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Violations of Competition Law as Grounds for Setting Aside Arbitral Awards: Lessons from the Paris Court of Appeal in GBO v. CAI

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On January 23, 2024, the Paris Court of Appeal ("CoA") dismissed an action for annulment of an arbitral award on public policy grounds, namely a violation of EU competition law. The ruling casts further light on the standard of judicial review applicable to annulment proceedings in France. In particular, it is instructive with regard to the interaction between competition law and arbitration. Against this backdrop, some important lessons can be drawn for practitioners.

Facts

The arbitration concerned an exclusive distribution agreement for footwear concluded between two companies, the French CAI and the German GBO. CAI manufactured shoes in Asia. In 2017, CAI granted a license to GBO to use CAI's trademarks, such as Disney, for the purpose of distributing CAI's branded shoes in Germany, Austria, and Switzerland. Shortly after, GBO became dissatisfied and decided to suspend its payments to CAI. Despite negotiations, GBO notified CAI that the agreement was terminated, alleging several breaches. CAI initiated arbitration proceedings to recover the sums that GBO allegedly owed it.

In 2022, the arbitral tribunal ruled that GBO's termination was unjustified and ordered compensation to CAI. Shortly after, GBO lodged an action for annulment against this award before the French courts.

Standard of Review for Public Policy Violations

The CoA was asked to determine whether the recognition or enforcement of the arbitral award would be contrary to international public policy. In France and elsewhere, it is widely accepted that minimal curial intervention is the appropriate standard when reviewing awards in setting-aside proceedings. Among other things, fully relitigating the case before national courts would defeat the purpose of the chosen arbitral process. Commonly, the grounds for annulment are similar to the grounds for refusing to recognize an award under Article V of the New York Convention (*e.g.*, Article 34 of the UNCITRAL Model Law). Specifically, Article V(2)(b) of the Convention

permits national courts to refuse recognition or enforcement of an award if such enforcement or recognition would be contrary to the public policy of their country. That specific exception to the Convention's pro-arbitration ethos solely focuses on the award and its effects on public policy. It does not give unfettered discretion to the court to adjudicate outside the ambit of Article V(2)(b).

In this context, and notwithstanding the absence of binding harmonization on the international plane, different jurisdictions, including France, have limited the review of an award to "international," rather than merely domestic, public policy grounds. At the same time, the application of mandatory rules by arbitral tribunals have led to greater scrutiny of awards by the judiciary (*Barraclough and Waincymer*, pp. 4, 35).

In France, for example, the challenged award had long been required to cumulatively amount to a "flagrant, effective and concrete" violation of international public policy (or a "manifest, effective and concrete" violation, *e.g.*, *MK Group v. Onix* or *Indagro*) to be set aside. In 2022, judicial scrutiny has been greatly heightened by *Belokon v. Kyrgyzstan* and now only a "substantial" (*caractérisée*) violation would justify an annulment. This new standard applicable to public policy issues seems to also involve a re-examination of the facts, regardless of whether they were available during the arbitral proceedings, and an assessment of the application of the law.

More intrusive scrutiny by national courts on public policy grounds is also apparent elsewhere in Europe. This has been the case in Germany (KZB 75/21, 2022), Sweden (*GE v. Natura Furniture*, 2021), Belgium (*SNF v. Cytec*, 2007) and the Netherlands (*Marketing Displays v. VR Van Raalte Reclame*, 2005). It remains to be seen, however, whether there is a broader shift from a "minimalist approach" that has been generally common among Member States into a "maximalist approach" where courts review the merits of the award as part of the annulment proceedings.

Turning back to *GBO v. CAI*, the exclusive distribution agreement between the parties granted GBO exclusive distribution rights for the products manufactured by CAI. GBO, which stopped paying, argued that the exclusive distribution agreement created a quasi-monopoly for CAI breaching international public policy. The CoA confirmed that it would examine whether the enforcement of the award would violate public policy in a "substantial" fashion.

Violations of Competition Law as Grounds for Setting Aside Awards

In the last few decades, competition law matters have increasingly become arbitrable in different jurisdictions. In 1985, the U.S. Supreme Court held in *Mitsubishi v. Chrysler* that antitrust law matters were arbitrable because domestic courts could still refuse enforcement of awards that did not adequately address antitrust violations. Later, in 1999, the European Court of Justice reached a similar decision in *Eco Swiss v. Benetton*, holding that potential violations of EU competition law were reviewable by national courts and could justify setting aside an award on public policy grounds.

Because EU competition law is indisputably a matter of public policy (see *T-Mobile Netherlands BV*, §49), the Paris CoA was required to verify whether enforcing the award would constitute a "substantial" breach of competition law. More specifically, it needed to examine whether the exclusive distribution agreement breached competition law in such a manner that the enforcement of the award, which upheld that agreement, would substantially breach international public policy.

Did the agreement between the supplier and the distributor substantially infringe competition law?

