Private Enforcement of Cartel Infringements before Arbitral Tribunals

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I. Private Enforcement on the Rise

A. Definition of Private Enforcement

Nowadays, everybody seems to be talking about private enforcement. High time to bring some clarity to the debate by defining the term. "Private enforcement" refers to the enforcement of claims by private parties – companies or natural persons – instead of authorities such as competition authorities. EU Competition law, for instance, can either be "enforced" by decisions of the European Commission (*Commission*),[1]) national competition authorities (such as the Austrian *Bundeswettbewerbsbehörde*),[2]) or by private parties who seek compensation for cartel damages resulting from the price increase of a cartelized product. The former is called "public enforcement", the latter "private enforcement".

B. The EU's Push towards Private Antitrust Enforcement

Modern antitrust sees public and private enforcement as two complimentary pillars of antitrust enforcement. According to the Cartel Damages Directive[3]) (*Directive*), "*national courts thus have an equally essential part to*

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*) The authors especially want to thank Mr. Winslow Mimnagh for his valuable support in preparing this article.

1) *See* Council Regulation (EC) No 1/2003 of 16. 12. 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty establishing the European Community, OJ L 1, 4. 1. 2003, at 1 *(Regulation (EC) No 1/2003)*.

2) *See Id.* Art. 5; Sec. 3(1) first sentence of the Austrian Competition Act *(Wettbewerbsgesetz)*.

3) Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, 1–19.

play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect substantive rights under Union law, for example by awarding damages to victims of infringements".[4]) Private enforcement acts as an additional deterrence to potential infringers, in addition to *inter alia* hefty fines and reputational damage.

Putting in place a more effective private enforcement regime in the EU therefore constitutes a key element of the Commission's competition policy. At its heart was the introduction of the Cartel Damages Directive on November 26, 2014. Member States were given until December 27, 2016 to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive.[5])

The implementation of the Directive led to the creation of new preferred forums for cartel damages actions, whereby the agility of the judicial process, courts' expertise in the adjudication of complex (damage) litigation involving the disclosure of large amounts of documents and the costs and duration of litigation play an essential part. At this point in time, the UK, the Netherlands and Germany stand out as jurisdictions with a sizable number of cartel damage actions pending before their civil courts.[6]) Austria also has a number of pending litigations and is an interesting forum for cartel damages actions due to its well developed and efficient judiciary.[7])

The Directive also led to the development of new business models. The expected upswing of cartel damage litigation made the EU an interesting forum for US claimant law-firms (such as Hausfeld). It has also led to the emergence of companies that focus on the purchase and enforcement of damage claims, such as the Belgian company Cartel Damage Claims as well as a larger number of economists specializing in the provision of expert testimony on cartel damages.

C. Austria's Commitment to Private Antitrust Enforcement

The Austrian legislature has made an effort to promote private enforcement in Austria. Symbolic for this commitment is that the Austrian Government asked the Austrian Verein für Konsumenteninformation (*Association for the*

[4]) *Id.* para 3.

[5]) *Id.* Art. 21(1).

[6]) For a useful summary, *see* 9 Matthijs Kuijpers, Tommi Palumbo, Elaine Whiteford & Thomas B Paul, *Actions for Damages in the Netherlands, the United Kingdom and Germany*, JECL&P, 55 (2018) (The authors publish a survey on the mentioned jurisdictions on an annual basis).

[7]) *E.g.*, some of the pending proceedings concern follow-on damage claims raised in the context of elevator and debit card cartels

Information of Consumers – VKI) to bring a collective action claim against Volkswagen in the aftermath of the well-known emissions scandal.

Already prior to the implementation of the Cartel Damages Directive, Austria was an attractive venue for cartel damage claims. The Supreme Court recognized on August 2, 2012 that Art. 101 TFEU / Sec. 1 of the Austrian Cartel Act (*ACA*) aims to protect property rights ("*Schutzgesetz*") and violations thereof may find redress under Sec. 1311 of the Austrian Civil Code.[8]) This was prior to the introduction of a specialized provision in Sec. 37a of the ACA. Furthermore, since its revision in 2013, Sec. 37(a)(3) of the ACA provides that infringement decisions bind civil courts with respect to the finding that a cartel infringement has occurred as well as a rebuttable presumption that horizontal cartels cause harm.

In line with this approach, Austria chose a "claimant-friendly" implementation of the Cartel Damages directive into Austrian law. An example is the limitation period which applies to cartel damage claims created prior to the introduction of the new rules in the ACA. In Germany, the question whether these claims are covered by the new provisions necessitated a Supreme Court decision.

II. The EU Cartel Damages Directive and its Implementation into Austrian law

Let us now have a closer look at the most important changes brought about by the implementation of the Cartel Damages Directive into Austrian law:

- Disclosure of evidence rules;
- Recognition of decisions of national authorities and presumption of harm caused by the cartel infringement;
- Introduction of a minimum limitation period;
- Limitation of joint and several liability; and
- Rules on the passing on of overcharges.

A. Disclosure of Evidence Rules

One of the most important and most heavily disputed features of the Cartel Damages Directive is the disclosure of evidence. Member States shall ensure that, upon request of a claimant having presented "*a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages*", national courts are competent to order

[8]) *See* OGH Aug 2, 2012, docket no. 4 Ob 46/12m (2012) (Austria).

that the defendant or a third party discloses evidence in their control.[9]) To avoid non-specific searches for information, the Directive provides that courts shall be able to order the disclosure of "*specified terms of evidence or relevant categories of evidence circumscribed as narrowly as possible on the basis of reasonably available facts in the reasoned justification*".[10]) Nevertheless, the Directive raised the question as to how to implement the disclosure of evidence rules without burdening national courts with US discovery style disclosure situations. The fact that the Cartel Damages Directive foresaw a proportionality requirement, and thus the considerations of the legitimate interests of all parties and third parties concerned, provided little comfort.[11]) The Austrian implementation of the Directive closely follows the wording of the Directive.[12])

The Cartel Damages Directive prohibits courts from ordering the disclosure of leniency statements and settlement submissions at any time ("*black-listed documents*").[13]) Information that was prepared specifically for the proceedings of a competition authority (*e.g.* responses to requests for information (*RFI*) or to the statement of objections [*SO*]), information that the competition authority has drawn up and sent to parties in the course of proceedings (*e.g.* RFIs and SOs) and settlement submissions that have been subsequently withdrawn may only be disclosed after the competition authority in question has adopted a decision or otherwise closed the proceedings ("*grey-listed documents*"), which requires that possible appeals against the decision have been resolved.[14]) The black-list aims to protect the cartel leniency process and thereby the attractiveness of the leniency programs of the Commission and the national competition authorities *(NCAs)*, which have long been the backbone of the EU's cartel enforcement. The Austrian implementation again closely followed the text of the Directive.[15]) Protected are documents in the possession of the Austrian Cartel Court *(Kartellgericht)*,[16]) the Austrian Federal Competition Authority *(Bundeswettbewerbsbehörde)*, the Austrian Federal Cartel Prosecutor *(Bundeskartellanwalt)*, the Commission and any other competition authority within the meaning of VO 1/2003,[17]) which includes competition authorities of other Member States.[18])

[9]) Art. 5(1) Directive.
[10]) *Id.* Art. 5(2).
[11]) *Id.* Art. 5(3).
[12]) *See* Sec. 37j(3) of the ACA.
[13]) Art. 6(6) Directive ("Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party to disclose any of the following categories of evidence: (a) leniency statements; and (b) settlement submissions.")
[14]) *See* Id. Art. 5.
[15]) *See* Sec. 37k(3) and (4) ACA.
[16]) The Higher Regional Court of Vienna acts as the Austrian Cartel Court.
[17]) Council Regulation (EC) No 1/2003, 1–25.
[18]) Sec. 37b no. 3 ACA.

