33. As the Advocate General observed in point 83 of his Opinion, the existence or absence of a prior finding by a competition authority of an infringement of competition rules has no connection with the considerations that must prevail when determining whether a jurisdiction clause is to apply in an action for damages allegedly suffered as a result of an infringement of competition rules.

34. In the context of Article 23 of Regulation No. 44/2001, a distinction dependent on the existence or absence of a prior finding by a competition authority of an infringement of competition law would also be contrary to the objective of foreseeability which underpins that provision.

35. Moreover, in accordance with the Court's settled case-law (see, to that effect, judgment of 13 July 2006, *Manfredi and Others*, C 295/04 to C 298/04, EU:C:2006:461, paragraph 60 and the case-law cited), and as mentioned in recitals 3, 12 and 13 of 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* 2014 L 349, p. 1), Articles 101 and 102 TFEU have direct effect in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. It follows that the right of any person that considers himself or herself prejudiced by an infringement of competition law rules to seek compensation for the harm suffered is independent of the prior finding of such an infringement by a competition authority.

36. In the light of the foregoing, the answer to the third question is that Article 23 of Regulation No. 44/2001 must be interpreted as meaning that it is not a prerequisite for the application of a jurisdiction clause, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, that there be a finding of an infringement of competition law by a national or European authority.

Note

Private Enforcement of EU Competition Law and the Relevance of Choice of Court Agreements

Peter Mankowski[1]

I. THE CASE

The facts of the *Apple* case[2] can be summarised very briefly: Apple Sales International, a company established under Irish law, on 20 December 2005 entered into a contract with eBizcuss recognising the latter as an authorised reseller of Apple products. eBizcuss undertook to semi-exclusively distribute its contractual partner's products. The jurisdiction clause in their contract read: "This Agreement and the corresponding relationship between the parties shall be governed by and construed in accordance with the laws of the Republic of Ireland and the parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple reserves the right to institute proceedings against Reseller in the courts having jurisdiction in the place where Reseller has its seat or in any jurisdiction where a harm to Apple is occurring." Later-on, in April 2012, eBizcuss sued Apple Sales International, its mother company Apple Inc. and Apple Retail France in Paris for damages due to acts of unfair competition and abuse of a dominant position. Apple Sales International raised the objection of lack of jurisdiction based on the derogatory effect of the jurisdiction clause. The Tribunal de commerce de Paris and the Cour d'Appel de Paris upheld this. The Cour de Cassation on further appeal squashed it[3]. After a referral back to the Cour d'appel de Versailles the appeal of eBizcuss was allowed and the case was returned to the Tribunal de commerce de Paris. Against this the three Apple companies appealed in turn[4]. The Cour de cassation, seised for a second time, referred questions for a preliminary ruling to the CJEU which touch upon the relation between Article 23 Brussels I Regulation and Article 102 TFEU[5]. The CJEU decided after hearing A-G WAHL[6]. It cited at length from its preceding judgment in *CDC Hydrogen Peroxide*[7]. In the result, the CJEU extended *CDC Hydrogen Peroxide* to Article 102

1. Universität Hamburg.
2. CJEU 24 October 2018 – Case C-595/17, ECLI:EU:C:2018:854 – *Apple Sales International v. eBizcuss.com* (hitherto cited as: *Apple*).
3. Cass. (1re civ.) D. 2015, 811 = JCP G 2015, 600 note L. D'AVOUT; Cass. (1re civ.) D 2015, 2082 = JCP G 2015, 1123 note F. MAILHÉ = Petites affiches n° 234, 24 novembre 205, 8 note V. LEGRAND = Clunet 143 (2016), 929 note C. KLEINER; further references may be found in *L. Usunier,* "Valse-hésitation à la Cour de cassation à propos du sort des clauses attributives de juridiction dissymétriques", *RTD civ.* 2015, 844.
4. Versailles Procédures 2017 comm. 7 critical note C. NOURISSAT.
5. Cass. (1re civ.) CCC 2017 comm. 247 note N. MATHEY = Resp. civ. ass. 2018 comm. 38 note N. CIRON.
6. A-G WAHL, Opinion of 5 July 2018 in Case C-595/17, ECLI:EU:C:2018:541.
7. CJEU 21 May 2015, C-352/13, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA / Akzo Nobel NV*, ECLI:EU:C:2015:335.

TFEU[8]. Whilst recognising the differences between Article 101 TFEU and Article 102 TFEU[9], it regarded taking account of a jurisdiction clause covering "the corresponding relationship", as not surprising one of the parties in the context of claims based on Article 102 TFEU[10]. Furthermore, the CJEU denied any necessity of a previous finding of a an infringement of competition law by a national or European authority[11]. It based its finding in this regard on the direct effect of Articles 101, 102 TFEU in particular[12]. A different result was also held to undermine the objective of foreseeability which underpins Article 23 Brussels I Regulation[13].

II. BACKGROUND: THE RISE OF PRIVATE ENFORCEMENT IN COMPETITION LAW

Private enforcement has become the dish of the day in modern competition law, with the EU taking the lead. This prompts severe and fundamental consequences. In particular, now the civil[14] courts are in charge of many relevant court cases. The procedures before them are subject to civil procedural law. Add to this a cross-border dimension (as it so often occurs in competition cases), and one will readily enter into the realm of the Brussels I*bis* Regulation. International jurisdiction thus has gained imminent prominence. Whereas in the past special jurisdiction by virtue of Articles 7, pt. 2 Brussels I*bis* Regulation and 5, pt. 3 Brussels I Regulation/Lugano Convention 2007 (torts) or Articles 8, pt. 1 Brussels I*bis* Regulation and 6, pt. 1 Brussels I Regulation/Lugano Convention 2007 (multiple defendants) has been the protagonist and has absorbed the focus of attention[15], nowadays Articles 25 Brussels I*bis* Regulation and 23 Lugano Convention 2007 on choice of court agreements gain ever more importance[16]. This cannot be surprising. Choice of court agreements, or in other terminology: jurisdiction clauses, simply are the primary device for contractually regulating jurisdictional risks[17] and the very option legal advisors and internal legal departments turn to. Insofar as they reach and as they are valid, they allow parties to execute risk and litigation management[18]. General jurisdiction and all kinds of special jurisdiction are at the parties' disposition and must give way to a valid jurisdiction clause wherever the latter is operable[19]. A valid jurisdiction clause reduces and severely curtails the prospective plaintiff's opportunities for

