WILLKIE FARR & GALLAGHER LLP

CLIENT ALERT

German Courts Will Fully Scrutinize Arbitral Awards on Competition Law Issues in Annulment and Enforcement Proceedings

December 22, 2022

AUTHORS

Matthias Schrader | Dr. Johannes Schmidt | Svenja Wachtel | Dr. Harry Nettlau

The German Federal Court of Justice (*Bundesgerichtshof*, "**BGH**") recently issued a landmark ruling holding that arbitral awards are subject to comprehensive factual and legal review by the courts concerning the application of German competition law (decision dated September 27, 2022, docket no. KZB 75/21, "**Decision**").

This Decision settles a long-standing debate about the applicable scope and intensity of state court review of arbitral awards in competition law matters in favor of an intensive review approach. At the same time, the Decision raises the question of how far-reaching its impact might be on the general practice of the German courts when reviewing arbitral awards. This alert provides a summary of the Decision and its context as well as its potential impact on arbitration proceedings and subsequent annulment and enforcement proceedings.

Key points to consider are:

- The BGH held that the general prohibition of a full merits review by state courts does not apply to competition law matters; rather full effect needs to be given to competition law regulations.
- The Decision might also open the door to full scrutiny of arbitral awards with regard to other subject matters that are intertwined with German public policy.

- Parties must anticipate fully relitigating the competition law issues of their arbitration before a state court in post-award proceedings.

Divided Decisional Practice on the Level of Review of Arbitral Awards Regarding Competition Law Issues

While there is a consensus that German and European competition law regulations form part of German public policy, German courts deviated in their views on the level of review they should apply when scrutinizing competition law issues discussed in arbitration awards. The views ranged from the "usual" strongly limited level of review, looking only for obvious incompatibilities with German public policy, to a full review of the merits. In between these minimalist and maximalist approaches, other courts pursued a middle-ground approach in the form of a "summary review" or "plausibility check."

The latest guidance from the BGH on this topic, suggesting a rather intensive level of review, dates from over 50 years ago and speaks to an earlier version of German arbitration law. It has been considered questionable whether this earlier BGH case law applies to the current statutory law and views on arbitration.

Looking at international court practice, there is no uniform approach to this issue, either. Courts in several European jurisdictions gravitate towards a full review where public policy, including competition law, is concerned. Notably, French courts appear to follow this approach in recent decisions regarding corruption. Courts in other jurisdictions give more weight to the finality of arbitral awards and the traditional limitation of a merits review (prohibition of the so-called *révision au fond*), thus significantly limiting the intensity of review. Courts outside the European Union take different views on whether competition law falls within the sphere of public policy in the first place, whereas this question appears rather settled among the EU Member States (competition law is part of public policy).

Summary of the Decision (Simplified)

The Applicant was leasing a basalt quarry from Respondent. The Respondent terminated the lease before the end of the contractual term, to which the Applicant objected. The Respondent initiated arbitration proceedings seeking inter alia that Applicant vacate the leased property. The Respondent also issued a second termination of the lease to the Applicant. The Applicant alleged that Respondent had threatened to prematurely terminate the lease if the Applicant did not agree to a sale of the quarry to a third party. The Applicant further alleged that after the Respondent had declared termination, it continued to put pressure on the Applicant to sell its facilities in the quarry to the third party. While the arbitration was pending, the German Federal Cartel Office ("**FCO**") fined the Respondent for a violation of German competition law with regard to the first termination. In the arbitral award, the arbitral tribunal ordered the Applicant to vacate the quarry and return it to the Respondent. The arbitral tribunal did not decide whether the Respondent's first termination was invalid, holding that its second termination was valid, including because it did not violate German competition law.

The Applicant applied to the Higher Regional Court of Frankfurt for annulment of the arbitral award, contending that the award violated German competition law and, consequently, also German public policy. The Higher Regional Court rejected Applicant's application. It declined to conduct a full review of the award on the merits. Instead, the Higher Regional Court held that a state court's competence to conduct a full review regarding competition law compliance is incompatible with the nature of arbitration as it would undermine the parties' choice to assign the resolution of their dispute to an arbitral tribunal and also contravene the general prohibition of *révision au fond*. Moreover, the Higher Regional Court considered it problematic that anything beyond a limited public policy control would elevate the narrow scope of set-aside proceedings to fully fledged second distance appeal proceedings with regard to competition law issues.

The BGH reversed the Higher Regional Court's decision and, with some limitations, set aside the award. The decision was handed down by the specialized Cartel Panel of the BGH, instead of the BGH's First Civil Panel which usually hears arbitration-related cases. The BGH ruled that an arbitral award is subject to unlimited factual and legal review by German courts with regard to the application of German competition law.

