dismissed by the BIPC. Shell then appealed to the Beijing High Court (the BHC), arguing that in light of the existence of the Arbitration Clause, the action brought by Shanxi before the BIPC had to be referred to arbitration. In a ruling of 28 June 2019, the BHC concurred with Shell, finding that the dispute between the Parties was referrable to arbitration, given the Parties' agreement to that effect in the terms of the Arbitration Clause. In the BHC's reasoning, the relief sought by Shanxi in its action for abuse of dominance against Shell was inseparable from the rights and obligations under the Distribution Agreement and essentially concerned disputes arising out of the performance of the Parties' rights and obligations under the Distribution Agreement and, as such, had to be referred to arbitration in accordance with the terms of the Arbitration Clause.

In a final step, dissatisfied with the outcome of the proceedings before the BHC, Shanxi then applied for the case to be retried before the SPC. Before the SPC, Shanxi essentially argued that:

- to resolve the dispute between the Parties required the Court to make a determination under the Chinese Anti-Monopoly Law, which in turn raised issues of public policy and could therefore not be arbitrated; and that
- the BHC's ruling violated previous rulings of the SPC that found against the arbitrability of antitrust law.

Shell rejected these arguments, emphasising, in particular, that the SPC was not bound by previous rulings.

[1] *Shanxi Changlin Indusrial Co., Ltd. v. Shell (China) Co., Ltd.*, (2019) Zui Gao Fa Min Shen No. 6242, SPC, PRC, 10 June 2020, reported in A. Dong, "Shanxi Changlin Indusrial Co., Ltd. v. Shell (China) Co., Ltd., Supreme People's Court of the People's Republic of China, (2019) Zui Gao Fa Min Shen No. 6242, 10 June 2020", in R. Alford (ed.), *ITA Arbitration Report*, Volume XIX, Issue 3 (April 2021), Kluwer Law International.
[2] *Shell (China) Limited v. Hohhot Huili Materials Co., Ltd.*, Case (2019) Zui Gao Fa Zhi Min Xia Zhong No. 47, ruling of the Supreme People's Court of the People's Republic of China, 21 August 2019, reported in 13(1) G.C.L.R. (2020) R-11.
[3] See Cl. 22, Distribution Agreement.

The SPC, in turn, dismissed Shanxi's application, finding that antitrust claims were arbitrable under Chinese law. More specifically, the SPC held that:

- there was a close connection between Shanxi's antitrust claims and the Parties' rights and obligations under the Distribution Agreement, as a result of which the SPC found that the antitrust claims were to be considered to arise from the Distribution Agreement;
- a broad-form arbitration clause, such as the Arbitration Clause, was enforceable under Chinese law;
- irrespective of the nature of Shanxi's antitrust claims, Art. 2 of the Arbitration Law of the PRC expressly stated that *"[c]ontractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal subjects may be arbitrated"*; and that as a result,
- the Parties were bound by the obligation to arbitrate in the terms of the Arbitration Clause.

Given its straightforward endorsement of antitrust arbitrability, the SPC's ruling is commendable overall, albeit that it fails to make reference to and explain its divergence from the previous reasoning in *Huili*. In that case, the SPC arrived at the diametrically opposite conclusion: finding that the question of whether Shell had violated prevailing provisions of antitrust law by engaging in horizontally monopolistic practices with distributors other than Hohhot Huili Materials Co., Ltd. (Huili), the claimant in those proceedings, was a non-contractual issue of public order to be dealt with by the courts, ousting the tribunal's jurisdiction, there being no specific mention of antitrust disputes in Art. 2 of the Arbitration Law of the PRC.

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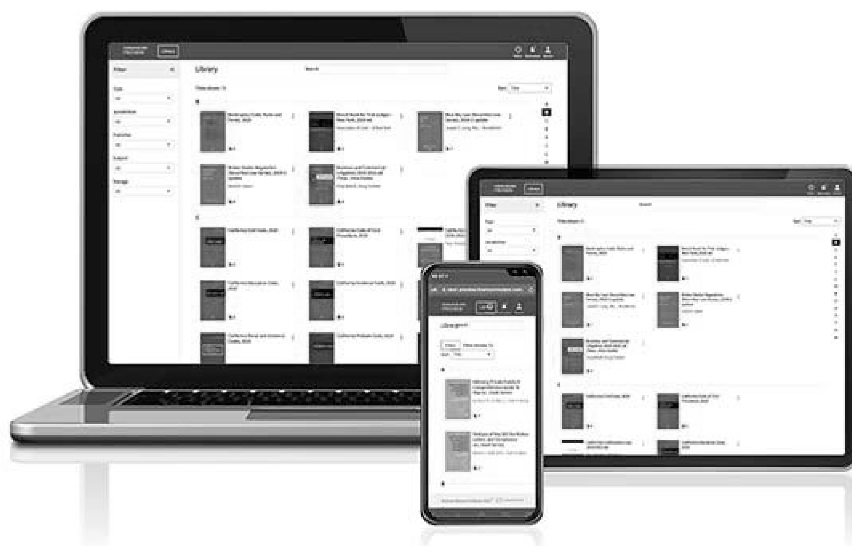

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