View on our website.

GIBSON DUNN

International Arbitration | Judgment & Arbitral Award Enforcement Update

July 22, 2026

Frankfurt Higher Regional Court Confirms Full Judicial Review of Arbitral Awards under EU Competition Law

In a decision of March 6, 2026 (Case No. 32 Sch 3/25), the Frankfurt Higher Regional Court confirmed the German Federal Court of Justice's Steinbruch doctrine – under which an arbitral award is subject to unrestricted judicial review, in fact and in law, for compatibility with the mandatory antitrust prohibitions – and clarified that the same standard applies to the mandatory prohibitions contained in Articles 101 and 102 TFEU. The decision is significant because it confirms that competition-law issues are subject to full judicial scrutiny despite arbitration's traditionally limited scope of review. On that basis, the court set aside an award premised on an overbroad post-M&A non-compete.

Overview

Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**; Article 5(2)(b)) and German law (Section 1059 of the German Code of Civil Procedure(**ZPO**), corresponding to Article 34 of the 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”.

In its landmark 2022 *Steinbruch* ruling (decision of September 27, 2022 – KZB 75/21; for our analysis of the ruling, see here), the Cartel Senate of the German Federal Court of Justice (**BGH**) significantly expanded that regime: arbitral awards are subject to a *full* judicial review on the merits by the state courts, in fact and in law, of German competition law.

The Frankfurt Higher Regional Court (*Oberlandesgericht*, **OLG**) has now confirmed this doctrine and held expressly that an arbitral award's compatibility with Articles 101 and 102 TFEU is subject to the same unrestricted review, on both the facts and the law. On that basis, the court set aside a German Arbitration Institute (**DIS**) award that had given effect to an overbroad post-M&A non-compete – void under Article 101 TFEU – and remitted the matter to the *same* tribunal under Section 1059(4) ZPO.

Factual Background

In October 2021, the German subsidiary of a Swiss banking group (the **Seller**) sold its Spanish wealth-management business to a Spanish bank (the **Purchaser**) under a German-law share purchase agreement (**SPA**). The SPA contained a 24-month non-compete barring the Seller and its group from competing in the Spanish wealth-management market, subject to several exceptions. The SPA provided for arbitration under the rules of the DIS, seated in Frankfurt.

In 2023, the Seller's ultimate parent merged with another major Swiss banking group. That group also operated a small Spanish business – less than 1% of the merged group's consolidated revenues. The Purchaser commenced arbitration, contending that the merger breached the non-compete unless the Spanish business was divested within six months. In a bifurcated proceeding, the tribunal issued a Partial Award (Phase I) finding that the Seller had breached the non-compete; remedies and quantum were reserved for Phase II. The Seller applied to set the Partial Award aside.

The Decision

Full review – now expressly for EU competition law. Confirming the *Steinbruch* ruling, the court held that an award is subject to unrestricted review, in fact and in law, as to the application of the mandatory antitrust prohibitions, and made explicit that this review covers Articles 101 and 102 TFEU – which, as the European Court of Justice held in *Eco Swiss*, form part of the *ordre public* and must be applied by the national courts of their own motion.[1] Decisively, the question is not whether the tribunal addressed the competition-law issues and assessed them defensibly – the court rejected the Purchaser's characterization of any error as a mere "*reasoning error*" – but whether the award itself is compatible with the mandatory requirements of Articles 101 and 102 TFEU. Accordingly, the court's focus was not the persuasiveness of the tribunal's reasoning but the compatibility of the award itself with mandatory competition law. It was therefore immaterial that the Seller had not raised Article 101 before the tribunal or that the non-compete concerned a past, closed period.

Jurisdiction and the partial award. Two procedural points preceded the merits. First, jurisdiction over the set-aside application lies with the OLG's arbitration senate, not the specialized cartel senate, even where competition-law questions are decisive (Sections 1062, 1059 ZPO). Second, a partial award that finally disposes of individual elements of the claim –

here, the existence of a breach, with only quantum reserved – is independently challengeable; the Seller did not have to await the Phase II award, which would have risked the Partial Award becoming unchallengeable.

The tribunal's interpretation rendered the non-compete incompatible with Article 101 TFEU. On the merits, the court held the non-compete – as the tribunal had construed it – to be an overbroad ancillary restraint (*überschießend*). A post-M&A non-compete escapes Article 101(1) TFEU only insofar as it is directly related and objectively necessary to the transaction and proportionate in subject matter, geography and duration; anything beyond that is void under Article 101(2) TFEU. The 24-month term and the geographic and material scope were unobjectionable, but the exceptions to the non-compete were too narrow – in particular, they failed to preserve the seller's freedom to acquire or hold purely financial, non-controlling stakes, as reflected in the European Commission's Notice on ancillary restraints.[2] The covenant was therefore not objectively necessary within the meaning of the ancillary-restraints doctrine and infringed Article 101(1) TFEU. Because nullity under Article 101(2) is absolute and must be examined *ex officio*, it was irrelevant that the specific merger arguably fell within the (inadequate) exceptions; nor would the court rescue the non-compete clause by a validity-preserving (blue-pencil) reduction.

