CASE COMMENTS

Competition Public Policy and Arbitration—Love at "Second Look": German Federal Court Permits a Full Review of Arbitral Awards if Competition Public Policy is at Stake

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Arbitration awards; Competition; Germany; Public policy

Abstract

In its decision of 27 September 2022 (KZB 75/21), the German Federal Court ruled on the standard of review of arbitral awards in cases involving public policy—also known as the "second look". If competition public policy is at stake, the German courts may undertake a full factual and legal review of arbitral awards. Moreover, every misapplication of the core competition rules shall constitute a "manifest" violation of public policy and might lead to the setting aside of an award. The German Federal Court thus adopted the so-called "maximalist" approach and ended the recent inconsistent case law of the German lower court instances. Accordingly, this Case Comment examines the scope of this decision and its implications on arbitrations involving the questions of competition law.

Summary of the case

This case arises from the termination of a lease over a basalt stone quarry. The landlord (Constantia Forst GmbH) leased two stone quarries situated on its property to different companies. Competition between the two leaseholders negatively affected the overall lease price and was, thus, undesired by the landlord.

In 2017, the landlord tried to persuade the unwilling leaseholder 2 (Vogelsberger Basaltwerk GmbH & Co KG) to enter into a joint venture with leaseholder 1, its direct competitor. In doing so, it threatened to terminate, and eventually did terminate its lease. Moreover, following the termination, the landlord tried to persuade leaseholder 2 to sell its operating equipment to leaseholder 1.

The Federal Cartel Office (FCO, in German: *Bundeskartellamt*) found such conduct contrary to the German Competition Act (GCA, in German: *Gesetz gegen Wettbewerbsbeschränkungen—GWB*) and imposed a fine on the landlord. The FCA relied on s.21 para.3 no.2 GCA, which prevented the landlord from compelling leaseholder 2 to merge with another undertaking within the meaning of s.37 GCA.

In March 2018 the landlord initiated arbitration proceedings and sought the eviction of leaseholder 2 from the stone quarry. During the arbitration, the landlord once again declared the termination of the lease as a matter of precaution.

In 2020, the arbitral tribunal ordered leaseholder 2 to vacate and return the quarry to the landlord—except for the part of the property on which it was granted a building lease—and dismissed all other parties' claims and relief sought. The very centre of this decision was the tribunal's conclusion that the renewed declaration of termination did not infringe s.21 para.3 no.2 GCA. Essentially, the landlord could not have compelled leaseholder 2 to merge with another undertaking within the meaning of s.37 GCA, as no such concentration between the undertakings was possible since it did not affect all or a substantial part of the leaseholder's assets.

Leaseholder 2 challenged the award before the Higher Regional Court of Frankfurt (HRC Frankfurt, in German: *Oberlandesgericht Frankfurt*). As the Higher Regional Court of Frankfurt rejected its setting aside request, leaseholder 2 appealed to the German Federal Court (GFC, in German: *Bundesgerichtshof*—BGH).

Legal reasoning

The German Federal Court overturned the decision of the Higher Regional Court (HRC) of Frankfurt and set aside the award as regards eviction and return of the quarry.

Essentially, it found that the arbitral tribunal misapplied the concept of concentration within the meaning of s.21 para.3 no.2 and s.37 GCA and, thereby, violated German public policy.

First, the GFC emphasised that ss.19–21 GCA form part of German public policy, a fact already not overlooked by the HRC Frankfurt.[1] Second, the GFC addressed the standard (scope) of review of arbitral awards in cases involving public policy. It did not follow the rationale of the HRC Frankfurt, which considered the review of arbitral awards on public policy grounds to be severely limited (*stark eingeschränkt*) due to the autonomous nature of the arbitration and prohibition of *révision au fond*.[2] The GFC ruled that the review is rather unlimited and that German courts may fully review the tribunal's factual and legal analysis.[3] While it acknowledged that such a "maximalist" approach was widely criticised, the GFC confirmed its foundational jurisprudence dating back to the 1960s regarding the standard of review under the old legal regime. It also relied on the Opinion of AG Wathelet in the *Genentech* case.[4]

Third, the GFC ruled that the violation of competition public policy need not be "manifest" or "evident" (*offensichtlich* or *offenkundig*), as no legal order can confirm awards that violate its core principles. According to the GFC, every misapplication of its core provisions constitutes a manifest violation. The GFC emphasised that the German courts may undertake a *révision au fond* in cases involving fundamental principles of the German legal order.

