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CJEU's "ISU Decision": A Nail in the Coffin of Antitrust-Related Arbitration in the EU?

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The German Federal Court of Justice ("BGH") set off a heated debate when it vacated an arbitral award based on the false application of certain sections of the **German Competition Act (GWB)** on September 27, 2022 (BGH KZB 75/21), conducting a full review of the arbitral award on the merits. German practitioners were concerned that such a *de facto* second instance deprives German seated arbitration proceedings of one of their key advantages compared to state court litigation and thereby diminishes their attractiveness. Peter Sester analyzed the BGH's position and put it within the context of international case law in this **blog post**.

Since the BGH's purview is limited to German law, it remained unclear whether the Court of Justice of the European Union ("CJEU") would similarly require full state court review of an arbitral award for its compliance with European antitrust law. In its judgment in ***International Skating Union (ISU) v. European Commission et seq.*, dated December 21, 2023**, the Grand Chamber of the CJEU may have shed a light on its views in this respect.

BGH: False Application of German Antitrust Law Constitutes a Violation of the *Ordre Public*

According to Sec. 1059 Para. 2 German Civil Procedure Code, an arbitral award can be vacated, *inter alia*, if its recognition or enforcement would result in a violation of Germany's *ordre public*. In the absence of a defining statute, it is for the courts to determine which laws and legal principles comprise this *ordre public*. In its 2022 decision, the BGH found that the GWB's prohibitions on abusing a dominant or superior market position and on boycott and other anticompetitive practices *vis-à-vis* other market participants are of essential importance for a functional economy and therefore part of the German *ordre public*.

As a consequence, the BGH held that arbitral awards applying these prohibitions of the GWB are subject to full and unlimited review by the state courts in set-aside and enforcement proceedings and the prohibition of *re?vision au fond does not apply*. Prior to the December 2022 decision, the decisional practice of German courts had been divided, ranging from a strongly limited review for obvious false applications, to a full review of the merits with various middle-ground positions between these minimalist and maximalist approaches.

The European Courts' Judgments in ISU

The ISU is the world's predominant organizer of professional figure and speed skating competitions. It requires athletes as well as national ice-skating organizations that wish to participate in the ISU's competitions to accept a set of so-called "eligibility rules," including provisions that allow the ISU to impose "sanctions" on athletes for participating in competitions not authorized by the ISU. According to the ISU rules, the ISU's decisions may be challenged exclusively in arbitration proceedings before the Court of Arbitration for Sport ("CAS"), whose decisions may be reviewed only by the Swiss Federal Tribunal.

Following complaints lodged by two athletes, the European Commission ("Commission") adopted a decision on December 8, 2017, concluding – in essence – that the ISU's eligibility rules violate EU antitrust law and that the corresponding arbitration clause "reinforces" such violation. The ISU applied for annulment of the Commission's decision. On December 16, 2020, the General Court of the European Union ("GCEU") upheld the Commission's decision with respect to the violation of European antitrust law, while rejecting the Commission's conclusion on the arbitration clause. The parties appealed and cross-appealed, respectively.

The CJEU upheld the GCEU's decision regarding the eligibility rules but overruled the GCEU's holding on the arbitration clause. In line with its ***Eco Swiss Decision***, the CJEU reiterated that the European rules on competition in Art. 101, 102 TFEU are an integral part of the fundamental public policy (*ordre public*) of the EU. As such, they (i) must be recognized and applied by any arbitral tribunal and (ii) must be subject to judicial review by state courts during, for instance, enforcement of an arbitral award.

Up until now, the CJEU had never specified the standard of scrutiny for such judicial review of antitrust-related arbitral awards. While Advocate General Wathelet had in the past argued in favor of a full review, a number of practitioners preferred to confine judicial review to flagrant and manifest false applications of European competition law.

