e-Competitions
Antitrust Case Laws e-Bulletin

Concurrences
Antitrust Publications & Events

Arbitration & Antitrust

Arbitration & Antitrust: Interview of James Segan QC by Claire Morel de Westgaver

AGREEMENT (NOTION), CARTEL, DAMAGES, PRICE FIXING, LICENSING, PRIVATE ENFORCEMENT, FOREWORD, MERGER (NOTION), PRELIMINARY RULING (ART. 267 TFEU), COMPETITION POLICY, GENERAL ANTITRUST

Claire Morel de Westgaver | Bryan Cave Leighton Paisner (London)
James Segan QC | Blackstone Chambers (London)

e-Competitions Special Issue Arbitration & Antitrust | 17 February 2021

In the last few decades, arbitration has been widely accepted as the most prominent dispute resolution mechanism for cross-borders disputes. The number of competition disputes being settled in this way has nonetheless only started to increase in recent years. Arguably, public policy concerns have been chief among the reasons for various government and inter-governmental bodies' reticence, in particular as stories in the press have sometimes contributed to the false notion of "secret courts" making decisions behind closed doors. This is changing. Stakeholders have begun to appreciate the benefits of arbitration and, as a result, arbitral proceedings involving competition law issues have become more frequent. The Guidance on the Use of Arbitration issued recently by the Anti-trust division of the US Department of Justice is indicative of this trend.

*For this issue of the "**e-Competition Interview Series**", Claire Morel de Westgaver (CM) a partner in the International Arbitration team at Bryan Cave Leighton Paisner invited James Segan QC (JS) of Blackstone Chambers to discuss the growing intersections between international arbitration and competition law and to share his thoughts on lessons from landmark decisions, recent developments and where these changes will take the practice over the next few years.*

C.M.D.W.: ***This year marks 30 years since the landmark decision of the US Supreme Court in Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc. and just over 20 years since the ECJ's decision in Eco Swiss China Time Ltd v Benetton International N.V. To what extent have these decisions paved the way to the arbitration of antitrust issues and what lessons do you think practitioners can learn from them?***

J.S.: The significance of *Mitsubishi [1]* is hard to overstate. When it was decided, many judges in the USA and Europe were sceptical about whether arbitration could ever deal properly with antitrust claims. The dissenting opinion of Justice Stevens spoke for many judges in expressing the view that the *"unique public interest in the enforcement of the antitrust laws"* (71) meant that antitrust disputes could never properly be dealt with by the *"rudimentary procedures"* and *"[d]espotic decision making"* of arbitrators (¶79).

The five-judge majority in *Mitsubishi*, however, forcefully swept aside these concerns, making three key points. First, Justice Blackmun confirmed that antitrust claims were arbitrable, encouraging the national courts to *"shake off the old judicial hostility to arbitration"* so that arbitral tribunals could *"take a central place in the international legal order"*. Secondly, he held that a generally worded arbitration clause could in principle cover antitrust disputes and that there was no need for the clause *"specifically [to] mention the statute giving rise to the claims that a party … seeks to arbitrate"* (an issue which, by contrast, still troubles European courts 35 years later). Thirdly, he held that the public interest in the enforcement of antitrust laws emphasised by other judges could be secured by the ability of national courts *"at the award-enforcement stage to ensure that the legitimate interest in the enforcement of antitrust laws has been addressed"* (39).

The cumulative effect of these three key holdings in *Mitsubishi* was to render properly arbitrable a substantial body of US antitrust work, with the key involvement of the national courts coming later at the "second look" enforcement stage. As I discuss later below, the US courts have since taken matters even further with the recognition in the *JLM [2]* and *American Cent [3]* cases that purely domestic antitrust matters and even horizontal price-fixing claims are likewise arbitrable. The US courts have undoubtedly led the way in enabling and promoting the arbitration of antitrust matters.

"The US courts have undoubtedly led the way in enabling and promoting the arbitration of antitrust matters."