To begin with, vertical agreements at different levels of the supply chain entail a more complex analysis than horizontal agreements between direct competitors. Vertical agreements are commonplace in the business world (supermarkets, distributors, wholesalers, etc.) and are generally seen as pro-competitive. Unlike a cartel agreement with the intent of raising prices, vertical agreements may require careful analysis to ascertain whether they are actually anticompetitive. The great uncertainty brought about by vertical agreements led the EU legislator to enact the Vertical Block Exemption Regulation 330/2010 (now 2022/720) ("VBER"). This regulation grants a safe harbor for vertical agreements under certain conditions (among others, a 30% market share threshold and the absence of "hardcore" listed restrictions).

When reviewing the award, the Paris CoA verified whether the distribution agreement contained some hardcore restrictions that would render the VBER's safe harbor inapplicable. The CoA emphasized that GBO alleged a distortion of competition but failed to demonstrate it. Instead, GBO relied on vague and generic statements. Nevertheless, the CoA proceeded to concisely analyze the agreement considering the VBER. It found that:

- the purpose of the agreement was merely to grant GBO an exclusive right to obtain, use, and distribute the products in a particular territory;
- GBO was free to determine the final selling price without a maximum or recommended price from CAI. There was no resale price maintenance ("RPM"), which is strictly illegal in the EU (as opposed to the US where RPM can be justified since the *Leegin* case); and
- the agreement did not impose any restrictions on the customers to whom GBO could sell CAI products in Germany, Austria, and Switzerland.

Given that there had been no infringement of competition law, the Court concluded that the award did not violate international public policy and GBO's action for annulment was dismissed.

Lessons for Practitioners

Some significant lessons for practitioners can be drawn from the decision:

Should a party wish to make a non-frivolous competition law claim, it is preferable that they address these issues upstream before the arbitral tribunal, rather than downstream at the post-award stage. This is because the arbitral tribunal will examine any breach of competition law, whether substantial or not. However, as the legal test at the annulment stage in France requires a "substantial" breach, as noted by the CoA, not all competition law violations would necessarily result in setting aside the award.

The Paris CoA did not shy away from pointing out the sloppiness of GBO's allegations, which lacked any serious legal or economic analysis (*e.g.*, identifying the relevant market, market share, intra-brand/inter-brand competition, etc.). This shows that a discussion with a competition lawyer at the outset of the dispute can prove fruitful and avoid missing a good argument in the arbitration proceedings that comes to mind later when trying to resist enforcement. The arbitral tribunal assesses all the evidence and is better positioned to carefully consider additional evidence of potential competition law violations, including allowing cross examinations of experts. Even if

these allegations are rejected, the award will allow the domestic court to have a better understanding of the potential issues to determine whether there was a "substantial" breach of public policy. Moreover, when such allegations have been previously raised in the arbitration proceedings, the court is likely to take them more seriously at the annulment stage, rather than suspecting they are only brought as some last-minute tactical trick to delay enforcement.

Considering that national courts in France and elsewhere are required to set aside awards when their enforcement would be contrary to public policy, arbitrators should, too, endeavor to address potential competition issues (*inter alia*, RPM, territorial exclusivity, non-compete clauses, refusal to supply and hindering parallel imports) in advance, with the parties and in the award. Such a proactive stance would improve the award's enforceability, whether in jurisdictions with a "maximalist" approach (such as France) or, even more so, for those with a "minimalist" approach.

Even though this case does not constitute the best illustration, competition law claims can be very useful. For instance, contractual clauses that violate EU competition law are automatically void. Such clauses may include direct or indirect non-compete obligations of indefinite duration or exceeding five years, or certain active or passive sales restrictions, including prohibitions on using the internet to sell. Those restrictions potentially imposed on the contracting party may result in legal claims/counterclaims and might put the victim in a stronger bargaining position in settlement negotiations during or after arbitration proceedings.

If the disputed terms have not been imposed, the party who alleges a violation of competition law may implicitly admit taking part in such a violation by being a party to the agreement in dispute. Given that annulment proceedings are public, that party may struggle to argue differently in subsequent proceedings before competition authorities or another judge. Identifying who may be liable is therefore of paramount importance. Therefore, counsel representing a client in annulment proceedings should first ascertain this, and when relevant, explain to his/her client the implications of making such arguments.

Conclusion

The *GBO v. CAI* judgment illustrates that competition law claims should be sufficiently substantiated and particularize a clear infringement. Such a basic requirement accords with a pro-arbitration stance and the idea that only manifest violations can justify setting aside an award. Judges in Europe are becoming increasingly familiar with competition law (see, *e.g.*, the Justice Programme), and when needed, they apply relevant regulations, such as the VBER, and supporting guidelines. Accordingly, regardless of the parties' claims, courts may *ex officio* analyze the agreement(s) and check for potential infringements (*e.g.*, *van Schijndel*, §15). To best advise their clients, arbitration practitioners should therefore familiarize themselves with key concepts and competition law red flags, and, where appropriate, work in close collaboration with competition lawyers.

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This entry was posted on Wednesday, June 12th, 2024 at 8:28 am and is filed under Annulment, Competition Law, Public Policy
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