In its ISU judgment, the CJEU stressed that the judicial review of antitrust-related arbitral awards must cover the question of whether such award complies with Art. 101, 102 TFEU, since these rules are a matter of EU public policy. The CJEU refrained from expressly introducing a "full review" standard but uses the term "effective review." However, it is hard to imagine how state courts could conduct the required analyses of compliance with Art. 101, 102 TFEU without performing a full review of the merits of the arbitral award (at least to the extent it concerns European competition law).

It is noteworthy that the CJEU established a second requirement for an "efficient review." It requires the court reviewing an arbitral award concerning Art. 101, 102 TFEU to be allowed or required, as the case may be, to refer legal questions to the CJEU in accordance with Art. 267 TFEU. Thus, a review for false applications of Art. 101, 102 TFEU by a non-EU country court – like the Swiss Federal Tribunal – does not suffice, irrespective of the level of scrutiny applied. That is, only courts of an EU member state can meet the CJEU's standard of an efficient review.

Are There Consequences for Commercial Arbitrations?

While the CJEU established requirements for the review of antitrust-related arbitral awards between sports associations and their members, there remains the question of whether and to what extent these requirements must be applied in a typical commercial arbitration setting.

In principle, arbitral awards with antitrust law components will probably attract a relatively higher number of set-aside petitions or oppositions to enforcement in the EU because the broader and more in-depth level of court review tilts the risk-reward-balance towards the petitioner. In practice, however, antitrust law-related disputes in arbitration are not so common that we expect to see a measurable uptick in related ancillary court proceedings.

It is not typical that competition law disputes are specifically addressed in an arbitration clause in a commercial setting. In its ***CDC Hydrogen Peroxide*** **judgment**, the CJEU had held that claims for cartel damages (Art. 101 TFEU) must specifically be addressed in a forum selection clause in order for the dispute to be within the scope of that clause. Most have transferred this ruling to arbitration clauses. It is hard to imagine that a commercial party would now specifically submit its cartel damages claims to arbitration, knowing that there would be a full-fledged review of the arbitral award by the state courts. The relevance of the ISU decision for cartel damages claims (which are first and foremost tort claims) is thus for now, not clearly measurable.

The CJEU took a different approach in its ***Apple Sales*** **judgment** with respect to disputes arising from abusive behavior (Art. 102 TFEU). If the abuse of a dominant position materializes in contractual relations that a dominant undertaking establishes by means of contractual terms, forum selection clauses (and presumably also arbitration agreements) cover these types of competition law disputes even if those disputes are not specifically addressed. The ISU decision will thus be relevant in such a setting. Disputes around alleged abuse of dominant positions are often seen in the energy sector and in the digital markets. Parties claiming to be victims of an abuse of dominance (*e.g.*, as a result of margin squeezes or excessively long-term contracts) may now have another bite at the apple if their contracts provide for arbitration.

This leads to the question whether parties, in particular multinational players, are well-advised to circumvent the EU altogether in order to be able to enforce an arbitral award elsewhere in the world, *e.g.*, by choosing a seat in Switzerland and enforcing an award outside of the EU. The CJEU confirmed that such a circumvention of the EU does not invalidate the arbitration agreement. However, and this ties back to the actual subject matter of the ISU decision, dominant undertakings should factor into this decision that the avoidance of an EU seat may be seen as an aggravating factor in potential enforcement proceedings by the antitrust watchdogs in the EU. This is now confirmed for sports associations and it is not a big leap to assume the same in a regular commercial setting.

In summary, the CJEU continues to emphasize the pre-eminent role of Art. 101, 102 TFEU within the EU's legal framework, by requiring a *de-facto* full judicial review of antitrust-related arbitral awards. The ISU Decision blends into the CJEU's prior decisions, but confirms for the first time with full clarity the standard of review for state courts in the EU, joining the BGH's jurisprudence.

To further deepen your knowledge on Articles V(1)(b) & V(2) of the New York Convention, including a summary introduction, important considerations, practical guidance, suggested reading and more, please consult the Wolters Kluwer Practical Insights page, available here.

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