B. Binding Effect of Infringement Decisions And Presumption that Cartel Infringements Cause Harm

The Directive provides that Member States shall ensure that infringements of competition law found by a final decision of a national competition authority or review court of their own jurisdiction are deemed to be irrefutably established for the purpose of cartel damage actions under Articles 101 or 102 of the TFEU or national competition law. Decisions of NCAs of other Member States are considered *prima facie* evidence of competition law infringements.[19]) The Austrian implementation of the Directive goes further and provides that infringements found by final decision of competition authorities or review courts of other Member States are also deemed irrefutably established.[20]) Furthermore, the Directive and the Austrian implementation provide a rebuttable presumption that cartel infringements cause harm.[21])

C. Extension of the Limitation Periods

In its implementation of the Directive, Austria opted for the shortest possible limitation period of five years.[22]) The limitation period begins once the competition law infringement has ceased and the claimant knows or can be reasonably expected to know the identity of the infringer, the harm caused by the infringement, the behavior that caused the harm and the fact that it constitutes an infringement of competition law.[23]) Irrespective of the claimant's knowledge or reasonably expected knowledge of the above facts, the limitation period ends ten years after the damage occurred. Again, the limitation period only starts to run once the competition law infringement has ended.[24])

The limitation periods are suspended during a competent competition authority's investigation until at least one year after the infringement decision has become final or proceedings have been otherwise terminated. The running of the limitation period is also suspended during consensual dispute resolution for a maximum duration of two years.[25]) That suspension persists for the duration of any consensual dispute resolution process, up to the maximum two years, with respect to the parties involved or represented in said dispute resolution.[26])

[19]) Art. 9(1), (2) Directive.
[20]) Secs. 37i(2), 37b no. 3 ACA.
[21]) Art. 17(2) Directive; Sec. 37c(2) ACA.
[22]) *Id.* Art. 9(3); Sec. 37h(1) ACA.
[23]) *Id.* Art. 10(2); Sec. 37h(1) ACA.
[24]) Sec. 37h(1), 2nd sentence ACA.
[25]) Art. 10, 18 Directive.
[26]) Art. 18(1) Directive; Sec. 37h(2) no. 3 ACA.

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[22]) *Id.* Art. 9(3); Sec. 37h(1) ACA.
[23]) *Id.* Art. 10(2); Sec. 37h(1) ACA.
[24]) Sec. 37h(1), 2nd sentence ACA.
[25]) Art. 10, 18 Directive.
[26]) Art. 18(1) Directive; Sec. 37h(2) no. 3 ACA.

The provision has raised questions as to how judges will assure that they have the relevant information necessary to calculate whether the limitation period has expired. Investigative measures of competition authorities are not always public and it will be hard, if not impossible, for a civil court or the claimant (and sometimes even for the respondent) to determine at what point in time NCAs (especially such of other Member States) commenced or ended investigative measures.[27])

D. Joint and Several Liability

The Directive requires Member States to ensure that companies and undertakings that have infringed competition law are jointly and severally liable for the harm caused by the infringement. Each of them shall be bound to compensate for the harm in full and the injured party shall have the right to require full compensation from any of the infringers.[28]) The Directive provides for a privileged treatment of small and medium-sized enterprises (*SMEs*) as defined in Commission Recommendation 2003/361/EC.[29]) An SME is only liable to its own and indirect purchasers on the condition that its market share in the relevant market was less than 5% at any time during the infringement and that the application of the normal rules of joint and several liability would "*irretrievably jeopardize its economic viability and cause its assets to lose all their value*".[30]) The immunity applicant ("Kronzeuge") is jointly and severally liable to its direct and indirect purchasers or providers and to other injured parties only in so far as full compensation cannot be obtained from the other undertakings involved in the infringement.[31]) The Austrian implementation, again, closely follows the wording of the Directive.[32])

E. Passing on of Overcharges

To ensure the effectiveness of the right to full compensation, the Directive provides that direct and indirect purchasers can claim compensation for damages incurred as a result of the infringement.[33]) To avoid US-style over-compensation, the Directive asked the Member States to lay down suitable

[27]) *See* Sec. 37h(2) no. 2 ACA.
[28]) *Id.* Art. 11(1).
[29]) Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, (2003), 36.
[30]) Art. 11(2) Directive, unless the SME either coerced other undertakings to participate in the infringement or is a repeat offender, which previously engaged in the same infringement (Art. 11(3) Directive).
[31]) *Id.* Art. 11(4).
[32]) *See* Sec. 37e ACA.
[33]) Art. 12(1) Directive.

procedural rules.[34]) National courts shall be empowered to estimate the share of any overcharge that was passed on to the downstream market level in accordance with national procedures.[35])

Defendants will try to reduce the risk of over-compensation through third-party notices. In practice, however, one of the difficulties faced will be to establish the identity of the indirect purchasers of a cartelized product. Depending on the product and the mode of sale, even the direct purchaser will not have a complete overview of the customers that he sold the product on to.

The defendant can invoke a passing-on defense against damage claims (*i.e.* that the direct customer incurred no actual damage because the overcharge was passed on in full or at least in parts to the downstream market level). The burden of proof of the passing-on of the cartel overcharge is on the defendant.[36])

In so far as an indirect purchaser claims that the cartel overcharge was passed on, the Directive provides for a presumption of the passing-on of the overcharge, if the indirect purchaser can show that (1) the defendant committed a competition law infringement, (2) the infringement resulted in a cartel overcharge for the direct purchaser and (3) the indirect purchaser purchased goods or services that were the object of the infringement or has purchased goods or services derived from or containing them.[37])

III. The Directive's Invitation to Agree on Arbitration Introduction

In parts I and II, we have described the rise of private enforcement, the main features of the Directive and its implementation into Austrian law. We have thereby laid the groundwork for a discussion on the enforcement of cartel damage claims through arbitral tribunals, which will be the focus of the rest of this article. The questions that arise with regard to the enforcement of cartel damage claims through arbitration are numerous and complex, which is why some of the topics, in the following, will only be touched upon.

A. A General Encouragement to Use ADR

In recital (48), the Directive stresses the desire to achieve a 'once-and-for-all' settlement for defendants in order to reduce uncertainty for infringers and injured parties, and continues: *Therefore, infringers and injured parties should*

[34]) *Id.* Art. 12(2).
[35]) *Id.* Art. 12(5).
[36]) *Id.* Art. 13; Sec. 37f(1), 1st and 2nd sentences ACA.
[37]) *Id.* Art. 14 (2); Sec. 37f(2), (3) ACA.

be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), ***arbitration****, mediation or conciliation.*

Furthermore: *The provisions in this Directive on consensual dispute resolution are therefore* ***meant to facilitate the use of such mechanisms and increase their effectiveness****.* Does this not make an arbitrator's heart fill with joy?

Still, when looking at the mix of provisions contained in the Directive and those transposed into national law, some doubts arise. Are arbitral tribunals free to set out how to structure proceedings? Can they really be bound by the decisions of the competition authorities? Are they competent to decide on tort claims at all? How can they effectively cooperate with state courts or even refer work to them? And, last but not least, doesn't the ECJ Achmea Judgement, handed down well after the publication of the Directive, seriously endanger the arbitral tribunal's competence to consider matters subject to European law?