The significance of *Eco Swiss [4]* is somewhat subtler. The subject matter of the case was much narrower than *Mitsubishi* and concerned only the "second look" at the enforcement stage. In the underlying arbitration about a licensing agreement, neither the parties nor the arbitrators had raised any issue under EU competition law at all. It was instead only at the enforcement stage that the unsuccessful party sought to raise EU competition law arguments in contending that the award was incompatible with public policy (14). The CJEU confirmed that Article 101 TFEU (then Article 85 EC) is *"a fundamental provision"* which forms part of the *"rules of public policy"* in all member states; so that national courts were *obliged* to set aside arbitration awards if they were incompatible with Article 101 (36)-(39), (41). Although the decision did not – by contrast with *Mitsubishi* – directly concern arbitrability at all, its inevitable implication was that arbitral tribunals needed to make sure that their awards were compatible with EU competition law; and was therefore an implicit endorsement of the ability of such tribunals to deal with such issues. Following *Eco Swiss*, the national courts in many current or former EU member states including France [*5*], Italy [*6*], Sweden [*7*] and the UK [*8*] have concluded that EU competition law matters are arbitrable. Indeed, there is now a wide consensus that Articles 101 and 102 are fully arbitrable. [*9*]

Perhaps the clearest lesson from *Eco Swiss*, however, is that EU courts have generally been slower and more reluctant to embrace arbitration of competition law disputes than the US courts. In the *CDC [10]* case discussed further below, the German courts in 2013 sent three questions to the CJEU about jurisdiction in a cartel case, the third of which was whether a national court faced with an action for damages under Article 101 TFEU was required to take account of *"arbitration and jurisdiction clauses contained in contracts for the supply of goods, where this has the effect of excluding the jurisdiction of the court"* (emphasis added). So even in 2013 this was regarded as open to doubt by the German courts. Although the CJEU did not address the arbitration issues at all, Advocate General Jääskinen did, and his opinion is reminiscent of the dissenting minority in *Mitsubishi* thirty years earlier. The Advocate General expressed generally negative views as to the effectiveness of arbitration as a means of resolving competition law claims, stating that there was a *"much greater"* likelihood, when a case was referred to

international arbitrators, that European competition law would simply not be applied at all (100). The reservations that motivated the minority in *Mitsubishi* have not therefore gone away in the EU, even if they have become less mainstream.

C.M.D.W.: ***This year saw the DOJ emerge victorious in the first ever arbitration of a merger enforcement action. What do you think the implications of the Novelis arbitration are and will its effects be felt in the EU from a competition law perspective? Also, do you think we are going to see more cases of this type in the future?***

J.S.: Novelis is, I think, a good advert for the efficiencies of arbitration as a means of resolving complicated legal and economic issues. It was, as I understand it, the first occasion on which the DOJ had exercised its power under the Administrative Dispute Resolution Act of 1996 to resolve a matter by arbitration. The issue was whether aluminium body sheet for cars was a relevant product market under US antitrust law. The parties chose experienced antitrust administrators and lawyers to hear the arbitration, and it seems to have been a detailed affair lasting ten days with more than a dozen fact and expert witnesses. The flexibility of arbitration, and its capacity to result in speedy justice, can be seen from the fact that the parties requested a short decision of no more than five pages within 14 days of the arbitration. Prosecutors and regulators can sometimes be naturally conservative, but this was a good example of how innovation can yield results. In terms of its wider impact, the arbitration is obviously a good example and roadmap for other regulators. The Commission has indeed, for many years, used a requirement for arbitration between stipulated parties as a condition of clearing mergers [***11***] or of granting exemptions [***12***] or accepting commitments. [***13***]

C.M.D.W.: ***The decision of the CJEU in CDC Hydrogen Peroxide SA v Evonik Degussa GmbH and Others has resulted in a great deal of interest and debate surrounding the drafting of arbitration agreements and what they may cover in respect of damages claims arising from breaches of Article 101 or 102 TFEU. What do you think is the key takeaway from this decision and do you have any tips practitioners should bear in mind when drafting arbitration agreements?***

J.S.: The key takeaway from *CDC*, and the *Apple v MJA* ***[14]*** case that followed it, is that the current state of the law within the EU on whether standard-form arbitration clauses will cover competition law disputes is arguably lacking in logic.

In *CDC* itself, the CJEU held that a standard-form exclusive jurisdiction clause will *not* cover cartel claims under Article 101 TFEU: the clause must instead *specifically* mention such claims. The CJEU held that *"a clause which abstractly refers to all disputes arising from contractual relationships"* could not extend to *"the tortious liability that one party allegedly incurred as a result of the other's participation in an unlawful cartel"* (69), because *"the undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause"* (70). This could be different, the CJEU held, if the exclusive jurisdiction clause *"refers to disputes in connection with liability incurred as a result of an infringement of competition law"* (71). (This is the opposite of the US Supreme Court's reasoning in *Mitsubishi* as explained above.) Although this point was decided under the Brussels Recast Regulation which does not apply to arbitration (see Article 1(2)(d)), the reasoning of the CJEU has obvious applicability by analogy to arbitration clauses and has been applied by national courts in that context. [***15***] So a standard, generally worded arbitration clause is unlikely to be regarded by a court within the EU as catching claims under Article 101.