The BGH referred to its earlier case law from the 1960s, in which it had held that provisions of European competition law formed part of German public policy and conducted a full review of their application in the arbitral awards at issue then. It now confirmed that this earlier ruling still holds true under the current German arbitration law. Competition law serves to protect the public interest in functioning markets, instead of merely serving the interests of the parties to the arbitration agreement. If an arbitral award rests upon a misapplication of German competition law – whether obvious or not – recognition and enforcement of the award would contradict public policy. The BGH held that in order to give full effect to the fundamental provisions of the German legal order, the prohibition of révision au fond does not apply, but rather a full review of the arbitral award on the merits is necessary. It concluded that a limited review only for obvious violations of competition law would not adequately ensure an effective enforcement of competition law. Taking into account that competition law disputes usually involve complex factual and legal relationships, a limited scope of review would prevent the courts from appropriately examining these cases.

The BGH also pointed out procedural differences between arbitration proceedings and competition law actions before the German courts. First, in arbitration proceedings, which are private, the FCO does not have comprehensive participation rights. Second, where issues of European competition law are concerned, arbitral tribunals – unlike courts – are not competent to submit questions to the Court of Justice of the European Union for a preliminary ruling.

Conducting a full review of the arbitral award, the BGH held that the arbitral tribunal had erred in assuming that the Respondent's second termination of the lease did not violate competition law and was valid. Accordingly, it set aside the arbitral award to the extent that it rested on this erroneous assumption.

Implications of this Ruling on Arbitration in Practice

While the Decision provides unambiguous guidance on the level of review that courts ought to apply, it raises questions on the practical implications for set-aside and enforcement proceedings before German courts.

The Decision concerned claims of market abuse prohibited under the German Competition Act. However, the BGH's references to European competition law in the Decision and past case law indicate that the BGH does not distinguish between German and European laws against market abuse regarding the standard of review. It is also likely that the cartel prohibition (Art. 101 TFEU) would fall into the same category of laws that require full court review if initially determined by an arbitral tribunal. The question is where the BGH draws the line between areas requiring full court review and areas that are subject to the traditional ban on *révision au fond*, which include the majority of areas of German and European law. Being closely related to core competition law, state aid regulations and the new Digital Markets Act might be candidates for unfettered court review of arbitral awards.

German law generally takes an arbitration-friendly approach and considers a broad range of subject matters to be arbitrable, *i.e*., there are only a very few areas of law that arbitral tribunals cannot decide upon (e.g., divorces). However, certain subject matters that an arbitral tribunal may discuss and decide if provided with jurisdiction by the parties are intertwined with public policy – for example, consumer rights. Thus, the types of disputes that are eligible for arbitration, but that could become subject to unlimited court review in the post-award phase, may extend beyond competition law. In light of the low number of BGH judgments on the issue, it is difficult for arbitration users to assess whether their award will later fall into the full review category. Another challenge in practice may be the potentially difficult separation between competition law issues (subject to unlimited court review) and other issues (subject only to limited court review). For instance, in cartel damages cases a court may need to apply different levels of review when examining the arbitral tribunal's determination of liability under competition law, on the one hand, and its calculation of damages, on the other hand. It remains to be seen whether sub-sequent case law will establish boundaries or whether the Decision results in a creeping erosion of the prohibition of *révision au fond*.

After the Decision, parties must anticipate the risk of having to fully relitigate the competition law issues of their arbitration before a state court in post-award proceedings. Depending on how the courts will handle such cases in practice, the unlimited scope of court review could result in increased complexity of set-aside and enforceability proceedings where competition law issues are concerned. Moreover, when courts conduct a more thorough examination of the parties' factual and legal relationships, a discussion of case details at a public hearing may undermine the parties' interest in maintaining confidentiality that led them to agree to arbitration as their dispute settlement mechanism in the first place.

There is also a question as to whether the current structure of the German Higher Regional Courts, which are the first instance courts for set-aside proceedings, makes post-award litigation even more complex (and hard to predict). The way the German Federal States organize their courts, together with each court's internal allocation schedule, typically leads to

the result that there is only a single Higher Regional Court in each state that hears arbitration matters by a single designated panel of judges. This panel possesses particular expertise in applying German arbitration law and international treaties like the 1958 New York Convention to the arbitral awards brought before it. Competition law matters are typically similarly allocated to specific panels with special expertise, but these competition law panels are separate and distinct from the panels hearing arbitration matters. In the past, it has been a controversial issue in Germany whether a set-aside proceeding could be referred to a competition law panel on account of involving competition law issues. It remains to be seen whether and how the Decision, including the fact that it was handed down by a competition law panel, might impact case allocation in the future.

Arbitration users should be mindful of the Decision and its potential implications for court proceedings in Germany ensuing from Germany-seated arbitrations.

Your Willkie Global Litigation & Arbitration Team will be happy to provide you with further advice on these issues.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Matthias Schrader	**Dr. Johannes Schmidt**	**Svenja Wachtel**	**Dr. Harry Nettlau**
49 69 7930 2244	49 69 7930 2245	49 69 7930 2275	49 69 7930 2117
mschrader@willkie.com	jschmidt@willkie.com	swachtel@willkie.com	hnettlau@willkie.com