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German Cassation Court: Can Competition Law Be a "New" Weapon Against Arbitral Awards?

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Whenever courts annul an arbitral award on the grounds of substantive public policy, there is typically an outcry. Especially amongst arbitrators. And even more when the court analyzes the merits of the award and holds that the arbitral panel incorrectly applied the law. This is exactly what the German Federal Court of Justice (*Bundesgerichsthof*, the Court) recently did. In BGH KZB 75/21, decision of 27 September 2022, the Court vacated an award on the grounds that the arbitral tribunal had erred in its application of a fundamental norm of the German Antitrust Act (GWB). This blog post analyses whether the position of the German court is idiosyncratic, or whether it is, rather, in line with the position of other courts around the world.

The German Federal Court of Justice Ruling on National Antitrust Law

According to the *Bundesgerichtshof*, there is a violation of public policy when (1) an arbitral award would lead to an outcome (legal remedy) that is plainly unbearable from the perspective of the German rule of law, (2) the award offends a norm that protects the basis of German public and economic life, or (3) the award is contrary to the German perception of justice. The first of these public policy grounds can be relied upon to vacate or deny recognition to awards of unacceptable relief (e.g. punitive damages). The second is aimed at ensuring compliance with public economic law. The third is an umbrella clause that can be used in extreme cases (e.g. violation of human rights). As I discuss in my recently published book (*Contract Law in International Commercial Arbitration*) this approach is in line with international practice.

Violation of antitrust law falls within the scope of the second aspect of public policy. The *Bundesgerichtshof* held that Articles 19 (conduct of dominant undertakings), 20 (conduct of undertakings with relative or superior market power), and 21 (boycott and other restrictive practices) of the GWB, which prohibit certain conduct, including certain contractual provisions, are cornerstones of German economic law, serving not only individual interests but also the public interest in preserving the functioning of competitive markets. On that basis, the Court held, an arbitral award applying said articles of the GWB is subject to full control by the court hearing an application to vacate. Significantly, the Court explicitly stated that judicial control in such circumstances is not limited to the correction of evident errors made by arbitrators but that it extends to every mistake made in the application of the three GWB provisions:

No legal order can accept that national courts confirm (awards) that violate fundamental norms of that national legal order, regardless of whether the violation is evident (blatant) or not. As far as the application of a fundamental norm of the national legal order is concerned, the prohibition of *re?vision au fond* does not apply. Consequently, judicial control of the merits of the arbitral award is necessary.

The Court's reasoning regarding the effects of a fundamental economic norm potentially extends beyond antitrust law. In 1997, the German legislator abolished a provision of the GWB that previously barred the arbitrability of disputes on antitrust law. According to the Court the reasons laid down in the explanatory memorandum to the law reform clearly state that full *ex post* control by the courts is the necessary corollary to the extension of arbitrability. This rationale could be easily extended to other areas of public economic law.

The CJEU's Approach to the Control of Arbitral Awards in the Light of Competition Law

EU competition law is arguably the most important regulatory tool in the governance of the internal market. Its guardian is the Court of Justice of the European Union (CJEU).

The leading case on arbitration and EU competition law is *Genentech v. Hoechst*. In that case, the *Cour d'Appel de Paris* had stayed proceedings in an annulment suit and asked the CJEU for a preliminary ruling. The opinion of Advocate General Wathelet on the competence and duty of arbitrators, is particularly worthy of note:

The task of arbitrators in international commercial arbitration is to interpret and apply the contract binding the parties correctly. In the performance of this task, arbitrators may naturally find it necessary to apply EU law, if it forms part of the law applicable to the contract (*lex contractus*), or the law applicable to the arbitration (*lex arbitri*). However, the responsibility for reviewing compliance with European public policy rules lies with the courts of the Member States and not with arbitrators, whether in the context of an action for annulment or proceedings for recognition and enforcement.

In light of these remarks, there can be no doubt that arbitrators can and must consider Article 101 TFEU, otherwise they risk annulment of the award. In its judgment on *Eco Swiss*, the ECJ had already held that Article 101 TFEU (formerly Article 81 EC) constituted "a fundamental provision which was essential to the accomplishment of the tasks entrusted to the [EU] and, in particular, to the functioning of the internal market".

The comments of the Advocate General Wathelet in *Genentech* on the French control standard "flagrant or manifest nature of the infringement of public policy" are particularly salient:

If the review of an international arbitral award in the light of European public policy rules had to be limited to manifest or flagrant infringements of article 101 TFEU, this review would be illusory, since agreements or practices liable to restrict or distort competition are 'frequently covert', which would, in many cases, make it impossible (or excessively difficult) for individuals to exercise the rights conferred on them by EU competition law.

In fact, Article 101 TFEU is part of the nucleus of European public policy. However, despite the clearcut ruling of the CJEU there is still a certain degree of reluctance in countries like, e.g.,

Switzerland to respect EU competition law as a matter of public policy, even when an arbitration seated in Geneva or Zurich has an overwhelmingly strong connection to the EU markets (see e.g. *Bundesgericht* 4P.278/2005, decided on 8 March 2006, *BGE* 132 III 389). Switzerland is of great relevance because many EU based companies, including German ones, consider the country as their first choice when negotiating the seat of arbitration, irrespectively of whether there is any link to Switzerland. But even if parties agree to seat future arbitration in Zurich or Geneva and choose Swiss law as the law applicable to the contract, European competition law will still apply because parties cannot opt out of it.

The inadequate handling of EU competition law by some Swiss seated arbitral tribunals usually has no immediate negative consequences because the Federal Supreme Court of Switzerland (*Bundesgericht*) is reluctant to set aside arbitral awards on the grounds that the European public policy has been violated. However, such awards are of course not enforceable within the EU because "substantive public policy control" is not only an instrument of national law in the annulment of awards, but also an important element of the New York Convention.

The "Relaxed" Swiss Approach Towards EU Competition Law

The relaxed Swiss approach towards competition law can be clearly seen in a judgment that was handed down by the *Bundesgericht* in a dispute between Italian companies (*Bundesgericht* 4P.278/2005, decided on 8 March 2006, *BGE* 132 III 389). The Court's starting point was that Article 190(2) of the Swiss Private International Law Act provided that an award could be challenged if it was incompatible with public policy. According to the Swiss Court, public policy is an undetermined legal notion, which is difficult to frame and does not lend itself to a one-size-fits-all definition.

The *Bundesgericht* recognized that on the European level, the fight against cartel agreements constitutes one of the European Union's main *warhorses* and Article 81 of the founding treaty of the EC is its *spearhead*. Be that as it may, according to the *Bundesgericht*, it would be presumptuous to suggest that Western European or Swiss concepts of competition law should be imposed, as though they were self-evident, on all countries of the planet as a universal remedy suitable for all irrespective of the type or economic regime to which they adhere.

If the Swiss court's approach were to be accepted, so that the appropriate benchmark could only be a common antitrust public policy standard that was acceptable to everyone, ranging from communist or military dictatorships, as well as western democracies with market economies, competition law, and public policy would be a paper tiger. Such a common standard for different economic models (market versus state planned economy) is simply impossible. However, the Swiss court's approach made no sense in the case in hand: the dispute arose in the context of an agreement between two Italian businesses.

Conclusion

The decision of the German *Bundesgerichtshof* authorizing full control of arbitral awards as to the correct application of cornerstones of antitrust law is not idiosyncratic. It is perfectly in line with the position of the CJEU.

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