

Competition Law as a Matter of Public Policy in International Arbitration

Greek Association of Civil Procedure - ένωση Ελλήνων δικονομολόγων
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- 1. The object of public-policy-related review shall be the award as such, i. e. the conduct ordered by the arbitral tribunal, not the facts that the arbitrators had to assess in their award.*
- 2. Public policy only includes fundamental provisions of European and national competition law, in particular the prohibition of anticompetitive agreements (cartels), the prohibition of abuse of a dominant position and the prohibition of implementation of a merger before its clearance by the competent competition commission.*
- 3. In the case of a party ordered by an arbitral award to pay damages for non-performance of a contract presumed to be null and void due to a breach of the prohibition of cartels, the following should apply: A judicial review of the award with regard to a violation of competition law is only necessary if the losing party has already invoked the nullity of the contract for cartel infringement before the arbitral tribunal. Furthermore, the review seems to be justified if the condemnation risks indirectly inducing the unsuccessful or a third party to engage in anticompetitive behaviour in the future. This might be the case if the losing party is bound to the successful party by a long-term contract or if a large number of parties in the same industry has concluded similar agreements.*
- 4. It is true that the principle of unlimited reviewability of competition law-related aspects in an arbitral award established by the German Federal Court of Justice applies. Nevertheless, the risk that a state court will overturn an arbitral award on the grounds of a deviation in a specific issue of competition law has been very low in practice even since the transition to the system of legal exception in Regulation 1/2003.*
- 5. In my opinion, an arbitration agreement regarding a dispute that relates to competition law of the European Union is invalid if (1) the parties have agreed on a third country such as Switzerland as the place of arbitration and if (2) also the enforcement of the award in a third country appears possible. Such an arbitration agreement runs counter to the requirement of effective enforcement of EU competition law.*