8. *Apple*, paras. 21-27.
9. *Apple*, para. 28.
10. *Apple*, para. 29.
11. *Apple*, para. 36.
12. *Apple*, para. 35.
13. *Apple*, para. 34.
14. "Civil" is to be understood in a broad sense here, including e.g. (pre-Brexit) the CAT in the United Kingdom.
15. E.g. J. BASEDOW AND C. HEINZE,"Kartellrechtliche Schadensersatzklagen im europäischen Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVO)" in *Festschrift für Wernhard Möschel*, Baden-Baden, 2011, p. 63; D.-P. TZAKAS, *Die Haftung für Wettbewerbsrechtsverstöße im internationalen Rechtsverkehr*, München, 2011, p. 100-131; M. DANOV, *Jurisdiction and judgments in relation to EU competition law claims*, Oxford-Portland, 2011, pp. 87-104; *ID.*, "Jurisdiction in cross-border EU competition law claims: Some specific issues requiring specific solutions" in M. DANOV, F. BECKER and P. BEAUMONT (eds.), *Cross border EU competition law actions*, Oxford-Portland, 2013, p. 167; Vilà Costa, "How to Apply Artt. 5 (1) and (5) (3) of the Brussels I Regulation to Private Enforcement of Competition Law: A Coherent Approach" in J. BASEDOW, S. FRANCQ and L. IDOT (eds.), *International Antitrust Litigation*, Oxford-Portland, 2012, p. 15; J. BASEDOW,"International Cartels and the Place of Acting under Article (5) (3) of the Brussels I Regulation" in J. BASEDOW, S. FRANCQ and L. IDOT (eds.), *International Antitrust Litigation*, Oxford-Portland, 2012, p. 31; M. WILDERSPIN,"Jurisdiction Issues: Brussels I Regulation Artt. 6 (1), 23 , 27 and 28 in Antitrust Litigation" in J. BASEDOW, S. FRANCQ and L. IDOT (eds.), *International Antitrust Litigation*, Oxford-Portland, 2012, p. 41; P. MANKOWSKI, "Der europäische Gerichtsstand des Tatortes aus Art. 5 Nr. 3 EuGVVO bei Schadensersatzklagen wegen Kartelldelikten", *WuW* 2012, 797; *ID.*, "Der europäische Gerichtsstand der Streitgenossenschaft aus Art. 6 Nr. 1 EuGVVO bei Schadensersatzklagen wegen Kartelldelikten", *WuW* 2012, 947; W. WURMNEST,"Internationale Zuständigkeit und anwendbares Recht bei grenzüberschreitenden Kartelldelikten", *EuZW* 2012, 933; *ID.*, "Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie", *NZKart* 2017, 2; W.-H. ROTH,"Der europäische Deliktsgerichtsstand in Kartellstreitigkeiten" in *Festschrift für Eberhard Schilken*, München, 2015, p. 427. Comprehensively L. STAMMWITZ, *Internationale Zuständigkeit bei grenzüberschreitenden Kartelldelikten*, 2018, p. 129-389.
16. In particular W. WURMNEST, "Die Einbeziehung kartellrechtlicher Ansprüche in Gerichtsstandsvereinbarungen" in *Festschrift für Ulrich Magnus*, 2014, p. 567; *ID.*, "Gerichtsstandsvereinbarungen im grenzüberschreitenden Kartellprozess" in M. NIETSCH and M. WELLER (eds.), *Private Enforcement*, Frankfurt.a.M., 2014, p. 75.
17. A-G M. SZPUNAR, Opinion of 7 April 2016 in Case C-222/15, ECLI:EU:C:2016:224 Rn 29; R. THODE, "Case note", *jurisPR-PrivBauR*, 5/2012 Anm 1 sub A; P. MANKOWSKI in T. RAUSCHER, *EuZPR/EuIPR*, vol. I, 4th ed., Köln, 2015, Art. 25 Brüssel Ia-VO note 1; U. MAGNUS in U. MAGNUS and P. MANKOWSKI, *Brussels Ibis Regulation*, Köln, 2016, Art. 25 Brussels I*bis* Regulation note 5.
18. See only E. BRÖDERMANN,"Zustandekommen von Rechtswahl-, Gerichtsstands- und Schiedsvereinbarungen – Rechtssoziologische Notizen" in *Festschrift für Dieter Martiny*, Tübingen, 2014, p. 1045, 1059-1060; P. MANKOWSKI in T. RAUSCHER, *EuZPR/EuIPR*, vol. I, 4th ed., Köln, 2015, Art. 25 Brüssel Ia-VO note 1 with further references.
19. See only ECJ 14 December 1976, Case 24/76, *Estasis Salotti di Colzani Aimo and Gianmario Colzani Snc / RÜWA Polstereimaschinen GmbH*, *ECR* 1976, 1831, 1841 para. 7; CJEU 21 May 2015, C-352/13, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA / Akzo Nobel NV*, ECLI:EU:C:2015:335, paras. 59, 61; CJEU 28 June 2017, C-436/16, *Georgios Leventis and Nikolas Vafeias / Malcon Navigation Co. Ltd. and Brave Bulk Transport Ltd.*, ECLI:EU:C:2017:497, paras. 39 *et seq.*; CJEU 8 March 2018, C-64/17, *Saey Home & Garden NV v. SA / Lusavouga-Máquinas e Accessórios Industriais SA*, ECLI:EU:C:2018:173, para. 24; A-G M. SZPUNAR, Opinion of 7 April 2016 in Case C-222/15, ECLI:EU:C:2016:224, para. 29; Cass. (1re civ.) CCC 2017 comm. 247 note N. MATHEY; Gent *RW* 2016-17, 543, 544; LG Dortmund, *WuW* 2013, 872; W.-H. ROTH, "Internationale Zuständigkeit bei Kartelldeliktsklagen", *IPRax* 2016, 318, 325.

forum shopping (as all kind of special jurisdictions permit it[20])[21]. The prospective defendant is very much interested in concentrating and monopolizing a possible lawsuit in a forum that he deems favourable to his stance or in a location that makes litigation more cumbersome to the claimant. Switching over to private enforcement as one means of enforcement does not only influence the parties' respective tactics after proceedings have commenced[22] but at an even earlier stage their strategies, their litigation planning and their risk management.