Fourth, the said competition law provisions serve both parties to the arbitration agreement and the functioning competition—as an embodiment of public interest. A comprehensive review of arbitral awards is, thus, necessary to safeguard the effectiveness of competition public policy. In that respect, the GFC also emphasised the differences between state court proceedings and arbitration proceedings. These pertain to the FCO's possibility to participate in civil court proceedings according to s.90 para.1 GCA and the possibility of civil courts to refer a question concerning EU competition law to the European Court of Justice (ECJ) for a preliminary ruling.

Comment

The debate on the standard of review of arbitral awards in cases involving public policy—also known as the "second look"—belongs to the arbitration evergreens. Traditionally, the national courts' approaches vary between "minimalist" and "maximalist".[5] The "minimalists" rely on the prohibition of *révision au fond* and undertake only a limited review of arbitral awards, as in France, Italy, Scandinavia (Sweden and Denmark), and (likely) Austria. On the contrary, the "maximalist" states such as Belgium and the Netherlands undertake a full review of arbitral awards. Due to the inconsistent case law of its Higher Regional Courts on the standard of review, Germany might have been described as a "swing state" with a slight tendency toward a "minimalist" approach in its recent case law.[6] The German Federal Court's decision puts an end to this discussion for the time being.

Considering the background of the case, this judgment does not come as a surprise. First, the tribunal deviated from the legal assessment of the FCO, which participated in the arbitration proceedings. By doing so, the tribunal evidently misinterpreted the concept of "concentration" within the meaning of s.37 GCA, as the GFC needed to elaborate on this question in only three paragraphs (two being relatively short). Second, the HRC Frankfurt, as the first instance court in this matter, took a rather liberal stance on the standard of review.[7] These circumstances might have led to a strong "maximalist" response by the German Federal Court.[8] Nevertheless, certain statements in the GFC's judgment leave room for interpretation.

As previously stated, the GFC ruled that the German courts are not bound by the factual and legal findings of the tribunal. While this ruling might disappoint the arbitration community, it does not come out of the blue, as the GFC relied on its foundational jurisprudence dating back to the 1960s and leading commentators, in principle, did not oppose such review.[9] However, there might be