"So a standard, generally worded arbitration clause is unlikely to be regarded by a court within the EU as catching claims under Article 101."

The CJEU then, however, subsequently decided in *Apple v MJA* – overruling a decision of the French Court of Cassation that had applied *CDC* ***[16]*** - that the *CDC* line of reasoning does *not* apply to claims under Article 102 TFEU, because an abuse of dominance *"cannot be regarded as surprising one of the parties"* (29). The reason for this was said by the CJEU to be that an abuse of dominant position *"can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms"* (28).

It is difficult, with respect, to reconcile the *CDC* and *Apple* decisions. Their net effect is, somewhat oddly, that a standard-form arbitration clause will cover Article 102 claims but not Article 101 claims (or at least cartel claims). It is hard to understand how it could fairly be said that a contracting party *would* be surprised that the counterparty was participating in a cartel; but would *not* be surprised that it was abusing a dominant position. Indeed, if the test is that the relevant anti-competitive conduct *"can materialise in contractual relations that an undertaking … establishes and by means of contractual terms"* (*Apple v MJA* at (28)), then it is hard to see how that test would not be satisfied by an Article 101 claim concerning an allegedly cartelised price included in a sale agreement as in *CDC*. The logical solution would surely have been that both, or neither, of these forms of anti-competitive behaviour would be regarded as coming within a standard-form arbitration or jurisdiction clause. For my part, the "one stop shop" presumption should have prevailed and both forms should have been regarded as falling within an arbitration clause. As the UK Supreme Court has recently emphasised, the "one stop shop" presumption *"…is not a parochial approach but one which … has been recognised by (amongst other foreign courts) the German Federal Supreme Court (Bundesgerichtshof), the Federal Court of Australia and the United States Supreme Court and … "is now firmly embedded as part of the law of international commerce""*. [***17***]

Be that as it may, the sensible advice for practitioners in light of *CDC* remains that if a party wishes an arbitration clause to be construed as covering claims under EU competition law, the safest course by some margin is to reference such claims explicitly in the clause. I have suggested an amended form of the UNCITRAL model arbitration clause in an article I have published elsewhere. [***18***]

C.M.D.W.: ***In Microsoft Mobile OY (Ltd) v Sony Europe Limited & Ors, the English Court found that a dispute arising out of a cartel damages claim was covered by the parties' arbitration agreement pursuant to a good faith and pricing clause. What are the implications of this decision for follow-on claims that you have seen in practice?***

J.S.: The *Microsoft Mobile* ***[19]*** decision involved what I have called the "English contractual workaround" for the *CDC* reasoning. Even before *CDC*, the courts of England and Wales had held in *Ryanair* ***[20]*** that a standard form exclusive jurisdiction clause in a contract for the sale of goods would not catch an Article 101 claim by the purchaser against the seller on the basis that the price was a cartelised price. The reasoning in *Ryanair* was very similar to the later reasoning of the CJEU in *CDC*, with the *Ryanair* court focussing on whether the parties to the jurisdiction clause would be *"surprised"* to learn an Article 101 claim fell within the clause.

The courts in England and Wales therefore adopted a different approach from the US court in *JLM*, as discussed above, in which the Second Circuit held that an arbitration clause in nearly 80 shipping contracts was apt to cover a claim that the four counterparties had, by reason of *"a conspiracy formed independently of the specific contractual relations"*, charged a cartelised price to the plaintiff.

In order to get around the *Ryanair/CDC* reasoning, the defendant supplier in *Microsoft Mobile*, Sony, which was accused of charging a cartelised price for batteries, argued that a standard-form arbitration clause in the contracts of supply caught the Article 101 claim because the same facts would *also* have given rise to contractual claims for breach by Sony of its obligations (a) to negotiate prices in good faith and (b) to alert Microsoft to events that might affect Sony's ability to meet its obligations under the agreement. The English High Court accepted this reasoning, even though Microsoft had not pleaded any such contractual claims.