In competition law cases, two different aspects have to be distinguished: first the scope and second the validity of jurisdiction clauses. In *CDC Hydrogen Peroxide*[23], the CJEU laid the fundament. Now the second in line, *Apple*, addresses some consequential issues and fills some gaps left by *CDC Hydrogen Peroxide*[24]. A "*bloc de jurisprudence*"[25] is certainly building. Yet it is a safe guess that this will not be the last time that the CJEU will have to address consequential issues. *Apple* had to be decided still under the aegis of Article 23 Brussels I Regulation. The advent of Article 25 Brussels I*bis* Regulation has brought about quite some changes in the European law as to jurisdiction clauses. These changes need consideration once cases fall within the temporal scope[26] of Article 25 Brussels I*bis* Regulation[27].

III. Scope of jurisdiction clauses: Coverage of competition law claims as a matter of interpretation

1. General considerations

The scope and reach of a jurisdiction clause is a matter of interpretation of that very jurisdiction clause. Interpretation of a given jurisdiction clause has to take place before the validity of that clause can be assessed for only interpretation asserts the proper content which in the second step is subjected to scrutiny[28]. If by way of interpretation a jurisdiction clause has to be understood so restrictively as not to cover competition law claims, it would be futile and inefficient to indulge into a check of its validity which in turn would have as a precondition that the clause would cover competition law claims[29]. Yet even before reaching interpretation, consensus might need to be checked[30]. It would be futile to enquire about the content of a clause where the clause is not agreed upon at all. This results in a three-tier agenda: first, consensus; second, interpretation; third, validity.

2. Wording issues of jurisdiction clauses in relation to EU competition law

The respective width of a given jurisdiction clause and whether it also covers competition law claims, is a matter of interpretation of the jurisdiction agreement to be answered in accordance with the law governing the jurisdiction agreement[31], at least insofar as an autonomous interpretation is not feasible[32] and as no case law by the ECJ provides guidelines[33]. The standards established by EU law indubitably are the starting point for hierarchical reasons. Yet interpretation of contract clauses as such is not a task for the CJEU, but for the national judge. To expressly and unequivocally name and include competition law cases certainly is the most commendable way of drafting jurisdiction clauses for it provides the relatively opti-

20. In particular A. STADLER, "Schadensersatzklagen im Kartellrecht: Forum shopping welcome!", *JZ* 2015, 1138, 1148.
21. W. WURMNEST, *NZKart* 2017, 2, 8.
22. M. DANOV and F. BECKER, "Conclusion: Cross-Border Aspects of EU Competition Law and Litigants' Strategies" in M. DANOV, F. BECKER and P. BEAUMONT (eds.), *Cross-Border EU Competition Law Actions*, Oxford-Portland, 2013, p. 135, 143.
23. CJEU 21 May 2015, C-352/13, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA / Akzo Nobel NV*, ECLI:EU:C:2015:335.
24. A-G WAHL, Opinion of 5 July 2018 in Case C-595/17, ECLI:EU:C:2018:541, para. 58.
25. On this concept, B. BERTRAND,"Les blocs de jurisprudence", *RTD eur.* 2012, 741; T. AZZI, "La Cour de justice et le droit international privé ou l'art de dire parfois tout et son contraire", *Mélanges Bernard Audit*, Paris, 2014, p. 43, 53-54.
26. As defined by Art. 66 Brussels I*bis* Regulation.
27. P. MANKOWSKI, Case note, *JZ* 2019, 141 at 141.
28. To the same avail N.C. ELSNER,"Urteilsbesprechung: EuGH C-595/17 und die Parallelproblematik in der Schiedsgerichtsbarkeit", *StudZR* 2019, 36, 38.
29. P. MANKOWSKI, *JZ* 2019, 141 at 141.
30. To a similar avail, C. NOURISSAT,"Opposabilité d'une clause attributive de juridiction en cas d'action fondée sur le droit des pratiques anticoncurrentielles", *JCP* G 2019, 648, 651-652.
31. See only B. RODGER, "EU Competition Law and Private International Law: a Developing Relationship" in I. LIANOS and D. GERADIN (eds.), *Handbook on European Competition Law I: Enforcement and Procedure*, Cheltenham-Northampton, MA, 2013, p. 467, 476; W. WURMNEST in *Festschrift für Ulrich Magnus*, Köln, 2014, p. 567, 574; A. PATO, "Collective Redress for Cartel Damage Claims in the EU after CDC v Akzo Nobel NV and Others", *YbPIL* 17, 2015/16, 491, 499 *et seq.*; G. KODEK, "Gerichtsstandsvereinbarungen im Kartellrecht" in D. CZERNICH and R. GEIMER, *Streitbeilegungsklauseln im internationalen Vertragsrecht*, München, 2017, Teil 2 A (2) 1 para. 13; *L. Stammwitz, Internationale Zuständigkeit bei grenzüberschreitenden Kartelldelikten*, Baden-Baden, 2018, p. 411 *et seq.*
32. U. MAGNUS in U. MAGNUS and P. MANKOWSKI, *Brussels Ibis Regulation*, Köln, 2016, Art. 25 Brussels I*bis* Regulation, para. 141-143.
33. B. HESS, "Die Auslegung kollidierender Gerichtsstandsklauseln im europäischen Zivilprozessrecht" in *Festschrift für Hanns Prütting*, 2018, p. 337, 339 *et seq.*, referring to ECJ 21 May 2015, C-352/13, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA / Akzo Nobel NV*, ECLI:EU:C:2015:335, paras. 67-70.