Set-aside and remittal. Because the award perpetuated the competition-law violation by enforcing a contractually agreed restriction that was void under Article 101(2) TFEU, the court set it aside under Section 1059(2) No. 2(b) ZPO. As the Purchaser had requested in case of a set-aside, the court remitted the matter to the *same* tribunal under Section 1059(4) ZPO, consistent with the German Federal Court of Justice's recent clarification that remittal remains available even where an award is set aside for an *ordre public* violation and is not an exceptional remedy (BGH, decision of December 18, 2025 – I ZB 42/25). The court found no conspicuous and serious *ordre public* violation here – and reasoned that, precisely because the competition-law review is full and unrestricted rather than confined to grave or manifest errors, setting the award aside on those grounds does not itself indicate that the tribunal is irreversibly committed to its view.

Practical Implications and Outlook

The decision confirms and clarifies the *Steinbruch* doctrine by making clear that the same standard applies to Articles 101 and 102 TFEU: state courts may fully review, without restriction, whether an arbitral award is compatible with the mandatory prohibitions of EU or German competition law. In practical terms, parties can no longer assume that arbitration will shield competition-law determinations from substantive judicial scrutiny.

That bears directly on forum selection. Because an award remains open to full competition-law review by the state courts, arbitration's usual finality and limited-review advantages are reduced wherever competition-law questions are foreseeable – as they frequently are in M&A. The decision is also likely to influence future forum-selection discussions. Parties negotiating M&A agreements may therefore wish to consider whether a German Commercial Court may offer strategic advantages over arbitration where competition-law issues are foreseeable. Unlike an arbitral tribunal, a Commercial Court can also refer questions on Articles 101 and 102 TFEU to the European Court of Justice. This may reduce legal uncertainty where unresolved questions of EU competition law are foreseeable from the outset of a transaction. These courts offer Englishlanguage proceedings before commercially experienced judges for disputes exceeding EUR 500,000, expressly including post-M&A disputes. (For our analysis on German Commercial Courts, see here.)

More broadly, the decision is a reminder that post-M&A non-competes – and ancillary restraints generally – must be kept within the narrow limits of Articles 101 and 102 TFEU. Both the covenant's scope (duration, geography and subject matter) and its exceptions should be calibrated to the ancillary-restraints doctrine and the relevant Commission's Notice. Particular attention should be paid to merger exceptions, investment carve-outs and minority shareholding provisions, as the court's reasoning demonstrates that the drafting of these exceptions may determine whether a restrictive covenant remains compatible with Article 101 TFEU. An overbroad covenant may be wholly void under Article 101(2) TFEU, and German courts will not necessarily rescue it through a validity-preserving (blue-pencil) reduction. Although the case arose in the context of a post-M&A non-compete, the court's reasoning is likely to have implications well beyond restrictive covenants and may influence future arbitrations in which the outcome depends on the application of mandatory German or EU competition law.

[1] European Court of Justice, Case C-126/97, Eco Swiss, Judgment of June 1, 1999; confirmed by General Court of the European Union, Case T-616/18, Gazprom Competition Commitments, Judgment of February 2, 2022.

[2] Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005 C 56/24 (March 5, 2005).

The following Gibson Dunn lawyers prepared this update: Dr. Finn Zeidler, Dr. Annekathrin Schmoll, and Marc Kanzler.

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these issues. For additional information about how we may assist you, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of the firm’s International Arbitration or Judgment & Arbitral Award Enforcement practice groups:

Finn Zeidler – Frankfurt (+49 69 247 411 530, fzeidler@gibsondunn.com)

Annekathrin Schmoll – Frankfurt (+49 69 247 411 533, aschmoll@gibsondunn.com)

Marc Kanzler – Munich (+49 89 189 33 269, mkanzler@gibsondunn.com)

Christopher Harris KC – Global Co-Chair, Judgment & Arbitral Award Enforcement / International Arbitration Groups, Zurich / London (+41 44 382 5490, charris@gibsondunn.com)

Penny Madden KC – Co-Chair, International Arbitration Group,
London (+44 20 7071 4226, pmadden@gibsondunn.com)

Miguel A. Estrada – Co-Chair, Judgment & Arbitral Award Enforcement Group,
Washington, D.C. (+1 202.955.8257, mestrada@gibsondunn.com)

Rahim Moloo – Co-Chair, International Arbitration Group,
New York (+1 212.351.2413, rmoloo@gibsondunn.com)

Robert Weigel – Co-Chair, Judgment & Arbitral Award Enforcement Group,
New York (+1 212.351.3845, rweigel@gibsondunn.com)