[1] *Bundesgerichtshof* (BGH) (Federal Court of Justice) 27 September 2022, KZB 75/21, NJW 2023, 1517, 1518, at [13] lit. a) (Ger.); reported by Gordon Blanke, "German Federal Court of Justice confirms maximalist review of competition law awards" (2023) 16 G.C.L.R. R4–R6.
[2] *Oberlandesgericht Frankfurt* (Higher Regional Court of Frankfurt) 22 April 2021, 26 Sch. 12/20, NZKart 2022, 89, 90, at [79]–[80] (Ger.); reported by Gordon Blanke, "German Regional High Court adopts middle way in review of competition law awards" (2022) 15 G.C.L.R. R26–R28.
[3] *Bundesgerichtshof* (BGH) (Federal Court of Justice) 27 September 2022, KZB 75/21, NJW 2023, 1517, 1518, at [14] lit b) (Ger.).
[4] See *Genentech Inc v Hoechst GmbH* (C-567/14), Opinion of AG Wathelet EU:C:2016:177 (17 March 2016).
[5] For a comprehensive review of different approaches, see Rüdiger Morbach, *Der kartellrechtliche ordre public in der internationalen Schiedsgerichtsbarkeit* (2021), pp.273–295 and Gordon Blanke, "The 'Minimalist' and 'Maximalist' Approach to Reviewing Competition Law Awards: A Never-Ending Saga Revisited or the Middle Way at Last?", in Devin Bray and Heather L. Bray (eds), *Post-Hearing Issues in International Arbitration* (2013), pp.169–227; see also Giacomo Biagioni, "Review by national courts of arbitral awards dealing with EU competition law", in Mel Marquis and Roberto Cisotta (eds), *Litigation and Arbitration in EU Competition Law* (2015), pp.289–293 (2015); Jakob B. Sørensen and Kristian Torp, "The Second Look in European Union Competition Law: A Scandinavian Perspective" (2017) 34 J. Int. Arb. 35, 51–52; Gordon Blanke and Renato Nazzini, "Arbitration and ADR of global competition disputes: taking stock: Part 3" (2008) 1 G.C.L.R. 133, 143–145.
[6] *Oberlandesgericht Frankfurt* 22 April 2021, 26 Sch 12/20, NZKart 2022, 89 (Ger.); *Oberlandesgericht Frankfurt* 3 March 2022, 26 Sch 2/21, COVuR 2022, 271 (Ger.); reported by Gordon Blanke, "Regional High Court of Frankfurt A.M. (again) adopts Middle Way in review of competition law awards" (2022) 15 G.C.L.R. R31–R33; but see, e.g., *Oberlandesgericht Celle* (Higher Regional Court of Celle) 14 October 2016, 13 Sch 1/15 (Ger.); reported by Gordon Blanke, "Higher Regional Court of Celle adopts maximalist school in review of competition law awards" (2018) 11 G.C.L.R. R33–R36.
[7] *Oberlandesgericht Frankfurt* April 22 2021, 26 Sch 12/20, NZKart 2022, 89, 90 at [78] (Ger.): "…weder eine uneingeschränkte kartellrechtliche Überprüfung des Schiedsspruchs noch eine - ohnehin kaum näher abgrenzbare—summarische Prüfung der Kartellrechtswidrigkeit oder eine kartellrechtliche Plausibilitätskontrolle…"; see also Blanke, "German Regional High Court adopts middle way in review of competition law awards" (2022) 15 G.C.L.R. R26.
[8] See Blanke, "German Federal Court of Justice confirms maximalist review of competition law awards" (2023) 16 G.C.L.R. R4.
[9] *Bundesgerichtshof* (BGH) (Federal Court of Justice) 25 October 1966, KZR 7/65, BGHZ 46, 365 (Ger.); *Bundesgerichtshof* (BGH) 27 February 1969, KZR 3/68, NJW 1969, 978 (Ger.); see Peter Schlosser, "Anhang zu §1061", in Reinhard Bork and Herbert Roth (eds), *Stein/Jonas Kommentar zur Zivilprozessordnung*, 23rd edn (2014), Vol.10, para.371.

some room for discussion on whether this standard of review should apply to all violations of public policy[10] or solely to the ones pertaining to competition law.[11] On the one hand, the GFC repeatedly referred only to competition public policy provisions (ss.19–21 GCA). On the other hand, in doing so, it quoted AG Wathelet's Opinion delivered in the *Genentech* case. However, in its general remarks on the scope of review from the perspective of EU law (and its effectiveness), AG Wathelet does not distinguish between different types of EU public policy.[12]

Moreover, the GFC ruled that public policy violations need not be "manifest" and, again, relied on its foundational jurisprudence and the Opinion of AG Wathelet in the *Genentech* case. The leading argument was that the *révision au fond* is necessary to safeguard the effectiveness of the legal order.[13] However, the ECJ did not confirm AG Wathelet's opinion on the standard of review but instead refrained from discussing the matter.[14] The GFC seems to operate under the (highly probable)[15] assumption that the ECJ would share AG Wathelet's stance towards the standard of review as regards EU public policy. Assuming this, the Federal Court simply aligned its scope of review with the one pertaining to EU law.[16]