mal clarity; on the other hand, such express inclusion is not a necessary requirement[34]. Generally, those who are in charge of drafting contracts are well advised to avoid the possible pitfalls and surprises of contract interpretation[35]. They should make their desires as express as possible. A presumption in favour of a rational preference for one-stop adjudication might be a starting point[36], but cannot be more than just that: a starting point the more so since such favour might be unilateral on the proposing party's side. Anglo-Saxon contracting practice might be cumbersome and cost intensive but it at least reflects this approach. However, even (or rather: in particular) English language contracts more often than not raise the question about the meaning of certain prepositions. The richness of linguistic variations can be breathtaking[37] and might rapidly lead back into the dreaded realm of contract interpretation. A rough and ready answer fitting all occasions and all clauses is not at hand[38]. Clauses covering all claims *in connection with the contract*, are sufficient to comprise competition law claims *inter partes*[39], whereas clauses covering only claims *arising out of the contract* do not reach that aim[40]. Insofar the distinction is between bilateral party relations and does not distinguish between different claims under competition law[41]. *A minore ad maius*, general and generic jurisdiction clauses without further specifications are not precise enough[42]. On the other hand, the said delimitation evidences a compromise[43]: Competition law claims between private parties are generally open to party autonomy and jurisdiction if the latter are either precise or wide enough and carry the required degree of certainty[44]. Competition law claims are for suppliers and customers who fell victims to the cartel, closely interwoven with their respective contractual relations that have been manipulated by the cartelists[45]. Insofar, suppliers or customers cannot invoke to be surprised because allegedly the influence of a possible cartel was to remote to be contemplated[46], the more where compliance clauses (effectively submitting the respective supplier or customer under guidelines issued by the cartelant) have been negotiated[47].

3. Distinguishing between claims arising under Article 101 TFEU and claims arising under Article 102 TFEU?

EU competition law contains two different rules addressing variedly different scenarios respectively, in Article 101 TFEU and Article 102 TFEU. In *Apple*, the CJEU is not unambiguously clear on whether under the auspices of

34. CJEU, *Apple*, para. 25. But *cf.* to the opposite avail, M. WELLER and J. WÄSCHLE, "Case note", *RIW* 2015, 603, 605; R. HARMS, J.A. SANNER and J. SCHMIDT, "Case note", *EuZW* 2015, 584, 592; O. GEISS and H. DANIEL, "Cartel Damages Claims Hydrogen peroxide SA v. Akzo Nobel NV and other – A summary and critique of the judgment of the European Court of Justice of 16 May 2015", 2015, 36, *ECLR* 430, 435; A. STADLER, *JZ* 2015, 1138, 1149 and for cartels C. KRÜGER and M. SEEGERS, "Gerichtsstands- und Schiedsklauseln bei Schadensersatz in Missbrauchs- und Kartellfällen im Lichte des Apple-Urteils des EuGH", *WuW* 2019, 170, 171.

35. A. SATTLER, "Case note", *IWRZ* 2019, 138.

36. M. BREALEY and K. GEORGE, *Competition Litigation – UK Practice and Procedure*, 2nd ed., Oxford, 2019, para. 5.35.

37. See in particular A. BRIGGS, *The Subtle Variety of Jurisdiction Clauses*, [2012] LMCLQ 364.

38. P. GOFFINET and R. SPANGENBERG, "Les clauses attributives de juridiction à l'épreuve du droit de la concurrence", *JDE* 2019, 199, 200-201.

39. P. MANKOWSKI, "Case note", *EWiR* 2015, 687, 688; L. STAMMWITZ, *Internationale Zuständigkeit bei grenzüberschreitenden Kartelldelikten*, 2018, pp. 427-429. *Contra* Hof Amsterdam, *WuW* 2016, 1179, 1183; Rb. Rotterdam, ECLI:NL:RBROT:2016:4164.

40. P. MANKOWSKI, "Case note", *EWiR* 2015, 687, 688; M. WELLER in B. WIECZOREK and R. SCHÜTZE, *ZPO*, vol. 13, 4th ed., 2019, Art. 25 Brussels I*bis* Regulation, para. 23; see also Cass. (1re civ.) *JCP G* 2019, 650, 651 = CCC 2019 comm. 64 note M. MALAURIE-VIGNAL; Cass. (1re civ.) CCC 2019 comm. 84 note M. MALAURIE-VIGNAL; O. GEISS and H. DANIEL, 2015, 36, ECLR 430, 435.

41. G. PARLÉANI, "Les actions indemnitaires pour violation du droit de la concurrence confrontées aux clauses de prorogation de compétence", *AJ contrat* 2019, 31; M. MALAURIE-VIGNAL,"Les clauses d'élection de for à l'épreuve du contentieux de la réparation du préjudice concurrentiel: une étrange distinction entre entente et abus de position dominante", CCC 2019 comm. 64 = CCC n° 4, avril 2019, p. 22, 24; P. GUEZ in P. GUEZ (dir.), "Chronique de droit international privé appliqué aux affaires – 1 janvier au 30 novembre 2018", *RDAI/IBLJ* 2019, 185, 206.

42. See A-G JÄÄSKINEN, Opinion of 11 December 2014 in Case C-352/13, ECLI:EU:C:2014:2443, para. 129; Hof Amsterdam, *WuW* 2016, 1179, 1183; A. STADLER, *JZ* 2015, 1138, 1148.

43. C. REYDELLET, "De la clause attributive de juridiction et de son sort", *RLDA* 111 (2016), 37.

44. CJEU 21 May 2015, C-352/13, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA / Akzo Nobel NV*, ECLI:EU:C:2015:335, para. 62; Cass. (1re civ.) *JCP* G 2015.1322 note L. IDOT = Procédures 2015 comm. 358 note C. NOURISSAT = CCC 2015 comm. 287 note G. DECOCQ; Cass. (1re civ.) *JCP* G 2019, 650, 651 = CCC 2019 comm. 64 note M. MALAURIE-VIGNAL; Hof Amsterdam, *WuW* 2016, 1179, 1183 *et seq.*; J. BASEDOW and C. HEINZE in *Festschrift für Wernhard Möschel*, Baden-Baden, 2011, p. 63, 81; M. DANOV, *Jurisdiction and judgments in relation to EU competition law claims*, Oxford-Portland, 2011, p. 63-67; W. WURMNEST, EuZW 2012, 933, 935; *ID.* in *Festschrift für Ulrich Magnus*, Köln, 2014, p. 567, 569 *et seq.; Id.*, "Internationale Zuständigkeit" in H-G. KAMANN, S. OHLHOFF and S. VÖLCKER (eds.), *Kartellverfahren und Kartellprozess*, 2017, § 31, para. 122; P. MANKOWSKI, "Case note", *EWiR* 2015, 687, 688; M. NEGRI, "Una pronuncia a tutto campo sui criteri di allocazione della competenza giuridizionale nel private antitrust enforcement transfrontaliero: il case esemplare delle azioni risarcc.d. follow-on rispetto a decisioni sanzionatorie di cartelli paneuropei", *Int'l Lis* 2015, 78, 83-84; G. DECOCQ, "Case note", CCC 2015 comm. 211; R. HARMS, J.A. SANNER and J. SCHMIDT, "Case note", *EuZW* 2015, 584, 591; L. IDOT, *JCP* G 2015, 2221; K. HAVU,"Private Claims Based on EU Competition Law – Jurisdictional Issues and Effective Enforcement", *MJ 22*, 2015, 879, 885; C. VANLEENHOVE, "Case note", *SEW* 2016, 30, 32; N. CIRON, "Case note", Resp. civ. ass. mars 2016, 11, 12 *et seq.*; W.-H. ROTH, *IPRax* 2016, 318, 325 *et seq.*; C. KLEINER,"Case note", *Clunet*, 143, 2016, 931, 937 *et seq.*; N. MATHEY,"Case note", CCC 2017 comm. 222; R.M. MOURA RAMOS,"Case note", *RLJ*, N° 4009 (Nov.-Dec. 2017), 265, 272; L. STAMMWITZ, "Case note", *BB* 2018, 3028.

