The Netherlands as efficient jurisdiction for cartel damages claim litigation

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Recent developments may necessitate different choices

Under European Union law, the courts of any one of its Member States can have jurisdiction regarding cartel damages litigation, depending on the country of origin of the defendant or the place where the harmful event took place. In 2015, 23 follow-on damages claim cases were heard by United Kingdom courts, 11 by Dutch courts, and ten by German courts.[1] Recently, the Brexit referendum has made the choice of UK jurisdiction less obvious. In this article, we discuss the reasons why the Netherlands is popular and offers a serious alternative for cartel damages litigation.

Dutch courts are well-equipped to handle international cases

There are various reasons why Dutch courts have a remarkable reputation.

The quality of Dutch courts is undisputed

As the practice of cartel damages claim litigation already shows, Dutch courts are considered to be among the best in their field. Dutch courts are known to be as experienced as they are efficient. It is not without reason that the Netherlands ranks fifth on the Rule of Law Index of the World Justice Project, and even ranks first worldwide in the field of civil justice.[2]

Dutch law also allows for settlements to be universally binding upon the class of those who have suffered damage throughout the EU. Considering that defendants run the real risk they will be sued again, but by different parties in different EU Member States – all of whom may have jurisdiction – the possibility of arranging a pan-European settlement contributes to the likelihood of reaching an attractive settlement.

The language skills of the legal profession and its judges are excellent

Proceedings in Dutch courts are conducted in Dutch. Judges usually allow exhibits to be filed in English without requiring their translation into Dutch. Extremely skilled interpreters are widely available in the Netherlands, to be deployed in hearings. And in the near future, the Netherlands Commercial Court, which will enable parties to litigate in English, will open its doors.[3]

Litigations costs are relatively low in the Netherlands – effectively no 'loser pay' rule

The Dutch legal system is distinguished by its efficiency and expertise, which substantially reduces litigation costs.

When proceedings are initiated, both claimant and defendant are due to pay court fees, which are fixed and modest.[4] There is no 'loser pays' rule, at least not exceeding the minimal nominal fees as stipulated in various decrees. For example, nominal cost orders in favour of individual defendants per plaintiff are commonly less than €20,000, even in high-stake cases, and hardly ever in excess of €50,000. Only plaintiffs that are domiciled outside the EU and United States can, under specific conditions, be asked to provide security with regard to the costs of the proceedings.

How do Dutch courts rule in cartel damages cases?

No arrest/suspension when a decision to impose a fine is revocable

Dutch judges show little willingness to be slowed down easily when it comes to the advancement of proceedings. In the *Equilib/KLM* case,[5] for instance, the Court of Appeal of Amsterdam refuted the defence that the decision of the European Commission to impose a fine was not yet irrevocable, which was why legal proceedings would need to be suspended or adjourned. The Dutch court is also quite willing to assume that the procedure should not rely completely on the validity of the cartel ruling, and will therefore not have any problems ascertaining its jurisdiction.[6]

No arrest/suspension awaiting a Supreme Court ruling

Even when, in similar (cartel damage) cases, no decision has yet been reached by a higher court, the Dutch court has ruled that this does not imply the adjournment of the cartel damages case being tried until said decision would have been reached.[7] In compliance with European judiciary directives, the Dutch court refutes the line of defence that argues that a case needs to be suspended or adjourned until higher courts have reached a decision in a similar (cartel damage) case.[8]

Dutch judges claim jurisdiction relatively easily: the anchor defendant creates the jurisdiction

In line with EU legislation, Dutch judges can and will claim jurisdiction if:

1. the cartel infringement/restrictive trade practice originated (partly) in the Netherlands;
2. the restrictive trade policy was (partly) enforced in the Netherlands or damages as a result of the cartel infringement were (partly) suffered in the Netherlands; or
3. at least one of the (alleged) offenders is established in the Netherlands.[9]

A Netherlands-based defendant can serve as an *anchor defendant* when individual claims are essentially connected.[10] This means that all existing claims against the recipients of a decision to impose a fine can be handled by one single court. By allowing this, the

Dutch court addresses the risks of possible fragmentation and divergent rulings, which would be contrary to the EU Execution (EEX) Regulation.[11]

The Dutch court has ruled that cases in which judicial and factual circumstances are similar can and should be handled by one individual court.[12] The Dutch court assumes that this is the case relatively quickly.[13] Furthermore, it does not usually show itself to be eager to acknowledge the existence of separate (national) cartels.[14] In other words, the Dutch court is not likely to shy away from ascertaining its jurisdiction, provided the individual claims are more or less closely related. Legal objections in this regard are easily refuted by Dutch judges.

