Universität Augsburg
Juristische Fakultät

Co-funded by the
Erasmus+ Programme
of the European Union

INspiRE – European Integration – Rule of Law and Enforcement

Jean Monnet Centre of Excellence
Augsburg University/Faculty of Law

Contact:
Professor Dr. Thomas M.J. Möllers
Universitätsstraße 24
86159 Augsburg/Germany

Phone +49 (0) 821 598 - 4516
Fax +49 (0) 821 598 - 4517

thomas.moellers@jura.uni-augsburg.de
www.caplaw.eu/inspire/

PO box
86135 Augsburg/Germany

Dortmund Regional Court (Landgericht Dortmund – LG Dortmund) Judgment of 13 September 2017, file number: 8 O 30/16 [Kart] – Schienenkartell (rail cartel) –

– this is a non-official translation produced and published by the INspiRE project at Augsburg University –

Holding

1. The action is herewith dismissed.
2. The Plaintiff shall meet the costs of the legal dispute.
3. This judgment is provisionally enforceable on payment of security in the amount of 110% of the amount that is subject to enforcement.

Facts

1

The Plaintiff claims damages from the Defendant and, respectively, its legal predecessor, the latter being a member of the "rail cartel". The Plaintiff is a consortium that was founded for the realisation of the construction project "Construction of structural works for rail traffic NBS O-J" in 1998 between C AG and N GmbH & Co. KG. During the cartel period that the Federal Cartel Office (*Bundeskartellamt*) found to have existed from 2001 through May 2011, the Defendant and the legal predecessor, respectively, offered the full range of materials for track superstructure. 2

By letter dated 28 February 2003, the Plaintiff placed an order with the Defendant to supply brand new rails, including unloading, laying, welding and grinding, as well as all other ancillary services for the production of a gapless rail in North lot of the new O-J line for a total net price of € 7,168,000.00. The parties concluded an arbitration agreement regarding this order on 26 February 2003, in accordance with which "all disputes arising from order ###/###/## of 26 February 2003 shall be settled, excluding ordinary legal proceedings, by a court of arbitration in accordance with the respectively valid version 3

of the Arbitration Ordinance for Construction (*Schiedsgerichtsverordnung für das Bauwesen*), published by Deutscher Betonverein e.V. (*German Society for Concrete and Construction Technology*) and Deutsche Gesellschaft für Baurecht e.V. (*German Association for Construction Law*) (Reference is made to Annex B 6 regarding the details of the agreement in other respects). Furthermore, the contract also included a forum selection clause in which Munich was agreed as the place of jurisdiction.

By letter dated 25 September 2003, the Plaintiff placed a further order for the manufacture and delivery of railroad points at a total net price of € 2,564,000.00. In this regard, the parties agreed in No. 18 of the protocol that a court of arbitration would have jurisdiction in accordance with No. 17 of the subcontractor conditions. No. 17 reads: “All disputes arising from the subcontractor contract, from all additional orders, as well as all disputes related to the subcontractor contract or to the additional orders shall be decided, excluding ordinary legal proceedings, by a court of arbitration in accordance with the version of the Arbitration Ordinance for Construction (*Schiedsgerichtsverordnung für das Bauwesen*) valid on conclusion of the subcontractor contract.” Reference is made to Annex B7 with regard to the further content of the clauses. 4

The Plaintiff opines that, taking the case-law of the ECJ into consideration, the arbitration agreement does not cover compensation claims under antitrust law, such as the damages asserted here. 5

The Plaintiff moves for 6

7

1. a finding that the Defendant is obliged to compensate the Plaintiff for all and any damages incurred, plus interest at 8 percentage points per annum above the respective base rate from the time of occurrence of the damage which the Plaintiff has suffered and will suffer in the future due to cartel agreements and/or anticompetitive agreements of the Defendant in the context of public calls for tender in accordance with Section 298 of the German Criminal Code (*Strafgesetzbuch* – StGB) in connection with relation to orders that the Plaintiff placed with the Defendant from 2001 through 2011 for the delivery of materials for the track superstructure (particularly rails and points) with the order numbers ###/###/## ### #### and ###/###/## ### ####. 8