45. CJEU, *Apple*, para. 28; F. DASSER,"Die Durchsetzung von Gerichtsstandsvereinbarungen – eine Echternacher Springprozession?" in *Festschrift für Jolanta Kren Kostkiewicz*, Bern, 2018, p. 21, 32 *et seq.*; P.GOFFINET and R. SPANGENBERG, *JDE* 2019, 199, 200.

46. CJEU, *Apple*, para. 29.

47. L. STAMMWITZ, *Internationale Zuständigkeit bei grenzüberschreitenden Kartelldelikten*, Baden-Baden, 2018, p. 427; *ID.*, *BB* 2018, 3028.

Article 25 Brussels I*bis* Regulation it distinguishes between these scenarios[48] or not[49]. Howsoever, the CJEU in principle extends a line of argument developed for the purposes of Article 101 TFEU to Article 102 TFEU (paras. 26-28)[50]. This concords with the general mode of developing and organically progressing case law by a court that must have regard to the questions referred to it and the underlying cases. *Prévisibilité* and legal certainty might suffer a trifle until this way is perfected[51]. Yet the way is consequent and consistent. The questions referred to the CJEU in *Apple* concerned Article 102 TFEU, and thus they consequently gained an answer having regard to Article 102 TFEU. *Apple* proceeds and progresses from the ground laid by *CDC Hydrogen Peroxide*. *Apple* is not intended to extinguish any distinctions between Article 101 TFEU and Article 102 TFEU[52]. Both rules happen to co-exist very well[53] since they fight different phenomena. In cases covered by Article 102 TFEU there are neither two contracts nor the necessity for an intermediating link. Abuse of an own dominant market position hits the affected contracts with customers or suppliers respectively more directly (see para. 28). Abuse is less clandestine[54], more discernible and is not dependent on any additional information about a secret agreement detrimental to customers or suppliers. It materializes more directly and is thus closer related to the contractual bargain[55]. The potential paradox is that the surprise effect might be reduced as a result of the enhanced discernibility[56]. Better visibility highlights the signal if a jurisdiction clause also covers competition law claims. The supplier or customer will feel his opponent's market and bargaining power already in the substantive part of their bargain since he will have to accept unfavourable contract terms. There is no reason why that market and bargaining power will affect the choice of court agreement, too. Consequentially, it can even be argued that forcing an unfavourable choice of court agreement on a supplier or customer could be *per se* an abuse of a dominant market position under Article 102 TFEU[57]. It does not amount to a hindrance that a jurisdiction agreement might be concluded before competition law claims arise and, *a fortiori*, before creditors could possibly know about their existence[58].

On the other hand, every jurisdiction agreement covering competition law claims is effective only *inter partes*, i.e. between the parties to exactly this agreement. These parties cannot contractually bind third parties to their bargain (only successors to either party may be bound). *Acta inter alios tertiis non nocent.* This holds true also for the contractual bargain of a jurisdiction agreement, despite its primarily procedural effects. Accordingly, jurisdiction agreements between cartelists to their customers' or suppliers' detriment which would force the customers or suppliers to sue solely in the *forum prorogatum* must not be upheld[59]. Furthermore, a jurisdiction clause in a contract between a party abusing its dominant position and its supplier or customer, does not extend to the detriment of indirect victims[60].

4. No differentiation between stand alone- and follow on-actions

Neither claims based on Article 102 TFEU nor claims based on Article 101 TFEU require that the Commission must have asserted a violation of Article 102 TFEU or Article 101 TFEU previously[61]. Private enforcement has equal rank to

48. To this avail T. PFEIFFER,"Case note", *LMK* 2018, 412366 *sub* 2 c; *R.M. Moura Ramos,*"Case note", *RLJ*, N° 4013 (Nov.-Dec. 2018), 115, 122; M. MALAURIE-VIGNAL,"Les clauses d'élection de for à l'épreuve du contentieux de la réparation du préjudice concurrentiel: une étrange distinction entre entente et abus de position dominante", *CCC* 2019 comm. 64 = CCC n° 4, avril 2019, p. 22, 23-24; N.C. ELSNER, *StudZR* 2019, 36, 49.

49. To this avail L. STAMMWITZ, *BB* 2018, 3028; D. WIEGANDT, *EWiR* 2019, 61, 62.

50. Concurring assessment by R.M. MOURA RAMOS, *RLJ*, N° 4013 (Nov.-Dec. 2018), 115, 121.
Critical to this approach C. NOURISSAT in G. BOURDEAUX, M. MENJUCQ and C. NOURISSAT, "Chronique – Droit du commerce international", *JCP* G 2019, 219, 222.

51. C. NOURISSAT in G. BOURDEAUX, M. MENJUCQ and C. NOURISSAT, *JCP* G 2019, 219, 222.

52. To the same avail C. NOURISSAT, *JCP* G 2019, 648, 651.

53. ECJ 2 February 1973, *Continental Can*, *ECR* 1973, 215, 245 *et seq.*; EuCFI 10 July 1990, *Tetra Pak I*, *ECR* 1990, II-309, II-356 *et seq.*; A. FUCHS and W. MÖSCHEL in E.-J. MESTMÄCKER and U. IMMENGA, *Wettbewerbsrecht*, vol. I/1, 5th ed., München, 2012, Art. 102 TFEU, para. 26 with additional references; F. BULST in E. LANGEN and H.-J. BUNTE, *Wettbewerbsrecht*, vol. II, 13th ed., Köln, 2018, Art. 102 TFEU, para. 4.