The Dutch court has ruled that when there has been direct membership of a cartel by a Dutch entity, it could reasonably be anticipated that possible cartel damages claims would be put before a Dutch court. The fact that the cartel damages case is also connected to other jurisdictions does not affect this conclusion.[15] Furthermore, the Dutch court emphasises that cartel-related rulings are not only intended to affect its individual members, but possibly also parent companies.[16]

The Dutch court will also not easily decide that adding another party to a pending case or joining cases together constitutes an abuse of procedural law, nor is it likely to conclude that this hinders defendants in their defence.[17] If the possibility of an abuse of procedural law is raised by the defendant, the Dutch court emphasises the importance of the principle of efficiency, to which it will usually give precedence.[18]

Choice of court agreement does not affect the jurisdiction

The Dutch court has also ruled that a choice of court agreement does not affect its competence in cartel damages cases. The Dutch court has stipulated that a choice of court agreement only applies to claims of a contractual nature, which means that it does not apply to disputes concerning antitrust infringements because these are, in principle, not considered to be contractual claims.[19] The only possible exception to this would be when a plausible argument could be made that the agreement(s) to which the choice of court agreement applies is relevant to the judgment in the cartel damages case.[20] This will only occur in exceptional cases.

Dutch civil procedural law allows special claim vehicles

Dutch civil procedural law allows special claim vehicles to act as a plaintiff in proceedings. Dutch law provides the following options to enable a special purpose vehicle (SPV) to engage in proceedings:

The injured parties can assign their claims to the SPV, which subsequently litigates these claims. The injured parties and the SPV can also enter into a contract of mandate which will entitle the SPV to litigate the concerned claim. The SPV can subsequently litigate these claims either in its own name, or in the name of the injured parties.

The SPV can bring a so-called 'collective action' on the basis of Article 3:305(a) of the Dutch Civil Code (DCC). This enables the SPV to demand declaratory relief with regard to liability and causal relationship for the benefit of groups of injured parties as far as their claims are sufficiently similar. Such declaratory relief does not bind the injured parties if they opt out.

Unlike option 1, Article 3:305a DCC does not enable the SPV to claim the payment of damages. However, collective actions can provide the momentum necessary to force the injuring party to accept a collective settlement.[21] An SPV can commence a collective action without the cooperation of the injured parties, but is subject to other limitations.

Options 1 and 2 can be combined. Collective actions, option 2, can only be brought by a Dutch foundation or association. Statutory law restricts the foundation or association in distributing profits (Articles 2:26 (3), 2:285 (2) and 3:305a (1) DCC). Furthermore, in order to have *locus standi* the foundation or association is required to adopt sufficient safeguards for injured parties' interests (Article 3:305a (2) DCC). This requirement was introduced recently in order to counteract the use of collective actions by entrepreneurs that put their own commercial objectives before the interest of the injured parties they claim to represent. The minimum standards with regard to these safeguards are not yet determined by legislation or case law. As a means of self-regulation, a corporate governance code for collective action foundations and associations was introduced. This code, inter alia, entails that the board of the foundation or association should be independent of the law firm it employs and that the foundation or association should be run on a non-profit basis.

The above-mentioned corporate governance code does not apply to an SPV that brings claims as described above under Option 1. Furthermore, Dutch law allows such claims to be brought by vehicles other than Dutch foundations and associations, provided the plaintiff's law of incorporation empowers it to bring legal actions (Article 10:119 (a) DCC).

Option 2 is of limited use in cases where the intention is to represent claimants who opt out of the effects of the judgment obtained by another foundation or association. For reasons of uniformity of law, it is highly likely that the Dutch courts would provide the same declaratory relief as provided by a court of the same rank; although, it is possible, in theory, that another foundation or association could achieve a better result.

Other benefits of Dutch civil procedural law

The Netherlands is an attractive venue for settling international mass claims

The Netherlands is an attractive venue for settling international mass claims, irrespective of whether it regards cartel damages claims or other damages claims, and irrespective of whether any litigation has actually taken place in the Netherlands. This mechanism is set out in the Dutch Act on the Collective Settlement of Mass Claims. In short, it requires a collective settlement agreement between one or more potentially liable parties and one or more foundations or associations that, pursuant to their articles of association, promote the interests of the class members. Subsequently, the parties to the collective settlement agreement can jointly request the Amsterdam Appeal Court to declare this settlement agreement binding on all class members on an opt-out basis.

The international scope of this mechanism was first confirmed in the *Shell Reserves* case.[22] The vast majority of the class members did not reside in the Netherlands, but across the globe. Additionally, not all potentially liable parties had their domicile in the Netherlands. The *Converium* case[23] was of an even more international nature. None of the potentially liable parties resided in the Netherlands. Moreover, there was only a very limited number of Dutch class members.