On the other hand, the Directive provides to the contrary, and does so in very clear words. It is therefore a valid preliminary assumption that private enforcement can effectively be done through arbitration, until the contrary has been proven.

But – if we engage in a reading of the text of the Directive – does a sudden cloud overshadow our high expectations? Right at the outset of the Directive, Art. 1.2 seems to dismiss arbitration when proclaiming: *This Directive sets out rules coordinating the enforcement of those rules in damages actions* ***before national courts****.* Is this already the end of our story? Does this one sentence extinguish our hope that cartel damage claims could be submitted to arbitration? National courts are defined in Art. 2(9) as being "*within the meaning of Art. 267 TFEU*", which means a Court or Tribunal being entitled to request a preliminary ruling of the Court of Justice of the European Union. It is therefore pretty clear that arbitral tribunals are definitely not "national courts".

Still, in the view of the authors, this is no reason to give up. Usually, States that pride themselves on providing an arbitration-friendly legal environment have specific regulations that enable arbitral tribunals to revert to State courts for judicial assistance. For example, according to Sec. 602 Austrian Code of Civil Procedure *(Zivilprozessordnung – ACCP)*, the arbitral tribunal, or even one of the parties with the approval of the arbitral tribunal, may apply to the court for the performance of judicial acts for which the arbitral tribunal has no authority. Judicial assistance may also consist of the court requesting a foreign court or an administrative authority to perform such acts. Therefore, there is no need for premature apprehension. As will be outlined below, even though some situations will persist where an arbitral tribunal, even in such "co-operation" with a State court, is not quite as effective as a national court, there are many situations where it can, by applying techniques that have become

standards in international arbitration, even be a more suitable forum for private enforcement. The only things needed are some goodwill, a devotion to cooperation by the parties, and some extra thought and reflection by the arbitrators on the background and aims of the Directive. If this is assured, it is the authors' submission that arbitrating cartel claims can be a smashing success.

B. The Accompanying Provisions in the Directive

Recital (5) clearly sets out that actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution. Differing procedural rules are regarded as an obstacle by recital (8), and recital (9) deems it necessary to ensure a more level playing field for undertakings operating in the internal market. The necessity to be able to obtain disclosure of evidence is a basic feature according to recital (15), as well as the principle of equality of arms. Recital (18) specifically mentions confidentiality. Doesn't all of that pretty much sound like what we expect from arbitration?

In its desire to foster ADR, the Directive moves one step further: According to recital (49), in order to provide both sides with *a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before national courts, limitation periods need to be suspended for the duration of the consensual dispute resolution process.* And, according to recital (50), national courts should be able to suspend proceedings if the parties decide to submit the same claim to a consensual dispute resolution process. All this is then explicitly laid down in Art. 18(1), according to which the limitation period for bringing an action for damages is to be suspended for the duration of any consensual dispute resolution process. Furthermore, according to Art. 18(2), Member States shall ensure that national courts seized of an action for damages may suspend their proceedings for up to two years while the parties are engaged in consensual dispute resolution concerning that same claim. This is also mirrored by Sect 37g(4) ACA: If a consensual settlement between the parties "is to be expected", the national court may stay the proceedings.

Does this not speak against arbitration? Namely, the basic principle of arbitration is that the parties submit all or certain disputes that arise between them for a binding decision of the arbitral tribunal.[38]) It is therefore either court litigation or arbitration; one of them excludes the other. Furthermore, once the matter is pending without objection as to the validity of the arbitration

[38]) Gary Born, International Arbitration: Law and Practice, 2 (2nd ed. 2016).

agreement, there is definitely no competency of the ordinary court, but the opposing party can raise *lis pendens*.[39])

The Directive, in Art. 18(2) contains a clear reservation in this respect: The above mentioned obligation of Member States shall only apply "*without prejudice to provisions of national law in matters of arbitration*". The ACA takes this into account and, consequently, does not refer to ADR as a whole, but only to "settlement negotiations" that shall, according to Sect 37h(2)(3), suspend the limitation period and entitle the court to stay the proceedings in expectation of a settlement. If the case is pending before an arbitral tribunal, there is of course no need for such a suspension of the limitation period, because the case will be finally and bindingly decided there. It is therefore clear that both the Directive – even if it may appear to give little attention to different methods of ADR[40]) – and the ACA do in fact see arbitration as a true and valid alternative to proceedings before national courts.

IV. Is an Arbitral Tribunal in Practice an Adequate Forum for Private Enforcement of Cartel Claims?

Many of the principles that are explicitly laid down in the private enforcement provisions will be familiar to anybody regularly engaged in arbitration. This is particularly true for all the document production related issues: While continental national courts may be bewildered by the newly gained competence to order one party to produce documents that are not to be qualified as "common" to the parties,[41]) arbitral tribunals may have recourse to the well-developed system of document production as provided for in the IBA Guidelines on the Taking of Evidence in International Arbitration. Recital (15) stresses that *it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence*, and the same is true for defendants. Does this sound familiar to those belonging to the international arbitration community?

Another big issue is confidentiality. Recital (18) stresses that business secrets and other confidential information need to be protected appropriately. And, again, confidentiality is one of the big advantages of arbitration.[42])

As to the quantification of damages or harm (Art. 17 of the Directive), arbitral tribunals are used to a more flexible approach than national courts. Even though Sec. 73 ACCP permits Austrian judges to set the quantum according to their discretion if it is clear that damage has occurred, but the nature and

[39]) Nadja Erk-Kubat, *Parallel Proceedings in International Arbitration: A Comparative European Perspective*, Int'l Arb. L Lib, 71–246, at 72, 107–119 (2014).

[40]) *See* 3 Irene Welser, *Alternative Dispute Resolution – A Wide Choice of Varieties*, in Festschrift für Prof. Dr. M. Ilhan Ulusan, 757–774 (Altop et al., ed 2016) (which provides a clearer picture as to the variety of ADR mechanisms available).

[41]) *Id.* Art. 5(1).

[42]) Gary Born, International Arbitration, 2780 (2nd ed. 2014).

value of that damage is difficult to ascertain, in practice, arbitral tribunals are much more inclined to set damages in quite an uncomplicated, liberal way with the help of quantum experts nominated by the parties, if need be, in hot-tubbing procedures, but without formalistically appointing another additional expert. The desire of the Directive *that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult* will therefore be in good hands with arbitral tribunals that are used to applying such standards.

And there are other advantages of arbitration that are so readily apparent, that the Directive does not even have to mention them: When assessing cartel damage claims, a sound economic understanding is of the essence. Experienced arbitrators are sometimes more used to juggling numbers than State judges who, following the *iudex non calculat* approach, are normally obliged to leave such quantifications to external court-appointed experts. Dealing with large numbers of documents is another task that arbitral tribunals are certainly more accustomed to do than national courts,[43]) where procedural laws may either limit the time within which new evidence may be introduced to a very early stage of the proceedings, or set a very formalistic way of dealing with them, *e.g.* by demanding that parties clearly mark every line of the document that they wish to rely on.

Another issue is language. The Directive strives to overcome national borders and to create a uniform European system where, in principle, claimants can choose where to sue and get the same standard of protection all over Europe. The need to communicate with the court in the local language, the need to have all documents translated into that language, and the mixed feelings that a company or individual might have when exposed to proceedings that, due to the language barrier, it cannot fully understand, will certainly not enhance this desire. If a claimant evaluates the various possibilities when bringing a claim, an international environment where arbitrators come from different backgrounds and, despite various mother tongues, everyone speaks the same language, may greatly help to inspire confidence and even make facilitating dispute resolution easier.

