

GERMAN ARBITRATION DIGEST

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Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgerichts, BayObLG)			
Case No. :	102 Sch 250/23 e Case No. other instances: I ZA 2/25 (German Federal Court of Justice, BGH)			
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Key legal provisions:	Section 1061 German Code of Civil Procedure (ZPO) Section 1064 German Code of Civil Procedure (ZPO) Article IV New York Convention (NYC) Article V New York Convention (NYC)			

The Highest Regional Court of Bavaria confirms high threshold for establishing a violation of the right to be heard in foreign arbitral proceedings

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On 15 January 2025, the Highest Regional Court of Bavaria (BayObLG) ruled on the enforceability of a foreign arbitral award rendered under the rules of the Vienna International Arbitration Centre (VIAC). The court rejected the respondent's objections to enforcement, finding no violation of the respondent's right to be heard by the arbitral tribunal. Thereby, the BayObLG clarified the standard to oppose enforcement under Article V New York Convention (NYC).

Facts

The applicant, a company from Bosnia and Herzegovina, sought recognition and partial enforcement of an arbitral award rendered under the auspices and the rules of VIAC. In its award, the arbitral tribunal had dismissed the claims brought by two companies based in Germany and the United Kingdom against the applicant under a sales agreement and a marketing services agreement while largely upholding the applicant's counterclaims.

Invoking Article V(1)(b), (2)(b) NYC, the respondent opposed enforcement of the award, arguing, inter alia, that enforcement would violate the German public policy due to an alleged infringement of its right to be heard. According to the respondent, this violation of its right to be heard was reflected in (i) the arbitral tribunal's insufficient assessment of the evidence it had submitted, (ii) the failure to provide the respondent with an adequate opportunity to comment on all relevant legal issues, (iii) the disregard of witness statements submitted by the respondent, (iv) the acceptance of delayed submissions by the applicant, and (v) the failure to address all legal arguments put forward by the respondent.

In its judgment, the BayObLG examined each of these arguments in detail but found no evidence of a violation of the respondent's right to be heard that was causal for the arbitral tribunal's decision. Therefore, although the court acknowledged that a violation of the right to be heard would in principle be incompatible with the German public policy, it rejected the respondent's objections. Thus, the court declared the arbitral award enforceable to the extent the applicant had applied for it.

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Key findings

The BayObLG found that the respondent failed to establish a violation of its right to be heard. Therefore, the enforcement of the arbitral award was neither "contrary to the public policy of [Germany]" (Article V(2)(b) NYC) nor did the court find that the respondent had been "otherwise unable to present his case" (Article V(1)(b) NYC).

Before addressing the grounds refusing enforcement, the BayObLG examined the formal requirements of an application for recognition and enforcement. The court clarified that, under German law, the failure to submit the arbitration agreement and an authenticated or certified copy of the arbitral award pursuant to Article IV(1) NYC does not render the application inadmissible. Pursuant to Section 1064(1), (3) German Code of Civil Procedure (ZPO), it is sufficient to submit either the original arbitral award or a certified copy thereof. As the requirements under this domestic provision are more favourable to an applicant than the requirements under the NYC, compliance with the German standard is sufficient pursuant to Article VII (1) NYC. Even if – as was the case here – neither the original nor a certified copy of the arbitral award was submitted with the application, the court may still declare the arbitral award enforceable if its existence and the authenticity are not in dispute.

In considering whether the arbitral tribunal had violated the respondent's right to be heard, the BayObLG further clarified the requirements for such a violation. The court held that a breach to the right to be heard can only be established if the arbitral tribunal fails to consider essential elements of a party's factual or legal submissions. Arbitral tribunals are not required to address each and every aspect of the parties' submissions. However, merely formulaic remarks about the parties' key arguments and the evidence submitted are insufficient to demonstrate that they were duly considered. It must be evident from the arbitral award that the arbitral tribunal has indeed deliberated the core arguments of both parties. Yet, once it is established that the arbitral tribunal has not disregarded a party's evidence, state courts are precluded from reviewing the arbitral tribunal's evaluation of the evidence. Due to the prohibition of a *révision au fond*, the assessment of evidence lies solely within the competence of the arbitral tribunal.

Furthermore, a violation of the right to be heard is only considered relevant if it was – potentially – decisive for the outcome of the arbitration. The objecting party has to demonstrate that the arbitral tribunal might have reached a different decision had it taken the allegedly disregarded argument into account. Even where a failure to consider a submission is established, this alone does not bar recognition and enforcement of the award unless it can be shown that the omission was potentially outcome-determinative.

Comment

The decision underlines the high standards of German courts for assuming a violation of the right to be heard. Particularly noteworthy is the judgment's strong emphasis that a violation of the right to be heard must be material to the arbitral tribunal's decision. The decision furthermore defines clear guidelines as to the extent to which an arbitral award can be reviewed by the exequatur court, and where the non-reviewable scope of a *révision au fond* begins.