54. C. KRÜGER and M. SEEGERS, *WuW* 2019, 170, 171.

55. See Cass. (1re civ.) *JCP* G 2019, 650, 651 = CCC 2019 comm. 64 note M. MALAURIE-VIGNAL.
But *cf. N.C. Elsner*, *StudZR* 2019, 36, 48-49.

56. P. MANKOWSKI, *JZ* 2019, 141, 142; see also R.M. MOURA RAMOS, *RLJ*, N° 4013 (Nov.-Dec. 2018), 115, 125-126.

57. C. HEINZE, "Los acuerdos atributivos de jurisdicción y la ejecución efectiva del Derecho de la Competencia de la UE", *AEDIPr* 2014-15, 79, 99 *et seq.*; SOUSA FERRO, *CPI* Oct. 2018; L. STAMMWITZ, *BB* 2018, 3028; P. MANKOWSKI, *JZ* 2019, 141, 142; see also A. L. CALVO CARAVACA and J. SUDEROW, "Aplicabilidad de un acuerdo de elección de foro a una reclamación del indemnización de daños por vulneración del Art. 102 TFUE: el caso Apple Sales International (C-595/17)", *Cuad Der Trans*, 11 (2), 2019, 439, 446. More liberal C. KRÜGER and M. SEEGERS, *WuW* 2019, 170, 173. N.C. ELSNER, *StudZR* 2019, 36, 53 argues that Art. 25 Brussels I*bis* Regulation takes precedence to the purposes pursued by Directive 104/104/EU since the latter does not not specifically address jurisdiction.

58. *Contra* A-G JÄÄSKINEN, Opinion of 11 December 2014 in Case C-352/13, ECLI:EU:C:2014:2443, para. 130.

59. ECJ 21 May 2015, C-352/13, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA / Akzo Nobel NV*, ECLI:EU:C:2015:335, para. 64; W. WURMNEST, *EuZW* 2012, 933, 936; G. MUSGER, *ÖBl* 2015, 235, 237; G. KODEK in D. CZERNICH and R. GEIMER, *Streitbeilegungsklauseln im internationalen Vertragsrecht*, München, 2017, Teil 2 A (2) 1, para. 12.

60. C. KRÜGER and M. SEEGERS, *WuW* 2019, 170, 171; P.GOFFINET and R. SPANGENBERG, JDE 2019, 199, 200.

61. *Apple*, paras. 33-36; A-G WAHL,Opinion of 5 July 2018 in Case C-595/17, ECLI:EU:C:2018:541, para. 83; G. DECOCQ,"Les clauses attributives de compétence sont applicables aux actions en dommages et intérêts fondées sur un abus de position dominante", *Rev.jur.comm.* 2019, 49, 51.

public enforcement[62]. To make a victim's options or a private attorney-general's option dependent on the discretion of public watchdogs would be insensible and contrary to the very idea of private enforcement[63]. On the other hand, a previous verdict of the respective practice by the Commission is by no means detrimental to the claimant's case. On the contrary, the private claimant can make use of it to his own avail[64]. *A fortiori*, the jurisdiction clause covers follow on-suits if it covers competition law claims at all. It does not bear any relevance for the outcome whether the case is a stand alone-action or a follow on-law action[65]. On the contrary, it would be highly paradoxical if the claimant could not avail himself of the results reached by the Commission without paying a price. The Commission has by far better instruments and opportunities to gather the relevant facts than almost any private claimant does.

5. Drafting considerations

Drafting jurisdiction clauses has to consider two steps: The first one is coverage. The second one is validity under the auspices of Article 25 Brussels I*bis* Regulation. The wording of the clause to be proposed must be either precise or wide enough to cover competition law claims. There is no automatism[66]. Drafters are in an unenviable and rather difficult position[67]. They must decide whether they are bold enough to name competition law claims explicitly in all possible variations, best even expressly listing both Article 101 and Article 102 FTEU. This would certainly be precise enough. Yet it could alert the other contracting party about what is intended. "Watch out, you are getting to be framed", could be the catch phrase for such wording, highlighted in bold neon letters. The alternative would be to opt for a wide wording not expressly mentioning competition law claims. This could run into trouble with, and might be challenged with regard to, the precondition that the jurisdiction clause "to settle any disputes which have arisen or which may arise in connection with a particular legal relationship" as established by Article 25 (1) 1st sentence, first phrase Brussels I*bis* Regulation.

IV. Validity of jurisdiction clauses covering competition law claims and Article 25 (1) 1st sentence, second phrase Brussels I*bis* Regulation

Insofar as a jurisdiction clause generally covers competition law cases, the consecutive question arises as to whether it is valid. In competition law cases there is no objective exclusive jurisdiction trumping jurisdiction clauses *a priori*. Article 24 Brussels I*bis* Regulation does not address competition law cases. There simply is no "natural" forum for an exclusive concentration of suits stemming from the same cartel, and any focus to an abuse of a dominant position could possibly lead only to the market concerned or to the abusing party's domicile. Consequently, there is no paragraph in Article 25 Brussels I*bis* Regulation specifically inhibiting jurisdiction clauses in competition law cases. Conversely, competition law cases are not specifically mentioned anywhere in Article 25 Brussels I*bis* Regulation, particularly not in Article 25 (4) Brussels I*bis* Regulation. Article 25 Brussels I*bis* Regulation dos not contain a counterpart to Article 8 (4) Rome II Regulation, the latter ruling out parties' choice of law in competition law cases[68].