We may therefore conclude that, *prima facie*, arbitration and the arbitration procedural standards that are widely accepted are at least not wholly inappropriate in resolving cartel damage claims.

[43]) Johannes P. Willheim, Die Vorteile der Abhandlung von Follow-on Ansprüchen in kollektiven Schiedsverfahren, 2 ÖZK 2014, 49–54, at 51.

V. How to Start Arbitration: Is a Standard Arbitration Clause Sufficient?

Recourse to arbitration for damage claims resulting from cartel infringement is likely to arise in two contexts. Firstly, the parties to the dispute might have a pre-existing contractual relationship, where the damage was suffered within the context of that relationship and the contract between them includes an arbitration clause. Secondly, there may be no agreement or contract between the parties, or such an agreement does not contain an arbitration provision, but the parties nonetheless wish to have their dispute dealt with by way of arbitral procedures.

While both instances offer challenges for the initiation and conduct of arbitration, they are also opportunities for both the parties and the arbitral tribunal to seize upon. If the parties need to agree and sign a "new" arbitration agreement, this can already be tailored to the specific dispute between them and provide specific instructions to the arbitral tribunal to ensure their respective rights are protected to the fullest extent as they are envisaged by the Directive and the applicable national law. Without such "tailor-made" cartel-law-suitable arbitration clauses, arbitral tribunals may wish to rely on certain ambiguities or broad guidelines, often contained in standard arbitration clauses, to avail themselves of the myriad of resources made available to them on foot of the Directive, which are hopefully also transposed into the domestic law of the relevant Member State. What follows is a brief examination of the potential inherent in both scenarios and a few suggestions to ensure efficiency and effectiveness in arbitral proceedings concerning cartel violations.

A. What to Bear in Mind When Drafting a New Arbitration Clause

The opportunity to prepare a tailored arbitration clause is one that should be enthusiastically seized by the parties to a dispute. One of the major benefits for parties to arbitration is the flexibility and malleability of arbitration in order to achieve a mutually agreeable result. With knowledge of the specific dispute that has arisen and the requirements of both parties going into the negotiations toward an arbitration agreement, the parties are in a prime position to safeguard essential interests, an opportunity that would not be available to them in proceedings before national courts.

But even before a specific cartel law dispute has materialized, parties can of course ensure that the scope of their arbitration clauses is as broad or specific as desired and permit arbitration of claims arising out of cartel infringements. The mere fact that such claims are arbitrable does not necessarily mean any arbitration agreement will be sufficient to empower a tribunal to hear such

claims. To avoid difficulties, it is best to draft a broad arbitration clause.[44]) Often, a Model Clause associated with a set of arbitral rules or a specific arbitral institution will provide a solid foundation for broad arbitration clauses and may even tailor to specific industries.[45])

Drafting arbitration clauses is not without its own challenges. In the words of Gary Born: "*Properly drafted, they can provide the basis for a relatively smooth and efficient arbitration; less carefully drafted, they can give rise to a host of legal and practical issues; badly drafted, arbitration agreements can be pathological, either incapable of enforcement or precursors to uncertainty and costly litigation in national courts.*"[46])

Particularly important is an agreement on the seat of the arbitration and the applicable law to both the dispute and the arbitration clause itself. These choices will go a long way to shape the procedural rules of the arbitration and the formal requirements of the arbitration agreement. In Austria, such formal requirements are set out in Sec. 583 ACCP, which is applicable to all arbitral agreements entered into after July 1, 2006.[47]) Compliance with the formal requirements decided upon, such as the form and method of communication of the arbitration agreement, can be decisive in establishing its validity. Careful drafting in this regard can prevent considerable hurdles from presenting themselves either in the course of the arbitration or during the enforcement of any arbitral awards.

In terms of the provisions specific to the arbitration of cartel infringement claims, it would be in the parties' best interest to, as closely as possible, stick to the wording as it is used in either the Directive or the transposed provisions of the local law and to determine the arbitral tribunal's crucial rights and duties. In any case, the newly-drafted arbitration clause should make sure that the arbitral tribunal is really obliged to apply all the substantive and also procedural provisions contained in the Directive.

The rules and stipulations contained in the Directive are aimed at national courts and will need to be adapted with reference to an arbitral tribunal. This will go towards guaranteeing the application of prescribed procedural and substantive rules and protections and eliminate in large part the occurrence of any discrepancies which might represent obstacles during the arbitral proceedings or during the enforcement of a potential award.

Of particular importance are: the right to full compensation, particularly the ability to recover lost profits; the rules on disclosure of evidence; the rules on the standard and burden of proof as well as incentivizing the tribunal to

[44]) 21 Christoph Liebscher, Drafting Arbitration Clauses for EC Merger Control, J Int'l Arb 2004, 67–81, 75–76.

[45]) IBA Guidelines for Drafting International Arbitration Clauses, IBA Council, October 7, 2010, at 8, para 11.

[46]) Born, *supra* note 38, at 46.

[47]) Gerold Zeiler & Barbara Steindl, The New Austrian Arbitration Law: A Basic Primer, Sec. 583, at 34 (1st ed. 2006).

seek domestic court assistance in obtaining preliminary rulings from the ECJ. This has no effect on the tribunal's entitlement or competence to seek such judicial assistance but it provides the tribunal with the peace of mind that the option is amendable to the parties.

While this does not cover all the elements of an arbitration agreement, it does include those elements which are of significance in pursuit of relief for damages suffered from cartel infringements. Arbitration offers a great deal of choice to the parties and it is imperative they make extensive use of that choice before initiating arbitral proceedings.

B. Living with an Existing Arbitration Clause/ Competency of Arbitral Tribunals to Rule on Tort Claims?

In accordance with Sec. 582(1) ACCP, Austrian law permits "*any pecuniary claim*" within the jurisdiction of the courts, to be subject to an arbitration agreement.[48]) Sec. 582 ACCP therefore provides a broad scope for matters that may be submitted to arbitration and includes both contractual and non-contractual claims, which includes torts and therefore, all cartel law damage claims.

The Austrian Supreme Court favors expansive and effectual interpretations (*favor validitatis*) of arbitration agreements,[49]) the language used in the arbitration clause will therefore be a determinative factor in the arbitrability of tort claims. Arbitration agreements containing phrasing such as "*all disputes out of the contract*" or "*disputes between the partners arising out of the contract*" have been interpreted by the Austrian Supreme Court, as permitting non-contractual claims to be brought to arbitration.[50]) The non-contractual claim and the underlying contract must, however, have some proximity to one and other however and cannot be too loosely related.[51])

[48]) Sec. 582(2) explicitly excludes arbitrability for family law matters, all claims in relation to condominium property, and issues relating to contracts arising out of tenancy agreements as well as disputes pertaining to the nature of such contracts themselves. Where other provisions of Austrian law provide for their own, specific, exclusion of arbitrability, such matters are also barred from going to arbitration. They are, of course, irrelevant to the topic at hand.

[49]) Christian Hausmaninger, *sec 581, para 193*, *in* KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN IV/1 (Fasching & Konecny eds. ,"2nd ed. 2005); *see also* Irene Welser & Susanne Molitoris, *The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract ...", in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2012 21 (Klausegger et al. eds., 2012).

[50]) OGH, Aug 26, 2008, docket no. 4 Ob 80/08f (2012) (Austria); OGH, Jun 19, 1997, docket no. 6 Ob 2213/96a (1997) (Austria).

[51]) Welser & Molitoris, *supra* note 49, at 24.