Whether the scope of review is limited to "manifest" violations is also debated under art.45 para.1 lit (a) Brussels Ia Regulation.[17] However, the recognition and enforcement of judgments in civil and commercial matters within the EU rests on different premises than the recognition of arbitral awards. The Brussels Ia Regulation relies upon the principle of mutual trust between the Member States, whose courts can refer a question to the ECJ for a preliminary ruling and, thereby, ensure a uniform application and full effectiveness of EU law. This is not the case with arbitral tribunals.[18] Despite the fact that some EU Member States enable arbitral tribunals to refer a preliminary reference question through its national courts—the so-called "golden bridge",[19] it is unclear whether the ECJ would even accept such applications. Even if the ECJ accepted these applications, this would not change the fact that the tribunals are not a part of the EU judicial system and, as such, not obliged to use this possibility.[20]

As regards the forms of competition public policy violations, the GFC held that any misapplication of the said competition law provisions amounts to a violation of public policy and leads to setting the arbitral award aside.[21] Most frequently, the misapplication will pertain to the under-enforcement—when the tribunals disregard competition rules or apply them too leniently.[22] The GFC's rulings seem to sanction the over-enforcement of competition rules equally.[23] Over-enforcement includes cases when arbitral tribunals apply competition rules despite the conduct at hand not being anti-competitive or when they apply competition rules too strictly.[24]

However, we must remember that public policy intervenes only if the recognition of an award results in a violation of the forum's core provisions—the so-called. "*Ergebniskontrolle*".[25] If the tribunal misapplied competition rules yet somehow reached a conclusion which it would have achieved if applying competition law accurately—e.g., rejection of all claims, this should not lead to an award being set aside.[26] The reviewing courts control the material result and effects that a

[10] See Patrick Gerardy, "Anmerkung: Vollständige kartellrechtliche Schiedsspruchüberprüfung durch staatliche Gerichte im Rahmen der materiellen Ordre-public-Kontrolle" (2023) SchiedsVZ 166, 171: This author considers the GFC's judgment not directly applicable to the other cases but argues that there are no justifiable grounds not to apply it.

[11] See Nils Schmidt-Ahrendts and Dirk Wiegandt, BGH Takes a Close "Second Look" at an Arbitral Tribunal's Application of Core Antitrust Rules—BGH, Decision of 27 September 2022—KZB 75/21, (2023) 41 ASA Bulletin 39, 43; Klaus Peter Berger, "Kartellrechtliche Normen der §§19–21 GWG verkörpern deutsch-rechtlichen ordre public und binden Schiedsgerichte" (2023) EWiR 60, 61.

[12] *Genentech* (C-567/14), Opinion of AG Wathelet EU:C:2016:177 at [57]–[59], [61]–[62]: yet, the preliminary reference pertained to EU competition law.

[13] *Genentech* (C-567/14), Opinion of AG Wathelet EU:C:2016:177 at [71].

[14] See Axel Reidlinger, Diana Ionescu and Thomas Kustor, "The CJEU's Genentech Judgment of 7 July 2016 (C-567/14): Lessons for the Review of Arbitration Awards on EU Competition Law by State Courts", (2016) G.C.L.R 109, 112.

[15] See Paul Oberhammer, "Europäisches Beihilfenrecht und schiedsrechtlicher ordre public" (2012) GesRZ 29, 33.

[16] See Blanke, "German Federal Court of Justice confirms maximalist review of competition law awards" (2023) 16 G.C.L.R. R6.

