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The Dusseldorf Regional Court dismisses damages action against cartelists

by **Marc Reysen***

On 17 December 2013, a number of German customers seeking to obtain financial compensation from cement manufacturers suffered a significant setback. The Dusseldorf Regional Court dismissed as unfounded the action brought by CDC Cartel Damage Claims SA (CDC) against six former cartelists. The judgment is not final; given its relevance to the business model of the claimant, this may not be the final word in this matter.

The procedure

The judgment is another step in a long-running legal saga concerning several cement price-fixing arrangements in Germany between 1988 and 2002. The German Federal Cartel Office fined the producers in April 2003. This decision was appealed but confirmed by the Dusseldorf Higher Regional Court in 2009 and the Federal Supreme Court in 2013.

CDC brought an action for damages against six manufacturers in 2005 before the Dusseldorf Regional Court. The action was based on the alleged claims of 36 individual cement purchasers, which they had ceded to CDC. The total value of all claims brought amounted to almost €132m. During the procedure, the court rejected a petition to reduce the nominal value of the proceedings to €5m. It also formally rejected an application to declare the action inadmissible in 2007 – the judgment being confirmed on appeal by the Dusseldorf Higher Regional Court in 2008, the Federal Supreme Court not allowing a further appeal in 2009.

The judgment

Eleven years after the infringements were brought to an end, the court of first instance has finally dealt with the substance of the matter. However, interested parties looking for guidance on how to calculate damages and other substantive questions were sorely disappointed. The court dismissed the action primarily because, in its view, CDC never acquired the alleged claims.

The court considered three main issues. Two of these – an infringement of the Act on the Provision of Legal Advice and the application of the general statute of limitations – have become mostly irrelevant for other cases due to subsequent changes of the law.

Of general interest for future cases is the court's finding that the cession – which in effect aimed at allowing CDC to collect the damages on behalf of the cement users for a success fee – did not violate a legal prohibition. Indeed, the court explicitly acknowledged the economic and procedural benefits associated with the consolidation of individual claims for the effective assertion of cartel damage claims. However, these benefits did not prevent it from finding fault with the effects that CDC's business model had on the allocation of financial risks associated with the legal proceedings. The court found that it violated

public policy (*die guten Sitten*) leaving the cession of the claims void under section 138 (1) of the Civil Code.

Under German law, the winning party has a right to ask for the reimbursement of costs associated with the legal proceedings. The amount of costs is a function of the value of the proceedings – with this value being capped at €30m. In the present case, CDC had asked the court to reduce the amount in dispute to €5m, declaring that it would not be able to reimburse costs based on a €30m value. While it could draw upon certain cash assets, limited financial contributions from the original owners of the claims and third-party financing, this would only allow it to maintain operations until the judgment at first instance and reimburse costs based on a value of the claim of €5m. Given that the company capital had already been used up for the preparations of the procedure and that the original owners of the claims were not required to provide additional financing, the court found that such an arrangement unfairly shifted the financial risk associated with the action to the defendants.

The court thought that such a shift of the financial risks associated with the action was not necessary to achieve a consolidation of the claims and the beneficial effects associated with such a step, either. In particular, a joint liability of the original owners for the costs of the proceedings would have allowed the risk allocation foreseen by the law to remain largely in place. By choosing not to implement such safeguards, the parties to the cession unfairly shifted a financial burden to the defendant. Such a change in risk allocation was considered to violate public policy, which meant that, under section 138 (1) of the Civil Code, the cessions were void and the action had to be dismissed.

Conclusion

While a blow to CDC, the judgment does clarify the admissibility of consolidating claims to make actions for damages in Germany more effective. Protecting the interests of the defendants in proceedings that tend to be costly seems reasonable and in line with the German procedural framework. One effect this may have is to give other, well-funded entities a second-mover advantage. Whether CDC's current business model can survive under these conditions is an open question – and one that may determine whether CDC will (and can afford to) appeal the judgment of the Dusseldorf court.

References

Judgment of the Dusseldorf Regional Court of December 17, 2013 *Re CDC Cartel Damage Claims v Cemex* Case No 37 O 200/09 (Kart) U, http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2013/37_O_200_09_Kart_U_Urteil_20131217.html.

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