Nevertheless arbitral tribunals are in principle competent to rule on tort claims. Living with an existing arbitration clause should, in most cases, therefore allow for the bringing of cartel infringements before arbitral tribunals. Where an arbitration clause already exists, it will generally not be geared to the "special needs" that have to be considered when dealing with cartel infringements. There are two ways to deal with this issue: The parties could, before or in the course of initiating arbitration proceedings, supplement the existing arbitration clause with specific additional rules that mirror the competencies given to national courts by the Directive and require the arbitral tribunal to adhere to them.

In the alternative, the newly constituted arbitral tribunal should ideally take the initiative and include such specific empowerments and procedural competencies in its "Procedural Order No. 1". It will therefore, in cartel law arbitrations, not be sufficient to use a "boiler-plate" PO 1. This order should be carefully deliberated, and the necessary powers granted to national courts by the Directive should be covered comprehensively. The fewer discrepancies between the provisions of the Directive and the procedures and substance of the arbitral proceedings, the less likely it will be to have the arbitral award challenged and set aside.

C. Rules and Regulations to Be Applied by the Tribunal

When drafting "new" arbitration clauses for a cartel law dispute that has already arisen, supplementing an existing arbitration clause or, when the tribunal issues a Procedural Order No 1 on the basis of a standard arbitration clause, the following provisions should be borne in mind as they represent a departure from the norm in traditional arbitration procedures.

D. Substantive Law – a Reminder

Even though material law provisions do not specifically need to be mentioned in an arbitration clause or a procedural order, two main substantive provisions contained in the Directive should be given particular attention by the parties and arbitrators, as they may greatly influence the course of the proceedings and the evidence-taking: First, those concerning the – extended – limitation periods,[52]) contained in Art. 10, and second, the joint and several liability issue, contained in Art. 11.

It goes without saying that it remains of benefit to both Parties to ensure the arbitral tribunal is clearly informed of the applicable rules, that will –

[52]) *See above*, at 9.

according to widely acknowledged principles – have to be proven by the parties as the *iura novit curia* principle does not apply in arbitral proceedings.[53]) Claimants will benefit from the opportunity to recover the entirety of the harm suffered from a single infringer, while respondents may reduce their liabilities if they fall within the limited liability categories envisaged in the Directive. Respondents may further benefit from the provisions that provide for a means to establish a claim against fellow infringers. While an arbitral tribunal cannot directly order parties not involved in the proceedings to pay damages, the tribunal can include a statement in their award detailing the total compensation paid by a single infringer and the proportion of that total that was caused by third parties. This statement will of course not be determinative in future proceedings between the infringing parties but it may serve as compelling evidence.

The substantive provisions provided by way of the Directive and its implementation offers both sides to a dispute certain advantages. There may be considerable differences between the transposition of the Directive into national law and the original provisions themselves. Parties should be aware of these differences and identify the weaknesses or benefits extended to them by each. Clearly agreeing on the application of these substantive rules in arbitration agreements may assist the tribunal in fully complying with their substance and intent.

E. Procedural Rules, Burden of Proof Issues and Legal Presumptions

In order to ensure that an arbitral award is recognized and enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and that it cannot be challenged, it will also be necessary to prescribe a number of procedural rules – *e.g.* by including them in Procedural Order No. 1 – to which the arbitral tribunal shall adhere. These rules include those on document production and disclosure;[54]) the establishment of a presumption of harm for cartel violations,[55]) Art. 17(2); and of course the provisions on the burden and standard of proof, Art. 17(1). This is especially important to note, as the Directive explicitly states that Arts. 101 and 102 TFEU "*are a matter of public policy*".

The rules on document production and disclosure, as provided for in the Directive, permit the parties to seek reasonable disclosure of documents, in particular in support of the value of their claim, be it damages or the value of

[53]) *See also* Irene Welser & Giovanni De Berti, *Best Practises in Arbitration*, *in* Austrian Yearbook on International Arbitration 2010 79, 93 *et seq.* (Klausegger et al. eds., 2010).

[54]) Articles 5, 13–14 Directive.

[55]) One could argue that this provision is one of substantive law; still, the arbitral tribunal will have to take it into account mainly when shaping the proceedings.

damage that was passed-on. Arbitration is traditionally flexible and offers the parties considerable liberties when deciding on the extent of an arbitral tribunal's authority to make orders for document production.[56]) There may be a difference in the manner in which document is treated between practitioners from the common or civil law tradition,[57]) but tribunals will adhere to the rules as they are prescribed by the parties and provided for in the applicable law.

While the parties do not need to include a specific agreement on disclosure, since it will be covered in the national laws of Member States or even be applied by the arbitral tribunal following the IBA Rules on the Taking of Evidence approach, it may be to their advantage to clarify their position on such rules and clearly provide for their agreement that the tribunal may compel either party to provide the necessary documentation. Since the disclosure rules envisaged in the Directive can benefit both sides, such agreements may be more feasible to agree upon and lead to smoother arbitral proceedings. It should, of course, be borne in mind by the parties that they cannot authorize the tribunal to compel third parties to disclose documents. This is one of the hurdles that cannot be overcome by arbitration. Still, a possible solution and the relationship between the arbitral tribunal and third parties in general will be discussed in greater detail in Chapter VII below.

Concerning the presumption of harm as well as the burden and standard of proof, neither of these requirements give rise to considerable difficulties in the context of arbitral proceedings. Generally, in the absence of clear rules on the matter, arbitrators are afforded considerable discretion.[58]) With the transposition of the Directive, such rules will enter into the *lex arbitri* of the arbitral tribunal and become applicable, but the parties can also provide specific guidance as to their application by way of mutual agreement between them. Just like in the case of disclosure, such an agreement is not necessary, but it can provide an opportunity to further define the manner in which the provisions are to be applied (only in so far as they do not detract from the protections offered by the Directive). Doing so will ensure greater legal certainty for all parties involved as well as the arbitral tribunal.

It is in the interest of the flexibility of arbitration that these provisions are included in the first procedural order. Inclusion in a separate agreement signed by the parties but binding on the arbitral tribunal may impose stringent limits

[56]) Born, *supra* note 42, at 2324.

[57]) 33 Reto Marghitola, *Document Production in International Arbitration*, Int'l Arb. Law Library, 186 (2015); see also the newly established Prague Rules at page Lukas Hoder, *Prague Rules vs. IBA Rules: Taking Evidence in International Arbitration*, in this Yearbook, 157.

[58]) Phillip Landolt & Barbara Reeves Neal, *Chapter 5: Burden and Standard of Proof in Competition Law Matters Arising in International Arbitration*, in Eu and US Antitrust Arbitration: A Handbook for Practitioners, 156 (Blanke & Landolt edd., 1st ed. 2011).

on the operations of the arbitral tribunal through what is known as the "Frankfurt Trap". (Derived from the arbitral proceedings in Flex-n-Gate v GEA, the parties had signed an agreement between them prescribing specific procedural requirements to which the arbitral tribunal was to adhere. In the course of the proceedings, the arbitrators relied on their discretion to deviate from the rules of procedure but since this was contrary to the agreed upon procedural requirements, the respondent was able to get the award annulled.[59])) Therefore, it is worth a thought whether or not to include binding rules for the tribunal in an agreement between the parties or to allow the tribunal to determine such rules unilaterally.

In the interest of efficient and effective arbitration, rid of rigid procedural requirements, it would therefore behoove the parties to simply incorporate the procedural requirements in an, unsigned by the parties, procedural order issued by the tribunal, after having discussed and received informal approval from the parties as to its content. This way, the parties will have the peace of mind that not every procedural decision by the tribunal poses a potential risk to the enforceability of the final award. While arbitrators will have the correct guidelines to apply the protections envisaged by the Directive but not be so restricted that they are unable to accommodate developments in the course of the arbitral proceedings.