[17] Contra restriction: Christian Koller, "Art.45 EuGVVO", in *Stein/Jonas Kommentar zur Zivilprozessordnung*, 23rd edn (2022), Vol.12, para.19; Stefan Leible, "Art.45 EuGVVO", in Thomas Rauscher (ed.), *EuZPR/EuIPR*, 5th edn (2022), Vol.1, para.10; Georg Kodek, "Art.45 EuGVVO", in Dietmar Czernich, Georg Kodek and Peter Mayr (eds), *Europäisches Gerichtsstands und Vollstreckungsrecht*, 4th edn (2014), para.7; pro restriction: Jürgen Rassi, "Art.45 EuGVVO 2012" in Andreas Konecny (ed.), *Fasching/Konecny Zivilprozessgesetze*, 3rd edn (2020), Vol.5/2, para.20; Reinhold Geimer, "Art.45 EuGVVO", in *Zöller ZPO*, 34th edn (2022), para.7: the author uses the term "Eingeschränkter *ordre public*" (limited *ordre public*).

[18] See *Nordsee v Reederei Mond* (C-102/81) EU:C:1982:107.

[19] e.g., s.27 para.2 of the Danish Arbitration Act, see Harald Sippel, "A. Verhältnis Schiedsgerichtsbarkeit und Gerichtsbarkeit", in Manuel Nueber (ed.), *Handbuch Schiedsgerichtsbarkeit und ADR* (2021), para.22; some commentators argue that this is also possible in Austria (under s.602 ZPO) and Germany (under s.1050 ZPO); for Austria, see Andreas Reiner, *Das neue Schiedsrecht* (2006) 37, 98 (fn.141); Gernold Zeiler, "§602 ZPO", in *Schiedsverfahren*, 2nd edn (2014), para.1; see also Alexander Petsche, "§602", in Stefan Riegler et al. (eds), *Arbitration Law of Austria: Practice and Procedure* (2007), paras 6, 13; Christian Hausmaninger, "§602 ZPO", in Andreas Konecny (ed.), *Fasching/Konecny Zivilprozessgesetze*, 3rd edn (2016) Vol.4/2, para.28; but see Martin Weber, "Das staatliche Gericht im Schiedsverfahren", in Dietmar Czernich, Astrid Deixler-Hübner and Martin Schauer (eds), *Handbuch Schiedsrecht* (2018), para.14.98; for Germany, see Reinhold Geimer, "§1051 ZPO", in *Zöller ZPO*, 34th edn (2022), para.18.

[20] See *Nordsee v Reederei Mond* (C-102/81) EU:C:1982:107.

[21] Blanke, "German Federal Court of Justice confirms maximalist review of competition law awards" (2023) 16 G.C.L.R. R6.

[22] Gerardy, "Anmerkung: Vollständige kartellrechtliche Schiedsspruchüberprüfung durch staatliche Gerichte im Rahmen der materiellen Ordre-public-Kontrolle" 172; see also Christian Ewald, "Ökonomie im Kartellrecht: Vom more economic approach zu sachgerechten Standards forensischer Ökonomie" (2011) ZWeR 15, 18.

[23] Gerardy, "Anmerkung: Vollständige kartellrechtliche Schiedsspruchüberprüfung durch staatliche Gerichte im Rahmen der materiellen Ordre-public-Kontrolle" 172; but see Thomas Eilmansberger, "Die Bedeutung der Art. 81 und 82 EG für Schiedsverfahren" (2006) SchiedsVZ 5, 14–15; Morbach, *Der kartellrechtliche ordre public in der internationalen Schiedsgerichtsbarkeit*, p.265.

[24] Gerardy, "Anmerkung: Vollständige kartellrechtliche Schiedsspruchüberprüfung durch staatliche Gerichte im Rahmen der materiellen Ordre-public-Kontrolle", 171.