2. a finding that the Defendant is obliged to indemnify the Plaintiff with regard to the costs of the extrajudicial assertion of rights,
plus interest in the amount of 5 percentage points per annum above the respective base rate from lis pendens onwards. 9 10

The Defendant moves for 11

the action to be dismissed. 12

The Defendant raises the defence of the arbitration agreement, and furthermore objects with regard to the first motion, alleging that Dortmund Regional Court does not have jurisdiction. The Defendant furthermore asserts that there is no legitimate interest, and disputes that the orders in dispute are affected by cartel affiliation, as well as that the Plaintiff has incurred any damage. Lastly, the Defendant raises the defence of that the claims have lapsed. 13

Reference is made to the written statements that have been exchanged and to the Annexes for additional information regarding the facts of the case and of the dispute. 14

Rationale 15

The action is inadmissible in accordance with Section 1032 subsection (1) of the ZPO (*Zivilprozessordnung* – Code of Civil Procedure) because of the arbitration agreement that is in effect between the parties regarding both orders in dispute in the instant case and the objection of the arbitration agreement raised by the Defendant. 16

The parties concluded an effective arbitration agreement in No. 18 of the protocol regarding both order ###/###/## on 26 February 2003 (cf. annex B6), as well as order ###/###/##, on the jurisdiction of a court of arbitration in accordance with Sections 1029 and 1030 of the ZPO in accordance with No. 17 of the subcontractor conditions (cf. annex B7). 17

Cartel infringements and claims for damages resulting therefrom may be subject to arbitration as a matter of principle in accordance with German law. This particularly applies because the legislature has rescinded the former limitations contained in Section 91 of the GWB (*Gesetz gegen Wettbewerbsbeschränkungen* – Act against Restraints of Competition), old version (cf. Begr. RegE zum SchiedsVfG, BT-Drucks. 13/5274, p. 71; Günther, in: Festschrift Böckstiegel, 2001, 253, 257; Wagner, ZVglRWiss 114 (2015), 494, 498; Thole, ZWeR 2017, 133). 18

Contrary to the Defendant's opinion, both of the arbitration clauses in question in the instant case also include disputes concerning compensation claims under antitrust law such as those at dispute here, and thus preclude them from falling under state jurisdiction. 19

Whilst none of the clauses explicitly speaks of claims under antitrust law, an arbitration clause is subject to interpretation with regard to the underlying parties' will (in lieu of all: Thole, ZWeR 2017, 133, 134). 20

According to the established case-law, an arbitration-friendly interpretation can now be assumed, so that the broad interpretation takes priority as a matter of principle, regardless of the type of clause in question (cf. Thole ZWeR 2017, 133, 135; BGH of 10 December 1970 – II ZR 148/69, BB 1971, 369; BGH of 4 October 2001 – III ZR 281/00, NJW-RR 2002, 387, 388; cf. also Elsing, in: Festschrift Graf von Westphalen, 2010, pp. 109, 120). 21

A distinction is generally made between narrow and broad arbitration clauses when it comes to the substantive scope of arbitration clauses. Narrow clauses are limited to the claims "from the contract", or as here "from the order", and thus to contractual claims in a narrower sense, whilst according to the wording, broad arbitration clauses also include claims "in connection with the contract", or as here, "the order". The principle of arbitration-friendly interpretation is applicable to both types according to which preference is to be allotted in case of doubt to the interpretation that leads to the effectiveness and applicability of the arbitration clause, and thus favours arbitral jurisdiction (BGH of 27 February 1970 – VII ZR 68/68, BGHZ 53, 315, 320 et seq.; BGH of 9 August 2016 – I ZB 1/15, BeckRS 2016, 22

15081, mn. 17, on this EWiR 2016, 777 (Pickenpack); Elsing, in: Festschrift Graf von Westphalen, 2010, pp. 109, 120; Zöller/Geimer, ZPO, 31st ed., 2016, § 1029 mn. 78 with further references).