The *Microsoft Mobile* decision has, since it was handed down in February 2017, been cited frequently in the English courts, but mostly for the general proposition that a party cannot circumvent what would otherwise be the effect of a jurisdiction (or arbitration) clause by *"by simply omitting to plead a pleadable claim"*. [*21*] The specific implications for competition law claims have not been further discussed in the English courts, and the decision does not appear in itself to have led to any noticeable uptick in arbitration of competition law claims in practice.

C.M.D.W: ***As stakeholders take time to digest the Microsoft Mobile OY decision and contract accordingly, do you think we will see an up-tick in follow-on claims in the coming years being submitted to arbitration?***

J.S.: In principle, the *Microsoft Mobile* decision ought to lead to the arbitration of more competition law claims in the future. The type of clauses that were found to make a decisive difference in that case (by generating viable, albeit un-pleaded, contractual claims and thus sufficient nexus) are fairly standard, even boilerplate features of long-term supply agreements and so if correct, *Microsoft Mobile* would lead to the conclusion that a good deal of claims which would not ordinarily qualify under *CDC* ought nevertheless to be arbitrated. In practice, however, this does not seem, as yet, to have come about, with the bulk of competition work continuing to be litigated in the Courts.

C.M.D.W.: ***Do you think that Brexit is likely to have an impact on follow-on claims being litigated in the UK and could it lead to a greater number of these kinds of claims being settled via arbitration?***

J.S.: A great deal naturally depends on what exactly is negotiated with the EU. As things stand, however, there will be a number of substantive legal changes after 31 December 2020 that will make the UK simultaneously both more and less attractive as a venue for litigating private competition law damages claims.

"As things stand, however, there will be a number of substantive legal changes after 31 December 2020 that will make the UK simultaneously both more and less attractive as a venue for litigating private competition law damages claims."

Amongst the factors that might make the UK less attractive, I would highlight four. First, the substantive competition law of the UK will become progressively less similar to that within the EU, making the UK feel a less natural venue for claims under EU competition law. Under the Competition (Amendment etc) (EU Exit) Regulations 2019, Articles 101 and 102 TFEU will cease to form part of UK law, and will therefore technically become foreign law. Domestic competition law in the Competition Act 1998, which currently mirrors EU law precisely, is likely gradually to diverge as the UK courts are empowered to depart from pre-existing competition law wherever

"appropriate" in accordance with the new section 60 of the 1998 Act. Secondly, future Commission decisions will cease to be binding on the question of infringement of EU competition law, as a result of amendments to section 58A of the 1998 Act, albeit they will of course remain persuasive. Thirdly, there will be important changes to the regime governing the portability of UK judgments within the EU. The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations repeal the entire Brussels Regime, including the Brussels Recast Regulation. The UK is currently trying to rejoin the Lugano Convention but it is not yet known how that application will fare. Fourthly, there will also be no ability to make references to the CJEU, and so UK courts will simply have to take a view on relevant EU law issues for themselves.

It is by no means all bad news, however. On the upside, the UK will retain many of the key advantages which have already drawn so much competition damages work to the UK, in particular the disclosure regime and the large pool of specialised lawyers and experts practising here, especially in London. Moreover, Brexit will revive various litigation options which have not been open for a good number of years. Perhaps most significantly from an arbitration perspective, the UK courts will be able again, in principle, to grant anti-suit injunctions to restrain actions commenced within the EU, in favour of arbitration or litigation in another forum, an option which had not been open since *Turner v Grovit [22]* and *West Tankers*. [***23***] Moreover, the UK courts will no longer in principle be obliged to grant a *Masterfoods [24]* stay where there is an appeal at EU level, opening the possibility of using litigation in the UK as a form of "English rocket" to advance a dispute even where the General Court or CJEU are due to hear appeals against an infringement decision, an option which may prove attractive and less risky than might otherwise appear given the relatively low success rate of such appeals at EU level.

"Moreover, Brexit will revive various litigation options which have not been open for a good number of years."

C.M.D.W: ***Do you have any thoughts on the Micula v Romania litigation, the termination of intra-EU BITs and how either might affect the future of arbitrations involving claims with a competition law element?***

J.S.: The *Micula* litigation [***25***], and the *Achmea* decision that resulted in the termination of inter-EU BITs, demonstrate a marked hostility on the part of the European Commission and European Courts to the operation of any decision-making structure within the European Union bearing on intra-EU trade which is not under the ultimate control of the EU institutions.