[25] This seems to be the starting point of the GFC's legal analysis, see para.12 no.1: "Ein Schiedsspruch kann nach §1059 Abs. 2 Nr. 2b ZPO aufgehoben werden, wenn seine Anerkennung oder Vollstreckung zu *einem Ergebnis führt*, dass der öffentlichen Ordnung (ordre public) widerspricht, also mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist"; see Peter Schlosser, "Anhang zu §1061", in *Stein/Jonas Kommentar zur Zivilprozessordnung*, 23rd edn (2014), Vol.10, para.321 and Edward Münch, "§1059 ZPO", in *Münchener Kommentar ZPO*, 6th edn (2022) both with references to the German case law; see also Wolfgang Voit, "§1059 ZPO", in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung (Kommentar)* (2023), para.29.

[26] See *Oberster Gerichtshof* (OGH) (Austrian Supreme Court) 18 February 2015, 2 Ob 22/14w (Aus.).

recognition of a particular award shall have. The fact that the GFC's ruling might imply otherwise has to be attributed to the background of the case. The (material) result of the award in the case at hand—rejection of a claim based on a misapplication of the competition law core provisions—indisputably contradicted the German public policy.

The same goes for the concept of relativity of *ordre public*, which the GFC likely did not discuss due to the case's indisputably close connection to the forum. The application of *ordre public* might vary depending on the closeness of the case to the forum (*Inlandsbezug*).[27] This link was indisputably strong in the present case, as the quarry was located in Germany, both parties were established and doing business in Germany, and—most importantly—German (competition) law was applicable. While the concept of relativity may play a significant role in some cases, its importance in competition law is somewhat limited. Competition rules belong to overriding mandatory provisions (*Lois de police*) and apply as soon as the case affects the European or domestic market (*Auswirkungsprinzip*),[28] irrespective of the parties' place of establishment and business.

However, the case at hand deals with s.21 para.3 GCA. This provision prevents undertakings from compelling other undertakings to a conduct that is (per se) permissible under the competition rules (such as exempted agreements, permissible concentrations, etc.).[29] Section 21 para.3 GCA sanctions solely the means and not the goal itself.[30] From the perspective of international competition law, s.21 para.3 no.2 GCA applies only to domestic concentrations (mergers) and, more specifically—to concentrations that would be subject to German law.[31]

Let us now imagine that the whole scenery of the case was not located in Germany but on another continent and that the arbitration clause was the only link to the arbitral forum. Due to the inapplicability of s.21 para.3 no.2 GCA and the absence of a close connection to Germany, an arbitral award identical to the one in the case at hand would arguably not be set aside.

Final remarks

First, while the "maximalist" approach might contribute to the effectiveness of competition law, it is not a panacea. If parties want to hide their anti-competitive agreements or behaviour from the state authorities and tribunals, they might construe their disputes to hide any signs of such behaviour from the tribunal and, consequently, not challenge the award.[32] Such cases can only be combatted effectively by means of public enforcement.[33]

Second, the arbitral tribunals and arbitral institutions have already taken competition law very seriously in the past.[34] The Court of the International Chamber of Commerce (ICC) scrutinised the awards as to whether the tribunals sufficiently and comprehensively dealt with questions of competition law.[35] The arbitral tribunals were diligent in applying competition law and, in principle, willing to cooperate with competition authorities.[36] The newest "maximalist" signal from Germany might lead to even more frequent involvement of competition authorities in arbitral proceedings, e.g., as *amicus curiae* in arbitral proceedings.[37] If this should occur, the tribunals may be inclined to follow their assessments more often. This would not only minimise the risk of the awards being set aside (and the tribunals being held liable for this), but it would also increase their overall quality. Moreover, the parties might try to mitigate the risk of re-litigating competition law issues before the German courts by choosing arbitrators who are well acquainted with competition law.[38]

Finally, only time will show whether the German "maximalist" approach will result in an increased number of awards being set aside. Until 2021, this number did not significantly differ even from the friendliest arbitration fora, such as Switzerland.[39]