In the *Converium* case, the argument that the amount of settlement relief was unreasonable because the fees for the US plaintiffs' lead counsel, which were to be deducted from the settlement amount, were too high, was dismissed.

Proof of damage

When it comes to proving the scope of the damage, the Dutch court can be very forthcoming towards damaged parties in cartel cases. For example, in a case that involved a worldwide cartel, it has ruled that, when trying to ascertain proof of damage, claimants cannot reasonably be expected to know what should have been a reasonable price for the products in question.[24]

The principle of effectiveness implies that defendants are under the obligation to provide an insight into their price calculations because insufficient available information makes it extremely complicated for claimants in cartel damages cases to calculate the price increases or surcharges about which the complaint is made. This implies that defendants in cartel damages cases may be obliged to provide an insight into their price calculations, and substantiate their production costs and surcharges. When defendants fail to provide this information, the Dutch court considers itself free to make an estimate of the surcharge arising as a result of the cartel. This significantly reduces the burden of proof for claimants in Dutch cartel damages cases.

Gathering evidence

Although the Dutch legal system does not have the concept of US-style discovery or UK-style disclosure, there are some procedural tools that are sometimes effective. Admittedly, they are less invasive compared with those in Anglo-Saxon jurisdictions, but this is not always a bad thing, particulary when it comes to plaintiffs that are vulnerable to passing-on defences. In addition, the more restrictive rules greatly contribute to keeping litigation time and costs under control.

Dutch law contains a special arrangement that pertains to the inspection and provision of records. Based on the stipulations of Article 843a DCC Procedure, a party may, under certain conditions, seek the provision of items of evidence from its opponent. This party must have a *legitimate interest* in the provision of a *certain record*. In order to preclude the possibility that the item of evidence might disappear during this procedure, it is also possible to impose a prejudgment

attachment on information in the possession of the opponent by means of a so-called seizure of evidence. In this way, it is possible to ensure that the items of proof will be available when the right to inspection has eventually been granted. This arrangement offers all too welcome compensation for the informational disadvantage of claimants in cartel damages cases.

Notes

1 Joaquín Almunia, 'Antitrust damages in EU law and policy', Brussel 7 November 2013, http://europa.eu/rapid/press-release_SPEECH-13-887_en.htm?locale=en, accessed 27 March 2017.
2 http://data.worldjusticeproject.org/#table, accessed 27 March 2017.
3 www.netherlands-commercial-court.com, accessed 27 March 2017.
4 As per 1 January 2017, with a maximum of €3,894 in the first instance and €5,200 on appeal.
5 Court of Appeal Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 (Equilib/KLM).
6 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (CDC/Shell cs), para 4.26.
7 District Court of Gelderland 15 April 2015, ECLI:RBGEL:2015:2621, para 3.6.
8 European Court of Justice (ECJ) 14 December 2000, C-344/98 (Masterfoods); ECJ 1 December 2011, C-145/10 (Painer).
9 ECJ 21 May 2015, C-352/13 (CDC/Perioxide).
10 Art 6 (1) Brussels I Recast.
11 Court of Appeal Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 (EquilibKLM); District Court of The Hague 17 December 2014, ECLI:NL:RBDHA:2014:15722; District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (*Equilib/KLM*); District Court of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Deutsche Bahn/Nedri Spanstaal ea*).
12 District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (*Equilib/KLM*); District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (CDC/Akzo cs), para 2.12.
13 District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (*CDC/Akzo cs*), paras 2.12–2.13.
14 District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (*Equilib/KLM*), para 3.4.
15 District Court of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Deutsche Bahn/Nedri Spanstaal* ea), para 3.5; District Court of of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (CDC/Akzo cs), para 2.16.
16 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*CDC/Shell cs*), para 4.17.
17 District Court of Amsterdam 7 January 2015, ECLI:NL:RBAMS:2015:94 (*Equilib/KLM*), paras 3.6–3.8; District Court of Limburg 25 February 2015, ECLI:NL:RBLIM:2015:1791 (*Deutsche Bahn/Nedri Spanstaal* ea), para 3.5; District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (CDC/Shell cs), para 4.27.
18 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*CDC/Shell cs*), para 4.27.
19 District Court of The Hague 1 May 2013, ECLI:NL:RBDHA:2013:CA1870 (*CDC/Shell cs*).
20 District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190 (*CDC/Akzo cs*), para 2.23.
21 The settling of international mass claims in the Netherlands will be discussed below.
22 Court of Appeal Amsterdam 29 May 2009, ECLI:NL:GHAMS:2009:BI5744 (Shell Reserves).
23 Court of Appeal Amsterdam 17 January 2012, ECLI:NL:GHAMS:2012:BV1026 (Converium).
24 District Court of Gelderland 24 September 2014, ECLI:NL:RBGEL:2014:6118.