F. Binding Force of Decisions by Competition Authorities

Art. 9 of the Directive requires Member States to ensure final decisions by national competition authorities or by review courts are considered irrefutable evidence for the purpose of establishing claims to damages for cartel infringements. Traditionally, the rules of evidence, including the value of evidence, are largely left within the discretion of the arbitral tribunal.[60]) Arbitrators are then able to use their own judgment to determine the nature of the dispute and perform the exercise of weighing the evidence put before them. Still, the question of the binding force of court decisions has been and is being widely discussed.[61])

[59]) Peter Bert, *Arbitrator's Nightmare: When Procedural Orders Backfire – Flex-n-Gate v. GEA*, Kluwer Arbitration Blog, November 20, 2012; OLG Frankfurt am Main, 17.02.2011 – 26 Sch 13/10.

[60]) Born, *supra* note 42, at 2307–2309.

[61]) Different authors disagree, *e.g.*, on the question whether tribunals are or are not bound by pronouncements of criminal courts, *see* Ema Vidak Gojkovic, *An Unlikely Tandem of Criminal Investigations and Arbitral Proceedings: A Case Study of the INA – MOL Oil & Gas Proceedings*, Kluwer Arbitration Blog, January 26, 2017; Marie Stoyanov, et al., *Procedural interplay between investment arbitration and criminal proceedings in the context of corruption allegations*, in Annet van Hooft and Jean Francois Tossens

It is not unusual for national laws to prescribe some of the rules of procedure that are to be applied, however.[62]) Austrian law, for instance, in Sec. 594 ACCP, in addition to expressly providing for party choice and arbitrator discretion, also requires the parties to be treated fairly, have the right to be heard and have representation present. These rules are almost self-evident but they are nonetheless provided for and represent *lex arbitri* that must be adhered to by the arbitral tribunal.

Art. 9 of the Directive, if transposed into national law,[63]) may represent a similar rule of evidence that is, in the opinion of the authors, binding on the arbitral tribunal to the extent that it forms part of the arbitration's *lex arbitri*. Therefore, arbitral tribunals should consider themselves bound by final decisions of national competition authorities, as otherwise this would be contrary to the *effet utile* of the Directive and open up potential awards to being challenged.

G. Provisions that Cannot Be Applied and How to Cope with Them

The nature of arbitration as a consent-based method of dispute resolution entails a number of advantages, such as flexibility and party participation in the procedures and time lines, but also establishes clear limits on the powers of the arbitral tribunal. An arbitral tribunal will, for instance, of course lack the power to order a third party to do anything[64]) and has no authority to impose penalties on either the parties to the dispute (unless they specifically provided for that power, which is highly unlikely) or third parties.[65]) The Directive's Art. 8, which requires the imposition of penalties on (third) parties that do not comply with orders imposed on them, can therefore evidently not be implemented by an arbitral tribunal.

Additionally, arbitral tribunals are also not specifically vested with the power to request documents[66]) or assistance from national competition authorities. Art. 17(3), however, requires Member States to ensure national courts are entitled to request assistance in determining quantum from the national competition authorities but unfortunately, at least in Austria, this entitlement has not been explicitly extended to arbitral tribunals.

(eds), b-Arbitra | Belgian Rev of Arb., 7–44, 35–36 (2018); Michael Nueber & Sebastian Auer, *Zur Bindungswirkung von Strafurteilen im Schiedsverfahren*, ecolex 2018, 35.

[62]) *Id.* at 2306–2307.

[63]) In Austria it has been included in Sec. 37i(2) ACA.

[64]) For more on the interaction with third parties, see Chapter VII

[65]) Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration, 357 (1st ed. 2004).

[66]) Articles 5, 6 Directive (set out the power and procedure to be followed by national courts in ordering documents from national authorities).

Still, the mere fact that an arbitral tribunal does not directly possess these competences does not necessarily mean that they cannot be secured through the arbitral tribunal by other means. In most countries that support arbitration as a means of alternative dispute resolution, national law will provide some means for the national courts to assist arbitral tribunals,[67]) for instance through the issuance of court orders. In Austria, the relevant provision is Sec. 602 ACCP entitled Court Assistance *("Gerichtliche Rechtshilfe")* and entitles an arbitrator or party, authorized by the arbitral tribunal, to request assistance of national courts for judicial acts not within the authority of the tribunal. This provision specifically recognizes the right to request of the national courts that they lodge their own request with either a foreign court or an administrative authority.[68]) This means that by using court assistance, arbitral tribunals can also make requests to the competition authorities, or the ECJ.[69]) Even though this is not an "everyday procedure", at least not in Austria, arbitral tribunals should be encouraged to pursue this mechanism and to establish a new "best practice" of cooperation, which will, without any doubt, make the legal environment even more arbitration-friendly.

The effectiveness and viability of such provisions will greatly depend on the national laws applicable to the procedure. That being the case however, since the Directive specifically requires ADR mechanisms to be available, all Member States should provide for robust methods of domestic court assistance to arbitral tribunals involved in claims for cartel infringements. It represents the most effective way for arbitral tribunals to implement the provisions of the Directive notwithstanding that they go beyond the limits of their own competences.

H. Risks If the Tribunal Does Not Apply the Contents of the Directive in Full

The Directive provides for a number of rules that deviate from the standard fare commonly associated with traditional arbitral proceedings. Parties and arbitrators alike will need to take particular care to ensure these rules are represented in their arbitration agreements or complied with in the course of the proceedings themselves. Failing to do so will result in the need for national courts to review the decision and potentially annul the award. Despite the limited scope for such review, the ECJ, in the well-known *Eco Swiss* case, clearly stated that, on the basis of EU law and the requirement that the Member States ensure conformity of their laws and procedures with the rules

[67]) Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration 318 (6th ed. 2015).

[68]) Alexander Petsche, *Section 602*, in Arbitration Law of Austria: Practice and Procedure, at 401, para 5 (Stefan Riegler, Alexander Petsche et al., 1st ed. 2007).

[69]) *See* below, VIII

of the Union, national courts must address non-compliance with EU law in arbitral awards.[70])

The Court justified this position as compatible with the New York Convention, which limits the ability for national courts to review arbitral awards to specific grounds, by stating that the EU's competition rules are part of the *ordre public* of the Member States and therefore, pursuant to the Convention, could be subject to review and annulment.[71]) One drastic consequence therefore of the incompleteness or total failure to apply the Directive might be the annulment of the award by national courts. Arbitrators are therefore well advised to follow the provisions of the Directive as closely as possible.

In addition to the risk of the arbitral award being annulled on the grounds of being contrary to the State's *ordre public*, where the Directive is implemented in a manner that does not comply with EU law, of course, States may face the initiation of infringement proceedings by the Commission.[72]) Initially it will involve negotiations between the Member State and the Commission in order to achieve an implementation of the Directive that is in compliance with Union law but, should they fail, could ultimately lead to the imposition of penalties by the ECJ on the Member State concerned.[73])

This is an ancillary effect and will not generally be an issue that arises in the context of arbitral proceedings themselves. It is however in the interest of the parties and arbitrators for the Directive to be applied in order to avoid annulment and it is equally important for the Member State to avoid the imposition of penalties.

VI. Giving Notice to Third Parties

Recital (48) of the Directive makes it clear that any ADR mechanism should cover *"as many injured parties and infringers as legally possible"*. It is therefore of the utmost importance to consider the interaction between arbitration and third parties.