[27] See Christian Völker, *Zur Dogmatik des ordre public* (1997) pp.231–251, 264–265; Gunther H. Roth, *Der Vorbehalt der Ordre Public gegenüber fremden gerichtlichen Entscheidungen* (1967), p.179; see also *Oberster Gerichtshof* (OGH) 6 March 2020, 18 OCg 7/19g; Morbach, *Der kartellrechtliche ordre public in der internationalen Schiedsgerichtsbarkeit*, pp.303–305.
[28] See Karl-Heinz Fezer and Stefan Koos, "Internationales Wirtschaftsrecht", in Ulrich Magnus (ed.), *Staudinger BGB* (2019), paras 124–126; German law is explicit about this, see s.185 para.2 GWB.
[29] Ulrich Loewenheim, "§21 GWB", in Ulrich Loewenheim et al, *Kartellrecht*, 4th edn (2020), para.45; Jörg Nothdurft, "§21 GWB", in Hermann-Josef Bunte (ed.), *Kartellrecht (Kommentar)*, 14th edn (2022) para.80.
[30] Kurt Markert, "§21 GWB", in *Immenga/Mestmäcker Wettbewerbsrecht*, 6th edn (2020), Vol.2, para.82; Nothdurft, "§21 GWB", in *Kartellrecht (Kommentar)*, para.80.
[31] Kurt Stockmann, "§185 GWB", in *Kartellrecht*, para.34; Eckhardt Rehbinder and Jonas von Kalben, "§185 GWB", in *Immenga/Mestmäcker Wettbewerbsrecht*, para.244; Christoph Stadler, "§185 GWB", in *Kartellrecht (Kommentar)*, para.183; Fezer and Koos, "Internationales Wirtschaftsrecht", in *Staudinger BGB*, para.286.
[32] Reidlinger, Ionescu and Kustor, "The CJEU's Genentech Judgment of 7 July 2016 (C-567/14): Lessons for the Review of Arbitration Awards on EU Competition Law by State Courts", 116.
[33] See Reidlinger, Ionescu and Kustor, "The CJEU's Genentech Judgment of 7 July 2016 (C-567/14): Lessons for the Review of Arbitration Awards on EU Competition Law by State Courts", 116.
[34] See Gordon Blanke and Renato Nazzini, "Arbitration and ADR of global competition disputes: taking stock: Part 2", (2008) 1 G.C.L.R. 78, 87.
[35] According to the unofficial statements of the ICC-stuff; for general information on scrutiny of the award, see Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (2012) paras 3-1181–3-1220.
[36] See Eloise Glucksmann and Rüdinger Morbach, "Hot-Button Issues in International Arbitration: A Survey Among Arbitrators", (2020) J. Int. Arb. 257, 263; Morbach, *Der kartellrechtliche ordre public in der internationalen Schiedsgerichtsbarkeit*, pp.336–337.
[37] See Assimakis Komninos, "Ch. 21: Assistance by the European Commission and Member States Authorities in Arbitrations", in Gordon Blanke and Phillip Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (2011), p.749: however, such involvement remains informal and requires parties' consent; see also Gordon Blanke, "The European Commission as amicus curiae in EU competition arbitration: towards a structured approach" (2019) 12 G.C.L.R. 81–88.
[38] Schmidt-Ahrendts and Wiegandt, *BGH Takes a Close "Second Look" at an Arbitral Tribunal's Application of Core Antitrust Rules—BGH,* Decision of 27 September 2022, 44; see also Antje Baumann, *BGH: Kartellrecht im Schiedsverfahren (Glosse zu BGH 27.9.2022, KZB 75/21)* (2023) BB 782, 788.
[39] Reinmar Wolff, "Die deutsche Justiz im Wettbewerb der Schiedsstandorte: eine Erhebung zur Spruchpraxis der Gerichte" (2021) SchiedsVZ 328, 331–332; Schmidt-Ahrendts and Wiegandt, *BGH Takes a Close "Second Look" at an Arbitral Tribunal's Application of Core Antitrust Rules—BGH*, Decision of 27 September 2022—KZB 75/21, 44.