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German Federal Court of Justice on Full Judicial Review of Arbitral Awards in Case of Alleged Violations of Antitrust Laws

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Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"; Art. 5 Art. V (2) lit. b)) and German law (Section 1059 of the German Procedural Code ("**ZPO**"), corresponding to Article 34 UNCITRAL Model Law), state courts are, in principle, prohibited from fully reviewing an arbitral award on the merits (prohibition of a *révision au fond*). German state courts can only examine whether the arbitral award violates German public policy (*ordre public*). The traditional standard applied in this context has been whether the recognition and enforcement was "obviously incompatible with essential principles of German law".

Overview

While in its decision of September 27, 2022, Case No. KZB 75/21, the Cartel Senate of the German Federal Court of Justice ("**BGH**") implicitly reaffirmed the jurisdiction of arbitral tribunals over alleged violations of certain antitrust provisions, it also held that arbitral awards in case of alleged violations of such provisions are subject to a full judicial review on the merits by the state courts, thus in practice diluting the general prohibition of a *révision au fond*. In other words, while the ruling strengthens arbitration agreements in relation to a potentially anti-competitive behavior, the German courts will review awards like they would with state court decisions to ensure compliance with German public policy. Although the BGH's decisions was rendered in a setting aside procedure, it is very likely that it would also apply to proceedings on the recognition and enforceability of an arbitral award.

Factual Background

Respondent is the owner of a quarry leased to Claimant. Respondent terminated the lease agreement with Claimant as threatened after Claimant – contrary to Respondent's "suggestion" – did not merge with another company. Subsequently, the German Federal Cartel Office ("BKArtA") imposed a fine on Respondent for violating Section 21 (2) No. 1 of the German Act against Restraints of Competition ("GWB").

Respondent, nonetheless, initiated arbitration proceedings against Claimant for eviction from the property and re-terminated the lease agreement. The arbitral tribunal in its award ruled that Claimant had to vacate the property, because the second termination validly terminated the lease. The tribunal found that the second termination did not violate Section 21 (2) No. 1 GWB.[1]

Claimant then requested before the Frankfurt Higher Regional Court to set aside the arbitral award. The Frankfurt Higher Regional Court, however, dismissed this motion

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(decision of April 22, 2021 - 26 Sch 12/20). It ruled that, although the provisions of Sections 19, 20, 21 GWB were part of the substantive public policy (*ordre public*), the arbitral award would not *obviously* violate antitrust provisions.

The Decision of the German Federal Court of Justice

Upon Claimant's further appeal, the BGH ruled that an arbitration award relating to antitrust provisions is effectively subject to a full judicial review on the merits by the state courts, with regard to both the factual findings and the interpretation of antitrust law. It put forward the following reasons:

- Sections 19, 20 and 21 GWB which allow the cartel authorities to prohibit (and ultimately fine) certain anti-competitive behavior are *fundamental rules* of the German legal system and protect not only the interests of the parties, but also the public interest of effective competition in markets for goods and services. If such fundamental rules are in question, the prohibition of a *révision au fond* does not apply. Thus, the recognition and enforcement of arbitral awards is excluded if Sections 19, 20, 21 of the GWB have been applied incorrectly.
- Unlike in state court proceedings, in arbitration proceedings the public interest in effective competition is neither sufficiently protected by the cartel authorities and their enforcement proceedings, nor by the European Court of Justice. Only state courts are entitled to refer a matter to the ECJ to obtain its decisions on the binding interpretation of European anti-trust law. Arbitral tribunals, in contrast thereto, are not entitled to make such a referral.
- Sections 19, 20, 21 of GWB require a more extensive scrutiny because such matters are regularly characterized by complex factual and legal circumstances.
- A full judicial review by state courts is in line with the intention of the legislator: By eliminating the old Section 91 GWB (according to which certain contracts with anti-competitive effect were not arbitrable) in 1997, the German legislator wanted to ensure that arbitral tribunals considered violations of competition law in the same way as state courts, and that subsequently arbitral awards were fully reviewed in terms of their compliance with competition law in recognition and enforcement proceedings.

In the case at hand, this full judicial review concluded that the arbitral award had violated the German *ordre public,* because the arbitral tribunal had failed to apply antitrust law correctly. The termination of the lease agreement had violated Section 21 (2) GWB.

Relevance of This Ruling for Arbitration in Germany, and Further Perspectives

This ruling is the first ruling of the BGH which allows a full judicial review of arbitral awards in the case of potential violation of *fundamental rules* of the German legal system. This category is new and had not played any role in the recognition and enforcement of arbitral awards (both under Section 1059 ZPO and Art. 5 Art. V (2) lit. b) in the past. Also, the BGH seems to have effectively abolished the statutory requirement that such violations have to be *obvious*.

It is unclear what other provisions are *fundamental rules* of the German legal system, or whether such rules only originate from the sphere of antitrust law; this remains to be seen in the future. In light of the murky standards the BGH seems to apply in this respect, German courts are in jeopardy to step out of line with the state courts in other jurisdictions when it comes to granting arbitral awards recognition and enforceability. However, it is also well possible that this decision of the Cartel Senate of the BGH is an "outlier". It is difficult to imagine that the Senate of the BGH, which normally has the BGH-internal jurisdiction over the review of arbitration cases, would go as far as the Cartel Senate and dilute the prohibition of *révision au found* in a similar way.

[1] Sec. 21 (2) GWB: “Undertakings and associations of undertakings may not threaten or cause disadvantages, or promise or grant advantages, to other undertakings in order to induce them to engage in [anti-competitive] conduct...”

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s International Arbitration practice group, or the following authors:

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