Jurisdiction clauses in competition law cases under the Brussels I*bis* Regulation could face a very serious challenge from other quarters, though: Article 25 (1) 1st sentence 2nd phrase Brussels I*bis* Regulation refers to the *lex fori prorogati* as the law governing the substantive validity of jurisdiction clauses[69]. This reference has to be understood as to comprise the private international law of the *lex fori prorogati*[70]. It is a novelty compared to Article 23 Brussels I Regulation, striving for coherence with Article 5 (1) 2nd sentence Hague Choice of Court Clauses Agreement. This opens the realm of jurisdiction clauses to substantive law. Article 25 (1) 1st sentence 2nd phrase and Recital (20) Brussels I*bis* Regulation cede with a regulation autonomously by EU law and refer to

62. See only Komninos, *CML Rev.* 44 (2007), 1387; D. Wiegandt, *Bindungswirkung kartellbehördlicher Entscheidungen im Zivilprozess*, Tübingen, 2018, pp. 82-106.
63. L. Stammwitz, *BB* 2018, 3028.
64. P. Mankowski, *JZ* 2019, 141, 143.
65. P. Mankowski, *EWiR* 2015, 687, 688; L. Stammwitz, *BB* 2018, 3028; D. Wiegandt, *EWiR* 2019, 61, 62; see also M.-E. Ancel and L. Marion, *JCP* E 2016.1087; R.M. Moura Ramos, *RLJ*, N° 4009 (Nov.-Dec. 2017), 265, 277 with fn. 66; C. Nourissat, *JCP* G 2019, 648, 651.
66. G. Decocq, *Rev.jur.comm.*2019, 49, 50.
67. E. Treppoz, "De la difficulté de rédiger une clause attributive de juridiction", *Rev. contrats* 2016, 282.
68. P. Mankowski, *Schadensersatzklagen bei Kartelldelikten*, Bonn, 2012, p. 59.
69. T. Pfeiffer, *LMK* 2018, 412366 *sub* 2 c; see also C. Heinze, AEDIPr 2014-15, 79, 89-96; E. Treppoz, *Rev. contrats* 2016, 282, 284 *et seq.* and D.-P. Tzakas, *Die Haftung für Wettbewerbsrechtsverstöße im internationalen Rechtsverkehr*, München, 2011, p. 141-148 (invoking ECJ 9 November 2000, C-391/98, *Ingmar GB Ltd. / Eaton Leonard Technologies Ltd.*, *ECR* 2000, I-9305; ECJ 23 June 2006, C-465/04, *Honyvem Informazioni Commerciali Srl / Mariella De Zotti*, ECR 2006, I-2879 on the one hand and ECJ 1 June 1999, C-126/97, *Eco Swiss China Ltd. / Benetton International NV*, ECR 1999, I-3055 on the other hand).
70. See only P. Mankowski in T. Rauscher, *EuZPR/EuIPR*, vol. I, 4th ed., Köln, 2015, Art. 25 Brüssel Ia-VO note 45 with ample references.

domestic laws[71]. This complicates case handling[72] and leads to a iuxtaposition of different approaches for different issues[73]. EU competition law forms part of the law of each Member State. Hence, it is a possible target of the reference established in Article 25 (1) 1st sentence 2nd phrase Brussels I*bis* Regulation.

Article 25 Brussels I*bis* Regulation governs only jurisdiction clauses prorogation a forum in a Member State. In the European area of freedom, security and justice (Art. 67 (1) TFEU), the chosen courts of one Member State are *per se* deemed equally qualified to deal with competition law claims as the courts of any competent court in another Member State[74]. Each Member State is obliged to enforce EU competition law. Mutual trust demands the other Member States to believe in that State complying with this obligation. Hence, the duty to enforce EU competition law effectively does not *per se* permit to render each kind of derogation invalid[75]. But for leeways induced by EU law itself, Article 6 (3) Rome II Regulations safeguards (as far as it goes) that in a European context mandatory rules cannot be derogated from by agreeing on a court having jurisdiction that would be prone to apply lesser standards[76].

V. ARE ARBITRATION AGREEMENTS PROPER ALTERNATIVES TO JURISDICTION CLAUSES IN COMPETITION LAW CASES?

Yet jurisdiction clauses are but one contractual device. Arbitration agreements are the first and most prominent alternative. Arbitration agreements do not fall within the substantive scope of the Brussels I*bis* Regulation, pursuant to Article 1 (2) lit. d) Brussels I*bis* Regulation and in accordance with Recital (12) Brussels I*bis* Regulation. Arbitration awards are recognized and enforced under the New York Convention as Article 73 (2) Brussels I*bis* Regulation underlines another time. Yet this does not decide conclusively the issue whether arbitration agreements are admissible in competition cases[77]. The CJEU had not to address exactly this issue. Nonetheless, it will certainly find its way to Luxemburg in the future. To which extent arbitration agreements are compatible with the *effet utile* of Articles 101 and 102 TFEU and of any ensuing Regulations and Directives will not escape attention[78]. *Ingmar*[79] should be taken as a clear warning to all who are too hopeful and who tend to rely too much on contractual risk management: The CJEU is well prepared to defend the *effet utile* of EU law with all available means (to adopt a familiar political phrase: whatever it takes) against any attempts to evade and to circumvent it[80]. Arbitration agreements are by

71. I. QUEIROLO, "Evolutionary Trends in Choice of Court Agreement: From the Lotus Case to the Brussels I*bis* Regulation" in I. QUEIROLO and B. HEIDERHOFF (eds.), *Party Autonomy in European Private (and) International Law I*, Ariccia, 2015, p. 83, 102 *et seq.* and *Bowen* 2014 SLT Art. 99, 103.

72. R. GEIMER, "Bemerkungen zur Brüssel I-Reform" in *Festschrift für Daphne-Ariane Simotta*, Wien, 2012, p. 163, 184; K. FRENSING-DEUTSCHMANN,"Case note", *jurisPR-IWR* 5/2016 Anm. 3 sub C; *D. Coester-Waltjen,* "Ein Plädoyer für Art. 25 Brüssel Ia-VO" in *Festschrift für Reinhold Geimer zum 80. Geb.*, München, 2017, p. 31, 31 *et seq.* Admitted, but eventually accepted, by H. KRONKE,"'Leichtigkeit und Schnelligkeit des Verkehrs und managing litigation risks – Kriterien für Prorogationsnormen im transnationalen Handelsrecht" in *Festschrift für Reinhold Geimer zum 80. Geb.*, München, 2017, p. 397, 402.

73. I. QUEIROLO, "Evolutionary Trends in Choice of Court Agreement: From the Lotus Case to the Brussels I*bis* Regulation" in I. QUEIROLO and B. HEIDERHOFF (eds.), *Party Autonomy in European Private (and) International Law I*, Ariccia, 2015, p. 83, 103; see also S. GUZZI,"La proroga di giurisdizione per volontà delle parti nel Regolamento (UE) n. 1215/2012 – Nuove prospettive", *Dir. com. scambi int.* 2018, 131, 145.