With this in mind, the scope of an arbitration clause is not limited to claims that are contractual in a dogmatic sense, completely regardless of whether a broad or narrow arbitration clause was used. It is for instance recognised that claims of unjust enrichment are "claims from the contract" due to the invalidity of the contract, and that they themselves can be covered by a narrow clause, in fact one that is limited to contractual claims, particularly as the arbitration clause, which constitutes an agreement that is independent from the other elements of the contract, i.e. is a separate agreement which in case of doubt remains valid even after the termination or invalidity of the main contract and gives rise to the jurisdiction of the arbitration courts for all legal disputes arising from the terminated contract (cf. BGH, Order of 9 August 2016 – I ZB 1/15 –, juris – on the entire issue Thole, ZWeR 2017, 133, 136). It is also recognised that tortious claims can be such "from the contract", whilst narrow clauses are also be to be generally understood as broad (BGH of 10 December 1970 – II ZR 148/69, BB 1971, 369, 370). 23

Since compensation claims under antitrust law are tortious in nature on the basis of Section 33 subsection (3) of the GWB, old version (Rehbinder, in: Loewenheim/Meessen/Riesenkampff, Kartellrecht, 2nd ed., 2009, § 33 GWB mn. 31; Emmerich, in: Immenga/Mestmäcker, Wettbewerbsrecht, 5th ed., 2014, § 33 GWB mn. 47), the situation cannot diverge from that encountered with normal tortious claims; in particular, there is no violation of Section 133 subsection (2) of the GWB, old version/Section 185 subsection (2) of the GWB, new version (thus, however, Fezer/Koos, in: Staudinger, Internationales Kartellprivatrecht, 2015, file number 377; rightly opposing this concerning Article 81 old version, ECJ of 1 June 1999 – C-126/97, ECLI:EU:C:1999:269, mn. 41 – Eco Swiss China Time Ltd/Benetton International NV and in general terms Trittmann/Hanefeld, in: Arbitration in Germany, 2nd ed., 2015, § 1030 ZPO mn. 19; Voit, in: Musielak, ZPO, 13th ed. 2016, § 1030 mn. 13; K. Schmidt, in: Immenga/Mestmäcker, Wettbewerbsrecht, 5th ed., 2014, § 87 GWB mn. 61, 77). 24

It must be noted that tortious claims, as opposed to claims of unjust enrichment, are typically independent from the contract, whilst claims to restitution are of necessity linked to the (void) contract. It is however recognised in the case-law (fundamental BGH of 24 November 1964 – VI ZR 187/63, NJW 1965, 300, cf. Thole, ZWeR 2017, 133, 137 with further references) that tortious claims can also be included for narrow arbitration clauses if and because the act that the Defendant is alleged to have committed coincides with the legal criteria of a breach of contract. This is also suggested inter alia by the fact that, for as long as this congruence remains, the Plaintiff is not intended to be able to escape the effect of the arbitration agreement by filing an action under tort law instead of the underlying contract which is subject to the arbitration agreement. 25

Compensation claims under antitrust law must however then also be considered to be included by a (narrow) arbitration clause as long as it is a direct reflection of a contractual claim that is based on the same act. In other words, this must therefore be affirmed as a rule in the case of a direct purchase in the cases of concurring claims because it is neither necessary nor justifiable to separate a contractual claim that automatically falls under the narrow arbitration clause from a tortious claim not falling thereunder which must be brought before an ordinary court (cf. BGH BB 1971, 369: a separation does not reflect the parties' will). In particular, there is no indication that the parties to the contract assumed 26

that contractual claims are included, but not the tortious claims mirroring them; such an understanding of the clause is also not surprising for either of the parties to the contract. A corresponding diverging understanding was also not submitted by the Plaintiff in substantiated form (cf. on this burden of evidence Thole, ZWeR 2017, 133, 135 with references).