A. The Desire to Bind Third Parties

The nature of arbitration is one of consent. All parties to a dispute must have agreed to subject themselves to arbitration before an arbitral tribunal

[70]) *C-126/97 Eco Swiss China Time Ltd v Benetton international NV*, Judgment of the Court, June 1, 1999, ECLI:EU:C:1999:269, paras 36–37.

[71]) *C-126/97 Eco Swiss*, paras 38–39.

[72]) Treaty on the Functioning of the European Union (2012) OJ C326/01, Art. 258.

[73]) Infringement procedure, European Commission website, available at: https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en (last accessed November 12, 2018).

can decide on a dispute between them. As a result, arbitral tribunals are unable to produce binding decisions in relation to non-parties to the proceedings.[74]) This applies to both procedural and substantive orders. There are only two ways by way of which an arbitral tribunal might impose a binding effect on third parties. National law may provide for specific instances in which arbitral tribunals are entitled to subject a third party to their orders, although such provisions are rare.[75]) Arbitral tribunals may also have recourse to national courts, by way of court assistance provisions.[76]) Those courts may then have the authority to issue orders pursuant to a tribunal's request. This is an indirect method, but would permit the creation of binding effect. To the knowledge of the authors, no such order has ever been imposed on third parties with binding effect in Austria, nor has this ever been tried, but it may be an interesting topic to develop further.

B. The Possibility of Joinder

In accordance with the Directive, claimants must be able to obtain "*full compensation for harm caused by an infringement of competition law*"[77]) and Member States must ensure such compensation can be claimed by "*anyone who suffered it, irrespective of whether they are direct or indirect purchasers*".[78]) Additionally, cartel infringers are both jointly and severally liable for damages caused as a result of their infringements.[79]) The Directive makes it clear that where one infringer is made to compensate injured parties in full, that infringer will have a claim against the other infringers for their contribution in light of their individual responsibility for the harm caused.[80])

Again, arbitration only produces a binding effect on the parties that participated in the arbitral proceedings. In order to ensure the effective operation of the Directive, it may therefore be necessary for arbitral proceedings to be composed of multiple parties, including all injured parties as claimants and all infringers as respondents. It may be the case that all of these parties are known to each other in advance of the arbitral proceedings and the arbitral agreement

74) 35 Olga Sendetska, *Arbitrating Antitrust Damages Claims: Access to Arbitration, in* Maxi Scherer (ed), J Int'l Arb (2018) 357–370, at 360 (note that this excludes entities so close in proximity that they are virtually the same entity and where the agreement of one to participate in arbitration can be extended to the other); *see* 16 Stavros Brekoulakis, The effect of an arbitral award and third parties in international arbitration: *res judicata* revisited, A Rev. Int'l Arb. (2005), 1–31, at 11–12.

75) Blackaby & Partasides, et al., *supra* note 67, at 358.

76) Sec. 602 ACCP; *See also* Blackaby & Partasides, et al., *supra* note 67, at 318–319.

77) Art. 3(1) Directive.

78) *Id.* Art. 12(1).

79) *Id.* Art. 11(1).

80) *Id.* Art. 11(5).

can be signed and proceedings initiated on the basis of an agreement of all such parties but it is also likely, and perhaps more so, that this is not the case. In that event, parties may have need to request a joinder to an ongoing arbitral proceeding.

The general definition of joinder concerns an attempt by one party to an ongoing arbitration to include a non-party in the dispute or to permit a non-party to intervene in a dispute upon its own initiative.[81]) Whether or not joinder is permitted in the context of arbitral proceedings will greatly depend on a number of factors. Foremost among them is the applicable law and arbitral rules. In many cases, national legislation does not deal with the issue of joinder,[82]) in which case either the arbitral rules will need to provide guidance (or it will need to be decided, upon request, through arbitral discretion). As an example of such a provision, the UNCITRAL Arbitration Rules provide for the following:

> "*The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties.*"[83])

As can be gleaned from the wording of the provision, the general rule is that joinder requires the non-party to have signed or otherwise agreed to the arbitration agreement which grants the tribunal its authority.[84]) This agreement can come either in advance of the initiation of the arbitral proceedings, or the non-party can subsequently agree to the jurisdiction of the tribunal and accept the binding nature of its awards. The UNCITRAL Rules also require the parties to agree to such a joinder,[85]) this is not necessarily the case for all rules. In certain situations, a tribunal may permit joinder to occur despite opposition from the non-requesting party.[86])

81) 13 Bernard Hanotiau, *Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law*, in Albert Jan van den Berg (ed), International Arbitration 2006: Back to Basics?, ICCA Congress Series, 341–358, at 346.

82) Born, *supra* note 42, at 2573; for more on multi-party arbitration, *see* Willheim, supra note 43, at 51

83) UNCITRAL Arbitration Rules (2013), Art. 17(5).

84) Born, *supra* note 42, at 2573.

85) Born, *supra* note 42, at 2575.

86) Arbitration under the VIAC, LCIA, ICC and Swiss Arbitration Rules provide for this option, either explicitly or through arbitral practice; *See* 7 Simon Greenberg & José Ricardo Feris, et al., *Chapter 9. Consolidation, Joinder, Cross-Claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience, in* Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law, 161–182, at 173 (2010); 27 Richard Bamforth & Katerina Maidment, *"All join in" or not? How well does inter-*

The arbitral rules applicable to the dispute will therefore constitute a significant factor in the availability of joinder in cartel infringement arbitration. Parties to such arbitrations would generally be well advised to agree on the availability of joinder in their proceedings as it could go a long way toward more efficiently resolving all disputes and avoiding double-recovery in comparison to having to engage in multiple arbitral proceedings concerning the same factual circumstances. Joinder can make it easier for cartel infringers to share their liabilities, avoiding the need to seek subsequent compensation and brings the arbitral proceedings more in line with the provisions and objectives of the Directive.

Therefore, it may be concluded that the availability of third party joinder and multiparty proceedings in arbitration further contributes to arbitration as being generally fit for handling private enforcement claims. However, dark clouds arise if parties ignore such possibilities and respective requests.

C. Binding Force of an Award in Case of Refusal to Join?

Should a third party, having been requested to join the proceeding, decline such a request and refuse to submit itself to arbitration, the arbitral tribunal will – sadly – not be able to compel their participation. Equally, the arbitral tribunal's final award will not be binding on that third party.[87]) As Elsing puts it, "*Only through the participation of the third party can effects similar to their impleading be agreed, the authority to intervene and the substantive legal effect must be agreed to with the parties to the arbitration, while the participation in the proceedings requires the agreement of all parties involved (including the arbitrators).*"[88])

This situation is likely to give rise to a certain degree of fragmentation as a result of the need for multiple form or instances of dispute resolution.

national arbitration cater for disputes involving multiple parties or related claims?, ASA Bulletin, 3–25, at 12, (2009).

[87]) Moreover, the arbitral award does not bind a national court that in the aftermath of the arbitration has to deal with potential claims against a third party that was not party to the arbitration agreement, unless the third party has accepted the binding force, see BAUMBACH, LAUTERBACH, ALBERS, HARTMANN, ZIVILPROZESSORDNUNG Sec. 1042 Rz 14 (66th ed., 2008); Gerhard Wagner, *Bindung des Schiedsgerichts an Entscheidungen anderer Gerichte und Schiedsgerichte*, in DIE BETEILIGUNG DRITTER AM SCHIEDSVERFAHREN 44 *et seq.* (Böckstiegel, Berger & Bredow (eds.), 2005).