The natural starting point is with the decision of the Grand Chamber of the CJEU in *Achmea*. That case concerned, as is well known, an arbitral award under a bilateral investment treaty between the Netherlands and Slovakia. The treaty provided, in a fairly standard way, for binding arbitration of any disputes *"between one contracting party and an investor of the other contracting party concerning an investment of the latter"* by an arbitral tribunal applying UNCITRAL rules. The CJEU held that such provision was incompatible with EU law, because it was one *"…by which member states agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second sub-paragraph of article 19(1) EU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law"* (55). This was different from ordinary commercial arbitrations which *"originate in the freely expressed wishes of the parties"* (54).

The wider implications of this decision were obvious: member states of the EU could not continue to have conventional BITs between themselves, because such BITs generally depend on the establishment of an arbitral mechanism to resolve disputes; indeed that is the essential underpinning of a BIT. The CJEU had, with the stroke of a pen, outlawed an entire category of arbitrations within the EU. In implementation of the decision, 23 EU member states came together in May 2020 and concluded a multilateral treaty terminating the BITs between them.

It was a BIT which also gave rise to the *Micula* litigation, which has become a somewhat notorious saga still being played out at EU and national level in a number of different countries. As is well known, in December 2013 an International Centre for Settlement of Investment Disputes ("ICSID") arbitral tribunal awarded the Micula brothers approximately £150 million against Romania on account of the latter's termination of investment incentives contrary to the principles of fair and equitable treatment, legitimate expectations and transparency. The European Commission took the view that any payment of that Award by Romania would amount to an unlawful state aid; and issued a decision to that effect in March 2015. That decision was annulled by the General Court in June 2019, but on the limited basis that the Commission had purported retroactively to apply its powers to events pre-dating Romania's accession to the EU.

The Commission has lodged an appeal with the CJEU and its decision remains outstanding. In the meantime, the Micula brothers and their companies are pursuing enforcement proceedings in the USA, France, Belgium, Luxembourg, Sweden and the UK. Most of those countries have so far stayed any enforcement action pending the decision of the CJEU. The UK Supreme Court has recently, however, lifted any stay on enforcement in the UK, holding that the UK's obligation under Article 54 of the ICSID Convention to enforce the Award was an obligation owed to all contracting states and pre-dated the UK's accession to the EU, with the result that the obligation is, by reason of Article 351 TFEU, unaffected by any obligation of the UK arising from the European treaties. Romania is therefore currently in an impossible situation, with a national court in the UK permitting enforcement of the Award but the European Commission taking the view that any steps by Romania to satisfy it would be an unlawful state aid; and pursuing an appeal to the CJEU to that effect.

Taking the *Achmea* and *Micula* litigation together, it does seem to be the case that despite all of the developments discussed in my earlier answers, there remains a lingering suspicion at EU level of arbitration as an effective means of enforcing EU law in relation to the internal market. The CJEU is prepared to tolerate arbitration as a means of dispute resolution between private parties applying EU law, but as soon as a member state is involved, the analysis changes. In most competition cases, this will not of course be an issue, but in any cases involving a state party then the analysis may be different.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[1] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985).

[2] *JLM Indus. Inc. v. Stolt-Nielsen SA*, 387 F. 3d 163 (2nd. Cir. 2004).

[3] *American Cent. E. Texas Gas Co. v. Union Pac.*, 93 Fed.Appx. 1 (5th Cir. 2004).

[4] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International BV* [1999] ECR I-3079.

[5] *Jacquetin v Intercaves* (CA Paris, 20 March 2008, RG 06/06860).

[6] *Telecolor SpA v Technocolour SpA* (Court of Cassation, 21 August 1996).

[7] *Systembolaget / The Absolut Company* (Swedish Supreme Court, 17 June 2015, T 5767-13) - covered in ***Viktor Wahlqvist***, *The Swedish Supreme Court rejects a claim for annulment of an arbitration award without assessing the formal matter of the legislation on which the award was based (Systembolaget / Absolut), 17 June 2015, e-Competitions June 2015, Art. N° 74670* ; ***Simen M. Klevstrand***, *The Swedish Supreme Court discusses Eco Swiss doctrine (Systembolaget / The Absolut Company), 17 June 2015, e-Competitions June 2015, Art. N° 75447.*

[8] *ET Plus SA v Welter* (English High Court, [2006] I.L.Pr. 18).

[9] Geradin and Villano, 'Arbitrability of EU Competition Law-Cased Claims: Where Do We Stand after the CDC Hydrogen Peroxide Case?' (11 October 2016).