Concurring contractual claims are also relevant in the instant case, given the identical circumstances, and/or the act of which the Defendant is accused, with a level of definiteness that is sufficient within the review of admissibility. 27

It is recognised in the literature and case-law that the damage incurred by customers as a result of less advantageous prices or conditions resulting from distorted competition can lead to a compensation claim in accordance with Section 280 of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) which coexists alongside the claim in accordance with Section 33 subsection (3) of the GWB if, as is the case here, a legal relationship exists between the cartel member and the customer (Inderst/Thomas p. 420 with further references also regarding the case-law, Kling/Thomas, Kartellrecht, 2nd ed. 2016, § 23 mn. 40; also, Kamann/Ohlhoff/Völcker-Denzel/Holm-Hadulla, Kartellverfahren und Kartellprozess, § 26 mn. 489 et seqq.). The point of reference also for such claims is always the circumstance comprising the cartel infringement as well as the purchase forming the subject-matter of the dispute (cf. Inderst/Thomas loc. cit. on the content of the claim arising from Section 280 of the Civil Code) This provides for sufficient congruence in this regard. 28

As a sidenote it can be added that claims of unjust enrichment can also simultaneously arise on the basis of the same circumstances (see on the issue as a whole Kamann/Ohlhoff/Völcker-Denzel/Holm-Hadulla, Kartellverfahren und Kartellprozess, § 26 mn. 495 et seqq.), thus also where claims “from the contract” exist within the meaning of the arbitration agreement that again relate to exactly the same circumstances and the same act on the part of the cartel member. 29

Following this, the fact that it is linked to an act that precedes the actual contract (thus, however, Vischer, Festschrift Jayne, 2004, 993, 995 on forum selection clauses, similarly, Maier, Marktoranknüpfung im internationalen Kartelldeliktsrecht, 2011, 214, 226) does not preclude nonetheless classifying them as claims “from the contract”. It must be considered in this regard that the opposite view would lead to an unsuitable distinction between, on the one hand, activities by hardcore cartels whose agreements precede the actual conclusion of contract, and on the other hand fraudulent activities on the part of a single strong company that itself commits the act which is the subject of reproach in the context of the contract. There are no evident reasons for different treatment (thus also Wurmnest, Festschrift Magnus, 2014, 567, 581 on forum selection clauses). The opposite view in the literature, furthermore, ignores the fact that claims to antitrust damages, as shown above, also very much tie in with the underlying contract because not only the conclusion, but also the performance, and even the entire supply relationship, is influenced by the excessive price generated by the cartel, as alleged by the Plaintiff. It is only the contract that in fact makes the cartel agreements able to give rise to a detrimental impact. Moreover, it is not unusual that a pre-contractual breach of duty gives rise to a contractual claim to damages. 30

Ruling out claims due to the nature of fault (thus, however, in the earlier case-law of OLG Stuttgart 2 U 136/73, BB 1974, 1270 and of OLG Hamburg on transportation law, 6 U 150/80 = VersR 1982, 341: exclusion in case of intent; referring to these decisions, a British court in the case of Provimi Ltd. vs. Roche Products Ltd. and other actions, 2003, EWHC 961, mn. 95 et seqq.) is not convincing (thus Wurmnest, Festschrift Magnus, p. 581) because it appears to be unsuitable to distinguish according to the nature or severity (the foundedness of which must first be reviewed!) of the crime in terms of admissibility (cf. now also OLG Stuttgart Court 2 U 160/90 = Iprax1992, 86 and 88 = EuZW 1991, 125; Thole ZWeR 2017, 133, 138; cf. Wurmnest, Festschrift Magnus, p. 581). 31

Although claims under antitrust law certainly align with the public interest, this can hardly serve as an exclusion criterion given that it is recognised in the case-law, firstly, that claims under antitrust law, these being claims that serve the public interest, can certainly be subject to an arbitration agreement (OLG Berlin of 18 December 1996 – Kart U 6781/95, AfP 1998, 74, 76; OLG Stuttgart EuZW 1991, 125, 126). Furthermore, general claims under tort law ultimately pursue public interests. In any case, it must not be ignored that the criterion of congruence, which is recognised in the case-law, does not distinguish according to the quality of the respective claims, but rather exclusively according to the actual link between the alleged crime and the contract. 32