[88]) Siegfried H. Elsing, *Streitverkündung und Schiedsverfahren*, SchiedsVZ, Heft 2, 88–94, at 94 (2004) ("Nur unter Einbeziehung des Dritten können streitverkündungsähnliche Wirkungen vereinbart werden, die Interventionswirkung und die materiellrechtlichen Wirkungen durch einigung mit der streitverkündenden Partei des Schiedsverfahrens, die Eröffnung der Beitrittmöglichkeit durch Einigung aller Beteiligten (einschließlich der Schiedsrichter)").

Following from the irrefutable nature of the conclusions of national competition authorities, the factual circumstances will remain the same but the assessment of the damage suffered may vary greatly. The Directive specifically requires national courts, and consequently also arbitral tribunals, to be permitted to estimate the value of the harm suffered. The value of total damage suffered may therefore differ between proceedings and make it more difficult to ensure either claimants are fully compensated or infringing parties are not made to pay in excess of the harm actually caused.

This difference may cause more onerous compensatory obligations to be imposed upon non-settling infringers as a result of the operation of Art. 19(2) of the Directive. That provision allows claims against non-settling infringers to be brought for harm caused that was not compensated for by the settling infringer. It also provides that the non-settling infringer cannot subsequently seek compensation from the settling infringer for any compensation it is made to pay thereafter. Since the assessment of the value of damage may differ, it is possible that a subsequent court or tribunal might conclude the damage caused to have a higher value than that found in the original settlement. The non-settling infringer, pursuant to Art. 19(2), will be liable for the payment of the entire difference notwithstanding the fact that a proportion of that difference might have been the result of the settling-infringer's conduct.[89])

Tribunals may not be able to compel third party participation but it may often be in the interest of the injured parties and the cartel infringers to participate in such proceedings and have all claims dealt with in a single instance of dispute resolution. Therefore, to sum it up: The impossibility for arbitral tribunals to effectively bind third parties to their orders or award, is a certain drawback, but it should not fully deter us from considering arbitration. Quite to the contrary, if we go out and spread the word, more parties will freely agree to join arbitrations and so contribute to the efficiency of ADR that is sought after and promoted by the Directive.

VII. Does the Achmea Decision Raise Doubts Against Arbitrating Private Enforcement Claims?

Fortunately, the Achmea decision by the ECJ is not something with which we need to concern ourselves. While arbitral tribunals deciding on claims pursuant to cartel infringements will undoubtedly be required to interpret or apply EU law, it is clear that these arbitral tribunals are situated within the judicial system of the EU and will therefore, from the perspective of European law, be able to have recourse to national courts, preferably by way of court

[89]) *See also* Recital (51) (this inability to seek redress from a settling co-infringer was a protection included by the Commission to incentivise consensual means of dispute resolution).

assistance as described above (the so-called "*golden bridge alternative*"), for the purpose of accessing the ECJ for preliminary rulings.[90])

The ECJ in Achmea stressed the specific nature of arbitration by way of *bilateral investment treaties* as being incompatible with EU law. Member States could not be permitted to agree amongst themselves on the exclusion of ECJ jurisdiction over matters concerning EU law and thereby eliminating the judicial remedies available within that legal regime.[91]) These considerations are not of relevance in the present instance.

Concerning commercial arbitration, the ECJ has held that the limited scope of review available to national courts is justified in the interest of arbitral efficiency.[92]) Some room for review must be available however. As mentioned above, the ECJ in *Eco Swiss* established that notwithstanding such limited scope, commercial arbitration remains within the sphere of the EU's legal system by virtue of – at least – the national court's ability to annul arbitral awards, where they infringe on EU law, on the basis that they are contrary to that Member State's *ordre public*.[93])

The main consideration in this respect is that, whatever method of dispute resolution is applied, it must be ensured that they "*do not render impossible in practice or excessively difficult the exercise of rights conferred*" by EU law.[94]) As long as arbitral tribunals, in performing their duties in the context of the private enforcement of claims for cartel infringement, are given adequate domestic assistance to ensure their compliance with EU law, there is little reason to doubt the effectiveness of EU legal protections in arbitral proceedings.

VIII. Conclusion: Arbitration Is Fit for Private Enforcement

The opportunity offered by the Directive for the private enforcement of claims against cartel infringers through arbitration provides parties with a number of unique advantages over recourse to national courts. The flexibility

[90]) Sec. 602 ACCP Court Assistance ("Gerichtliche Rechtshilfe") (similar provisions are provided in Sec. 1050 of the German Code of Civil Procedure); *See also* 1 Michael Neuber, *Schiedsgerichtbarkeit und Europarecht – eine Friktion?*, ecolex 2014, 31–35, 34; Siegfried H Elsing, *References by Arbitral Tribunals to the European Court of Justice for Preliminary Rulings*, in Austrian Yearbook on International Arbitration 2013, 45–59, at 49, 53–55 (Klausegger et al. eds., 2013).

[91]) *C-284/16 Slovak Republic v Achmea BV*, Judgment of the Court (Grand Chamber), March 6, 2018, ECLI:EU:C:2018:158, 56–60.

[92]) Id. at 54.

[93]) *C-126/97 Eco Swiss*, supra note 70, at, 37, 39–41; *See also C-168/05 Elisa María Mostaza Claro v Centro Móvil Milenium SL*, Judgment of the Court, October 26, 2006, ECLI:EU:C:2006:675.

[94]) *C-168/05 Elisa María Mostaza Claro*, *id.*, para 24.

of procedures and timetables, potential for reduced costs, expertise of the arbitrators and greater input in the procedure as a whole, represent some of the basic benefits inherent in opting for arbitration. The Directive cannot empower arbitrators to perform all the functions of a national court, but many of the hurdles arbitrators might face in applying all the provisions of the Directive, on the basis of the relevant national rules, can generally be overcome through cooperation with national courts.

As private enforcement will largely be limited to an assessment of quantum, since the findings of the national competition authorities are irrefutable statements of fact, the potential for experts in such assessments to act as arbitrators should result in more accurate and fair outcomes. Such experts, through their expertise, can provide parties with a more agreeable assessment of quantum and may be able to provide such calculations without needing to have recourse to competition authorities, a process that might extend the duration of proceedings and will likely be required in proceedings before national courts.

ADR methods also provide the additional benefit to infringing parties, that they are shielded from additional liability following the conclusion of a settlement or the conclusion of arbitral proceedings (resulting in an award of compensation to all injured parties). Such infringers will no longer be jointly or severally liable for additional claims against other infringers involved in the same anti-competitive activity. It is therefore in the interest of infringing parties to seek a means of consensual settlement to such claims and arbitration provides a suitable means of doing so (in particular in light of the disclosure rules, allowing tribunals to order document production in establishing a "passing-on" defense).

Taken as a whole, arbitration provides parties with the benefits of ADR methods whilst retaining many of the features of contentious dispute resolution, including the arbitral tribunal's ability to order disclosure. On the other hand, by resulting in a binding decision of the tribunal, it avoids the "double track" that must be taken if other ADR mechanisms fail[95]) and therefore saves considerable time. National transposition of the Directive will be a significant determinative factor in the usefulness of arbitration as a means of private enforcement, but the Directive provides a solid foundation in this regard. Should domestic jurisdictions fail to provide the necessary opportunities for arbitration, the Commission is in a position to compel domestic change through infringement procedures. The consequence of this is that the Directive has paved the way for arbitration to make a meaningful contribution to the private enforcement of claims for cartel infringements.

[95]) If any other ADR mechanism fails, the matter must then be taken to the national court.