[10] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and others (Evonik Degussa GmbH and others intervening)* [2015] QB 906 - covered in ***Daniel Cashman***, *The EU Court of Justice renders its first judgement on jurisdiction in competition damages actions (Cartel Damage Claims (CDC) Hydrogen Peroxide), 21 May 2015, e-Competitions May 2015, Art. N° 75683.*

[11] See e.g. Blanke, "The Use of Arbitration in EC Merger Control, Latest Developments" 28 ECLR 673 (2007).

[12] See e.g. *British Interactive Broadcasting* 99/781/EC - covered in ***Andrés Font Galarza***, *The EU Commission exempts under art. 85(3) of the EC Treaty the creation of a joint venture in the digital interactive television services (British Interactive Broadcasting), 15 September 1999, e-Competitions September 1999, Art. N° 39319.*

[13] See e.g. *German Bundesliga* 2005/396/EC - covered in ***Stefan Wilbert***, *The EU Commission adopts its first commitment decision pursuant to Article 9 of Regulation 1/2003 concerning joint selling of German football media rights (Bundesliga), 19 January 2005, e-Competitions January 2005, Art. N° 36856.*

[14] Case C-595/17 *Apple Sales International v MJA* [2019] 1 WLR 2705 - covered in ***Jean-Yves Garaud, Aren Goldsmith, Jonathan Kelly, Paul Stuart, Romina Polley, Rüdiger Harms***, *The EU Court of Justice rules that jurisdiction clauses subject to EU law may be enforced by member states in actions for damages for abuse of dominance (Apple / MJA), 24 October 2018, e-Competitions October 2018, Art. N° 89982* ; ***Jacques Buhart, Jacob Grierson, David Henry, Nisrin Abelin, Boris Uphoff***, *The EU Court of Justice holds that a jurisdiction clause is not excluded when it does not expressly refer to disputes relating to liability resulting from an abuse of dominant position (Apple / MJA), 24 October 2018, e-Competitions October 2018, Art. N° 88784* ; ***Simon Troch, Maria Turbasa***, *The EU Court of Justice rules on the applicability of contractual jurisdiction clauses in the context of abuse of a dominant position, ruling that some competition law violations are more contract related than others (Apple / MJA), 24 October 2018, e-Competitions October 2018, Art. N° 90707.*

[15] See, for example, in the Netherlands (*Kemira Chemicals OY v CDC Project 13 SA*, 21 July 2015, Court of Amsterdam).

[16] *MJA v Apple Sales International* [2016] I.L.Pr. 13.

[17] *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at (107).

[18] 'Arbitration clauses and competition law', Oxford Journal of European Competition Law, Volume 9, Issue 7, 1 September 2018, see p430.

[19] *Microsoft Mobile Oy v Sony* [2018] 1 All ER (Comm) 419.

[20] *Ryanair v Esso Italiana Srl* [2015] 1 All ER (Comm) 152.

[21] See e.g. *Macquarie Global Infrastructure Funds 2 S.a.r.l. (in liquidation) v Fernando Rodina Gonzalez, Amitjugoett AB* [2020] EWHC 2123 (Comm) at (53).

[22] Case C-159/02 *Turner v Grovit* [2004] ECR I – 3565.

[23] Case C-185/07 *Allianz SpA v West Tankers Inc* [2009] 1 A.C. 1138; *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] 2 All E.R. (Comm) 1009.

[24] C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369.

[25] There are many decisions, but see in particular the General Court (Joined Cases T-624/15, T-694/15 and T-704/15 *European Food SA v Commission* EU:T:2019:423) - covered in ***Markus Wellinger***, *The EU General Court annuls a State aid decision of the Commission concerning the food production sector in Romania (Micula), 18 June 2019, e-Competitions June 2019, Art. N° 91040* ; ***Athanase Popov***, *The EU General Court annuls the Commission's State aid decision on the basis that it lacked jurisdiction to implement EU law in situation where all relevant facts have taken place before Romania's accession to the EU (Micula), 18 June 2019, e-Competitions June 2019, Art. N° 94141* ; ***Jacques Derenne, Dimitris Vallindas***, *The EU General Court annuls the Commission's decision for lack of jurisdiction of the Commission on the State aid matter (Micula), 18 June 2019, e-Competitions June 2019, Art. N° 90972* and UK Supreme Court (*Micula v Romania* [2020] 1 WLR 1033)