74. R. HARMS, J.A. SANNER and J. SCHMIDT, *EuZW* 2015, 584, 591; G. MÄSCH,"Blondes Have More Fun (Or Have They?)", *WuW* 2016, 285, 290.

75. ECJ 21 May 2015, C-352/13, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA / Akzo Nobel NV* , ECLI:EU:C:2015:335, para. 63; A-G JÄÄSKINEN, Opinion of 11 December 2014 in Case C-352/13, ECLI:EU:C:2014:2443, para. 116; C. STEINLE, S. WILSKE and M. ECKARDT, "Schiedsklauseln in Lieferverträgen", *SchiedsVZ* 2015, 165, 168.

76. H.I. MAIER, *Marktortanknüpfung im internationalen Kartelldeliktsrecht*, Frankfurt.a.M., 2011, p. 216–218; W. WURMNEST in *Festschrift für Ulrich Magnus*, 2014, p. 567, 570 *et seq.*; P. MANKOWSKI in T. RAUSCHER, *EuZPR/EuIPR*, vol. I, 4th ed., 2015, Art. 25 Brüssel Ia-VO, note 63; L. STAMMWITZ, *Internationale Zuständigkeit bei grenzüberschreitenden Kartelldelikten*, Baden-Baden, 2018, p. 402 *et seq.*; see also D. MASSING, EUROPÄISCHES INTERNATIONALES KARTELLDELIKTSRECHT, Frankfurt.a.M., 2011, p. 368 *et seq.*

77. On this scenario e.g. LG Dortmund, *IPRax* 2018, 617; C. STEINLE, S. WILSKE and M. ECKARDT, *SchiedsVZ* 2015, 165; G. WAGNER,"Schiedsgerichtsbarkeit in Kartellsachen", *ZvglRWiss* 114 (2015), 494; C. THOLE,"Erfassen Schiedsvereinbarungen auch Kartellschadensersatzansprüche?", *ZWeR* 2017, 133; A. PETRASINCU and P. WESTERHOFF, "Die Anwendbarkeit und Reichweite von Schiedsvereinbarungen in Kartellschadensersatzprozessen", *WuW* 2017, 585; C. HEINZE, "Antitrust Damages Claims and Arbitration Agreements" in F. FERRARI (ed.), *The Impact of EU Law on International Commercial Arbitration*, Huntington, NY, 2017, p. 383; A. WEITBRECHT,"Schiedsklauseln und artellschadensersatzansprüche", *SchiedsVZ* 2018, 159; P.N. MALANCZUK,"De reikwijdte van forumkeuze- en arbitragebedingen in kartelschadezaken", *TvA* 2018, 85; A. MEIER and A. SCHMOLL, "Erstreckung von Schiedsvereinbarungen auf kartellrechtlichen Schadensersatz", *WuW* 2018, 445; A. WOLF, "Schiedsvereinbarungen bei Kartellschadensersatzklagen", *IPRax* 2018, 594.

78. LG Dortmund, *WuW* 2013, 872; D.-P. TZAKAS, *Die Haftung für Wettbewerbsrechtsverstöße im internationalen Rechtsverkehr*, München, 2011, p. 141-148; C. HEINZE,"Antitrust Damages Claims and Arbitration Agreements" in F. FERRARI (ed.), *The Impact of EU Law on International Commercial Arbitration*, New York, 2017, p. 383; M. REQUEJO ISIDRO,"Claims for Damages and Arbitration: The 2014/104/EU Directive" in F. FERRARI (ed.), *The Impact of EU Law on International Commercial Arbitration*, New York, 2017, p. 421; C. KRÜGER and M. SEEGERS, *WuW* 2019, 170, 171-172; N.C. ELSNER, *StudZR* 2019, 36, 57-60.

79. ECJ 9 November 2000, C-391/98, *Ingmar GB Ltd. / Eaton Leonard Technologies Ltd.*, *ECR* 2000, I-9305.

80. See only P. MANKOWSKI, "Commercial Agents under European Jurisdiction Rules", *YbPIL* 10 (2008), 19, 46-53.

no means sacrosanct and immune[81]. To opt for an arbitral tribunal sitting in a Third State threatens and endangers EU competition law to be disregarded[82]. On the other hand, Recital (48) Directive 2014/104/EU heralds and welcomes arbitration in competition law matters as a true alternative to litigation. However, the usefulness of arbitration will readily find its limits in this field. Member State courts are still entitled to regard arbitral awards disregarding, or not complying with, EU competition law as contrary to their national public policy. The public policy of either Member State includes EU competition law, by virtue of EU law after *Eco Swiss*. Such arbitral awards are not recognized pursuant to Article V (2) lit. b New York Convention. If they are rendered in the respective forum state, they are prone to be set aside[83].

81. OGH, *IPRax* 2018, 532 = ÖJZ 2017, 1016 note B. GOTTLIEB = *IHR* 2017, 123 note T. ECKARDT = *ZVertriebsR* 2017, 397 note W. MORITZ = *ecolex* 2017/222, 520 note P. MANKOWSKI (thereon W. MORITZ,"Der international zwingende Charakter des Ausgleichsanspruchs", *wbl* 2018, 1; C. ASCHAUER and L. KLEVER, "Schiedsvereinbarung und zwingender Ausgleichsanspruch des Handelsvertreters", *JBl* 2018, 406; K. THORN and M. NICKEL, "Der Schutz der strukturell unterlegenen Partei vor Schiedsvereinbarungen", *IPRax* 2018, 541).

82. A-G N. Jääskinen, Opinion of 11 December 2014 in Case C-352/13, ECLI:EU:C:2014:2443, para. 100; ORTH, *ZWeR* 2018, 382.

83. ECJ 1 June 1999, C-126/97, *Eco Swiss China Time Ltd. / Benetton International NV*, *ECR* 1999, I-3055, paras. 31-39; A-G JÄÄSKINEN,Opinion of 11 December 2014 in Case C-352/13, ECLI:EU:C:2014:2443, para. 123; G. MÄSCH, *WuW* 2016, 285, 290; T. PFEIFFER,"Anwendbares Recht" in H.-C. SALGER and R. TRITTMANN (eds.), *Internationale Schiedsverfahren*, München, 2018, § 15, para. 72.