This view is also not precluded by the principle of effectiveness (in this vein however manifestly Jääskinnen Opinion of 11 December 2014, C-352/13, mn. 118 et seqq., 132 – CDC regarding forum selection clauses) as the ECJ itself elaborated with regard to the derogation of places of jurisdiction (loc. cit. mn. 62); a different view does not appear to be preferable with regard to forum selection clauses (cf. on this also Kamann/Ohlhoff/Völcker-Schwarz/Harler/Schwedler § 38 mn. 12). 33

This leads to the conclusion that, certainly in the case of direct purchases, there is no reason to remove claims under antitrust law from the scope of application, even of a narrow arbitration agreement. 34

Contrary to the Plaintiff's view, this result is also not precluded by the ECJ's decision in the case of CDC vs. Evonik (ECJ of 21 May 2015 – C-352/13, ECLI:EU:C:2015:335) (but see for a contrary view, however, Harler/Weinzierl EWS 2015, 121, 122; Wagner ZVglRWiss 2015, 494, 507, and probably also Harms/Sanner/Schmidt EuZW 2015, 584, 592; as well as Steinle/Wilske/Eckart SchiedsVZ 2015, 165, 168 et seq.; in summary Kamann/Ohlhoff/Völcker-Schwarz/Harler/Schwedler § 38 mn. 13). The ECJ stressed that the applicability of forum selection clauses to compensation claims under antitrust law is contingent on it being predictable for the injured party at the time of agreeing to the clause that claims from the infringement of the ban on cartels are also covered by it. According to the ECJ, this will not be the case as a rule since at this point the injured company will not be aware of the contracting partner's involvement with the illegal cartel. Thus, compensation claims under antitrust law are only intended to be covered by those clauses which refer to disputes arising from liability in respect of an infringement of competition law; according to the Court, it is only in such cases that they lead to a derogation of a court that has international jurisdiction case (cf. ECJ of 21 May 2015 – C-352/13, ECLI:EU:C:2015:335 mn. 69 et seqq.). 35

This argument of a lack of predictability on conclusion of the arbitration agreement is already not convincing on the merits because, in the case of any other breaches of contract, fraudulent 36

misrepresentation or even initial objective impossibility (which would however definitely lead to claims from the contract), one of the parties will certainly not be aware of the respective facts at the time of conclusion of the contract and of the arbitration agreement. Furthermore, there does not seem to be a principle according to which the aspects applicable to a forum selection clause are automatically applicable to arbitration agreements.

In particular, however, it must be noted that the decision (despite the broad questions submitted by Dortmund Regional Court) does not address the arbitration agreement at all. It must be taken into account that arbitration law – unlike derogation, which is subject to an autonomous interpretation under Union law (cf. Thole, ZWeR 2017, 142) – is first and foremost genuinely national law. In accordance with Article 1 paragraph 2 (d) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the decision does not directly fall within the scope of the Regulation at all, but rather the lex fori are responsible for reviewing it (cf. also recital 12; also ECJ of 25 July 1991 – Case C-190/89, ECLI:EU:C:1991:319, mn. 18 – Marc Rich and Co. AG/Società Italiana Impianti PA), so that the jurisdiction of the ECJ for the interpretation of arbitration clauses seems questionable (Thole ZWeR 2017, 133, 141; as well as Mankowski, in: Rauscher, EuZPR/EuIPR, 4th ed., 2016, Art. 25 Brüssel Ia, mn. 212 (for forum selection clauses); ibid. EWiR 2015, 687, 688), and there is therefore no transferability whatever. 37

Given that all this is therefore applicable to the narrow clause of the first order, the same must especially be applicable to the much broader clause of the second order. 38

In the underlying dispute, however, the arbitration agreements, are thus applicable as a whole; the action is inadmissible. 39

The legal costs are based on Section 91 of the ZPO; the decision regarding provisional enforceability is based on Section 709 of the ZPO. 40