

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 13	Decision date:	5 February 2025	Res judicata: Yes
Court:	German Federal Court of Justice (Bundesgerichtshof, BGH)			
Case No. :	I ZB 78/24 Case No.(s) other instances: 26 Sch 2/24 (Oberlandesgericht Frankfurt am Main)			
Keywords:	Foreign arbitral award, public policy, révision au fond, trade secrets, quantum determination, expert witness, right to be heard, prohibition of arbitrary decisions			
Key legal provisions:	Section 1061 German Code of Civil Procedure (ZPO) Article V(2)(b) New York Convention (NYC) Articles 3(1), 103(1) German Constitution (GG)			

German Federal Court of Justice upholds enforceability of a foreign arbitral award and confirms discretion of arbitral tribunals as well as its restrictive approach in treating public policy

Giulio Polisi, Humboldt-Universität zu Berlin

The German Federal Court of Justice (BGH), by its decision of 5 February 2025, upheld the enforceability of a foreign arbitral award against public policy concerns. The BGH emphasized the discretion of arbitral tribunals when determining the quantum of damages and substantive liability requirements. It held that successful challenges of arbitral awards on public policy grounds are subject to thorough substantiation.

Facts

The applicant and the respondent are producers of silicon coated breast implants for use in recreational and aesthetic surgery. The first is a German company, the latter is seated in Brazil. The parties had an agreement from 1992 to 2008, under which the applicant sold implants produced by the respondent on the European market. After their business relationship ended, the parties became competitors in that market.

In December 2019, the respondent initiated arbitral proceedings against the applicant. The arbitration clause provided for the application of German law and Rio de Janeiro, Brazil, as the seat of arbitration. By partial award, the arbitral tribunal found the applicant liable for damages for infringing two of the respondent's trade secrets.

A second hearing was held to determine the quantum of the damages. During this hearing, inter alia, one witness and two experts were examined on the value of the respondent's trade secrets and the applicant's efficiency gains due to their "theft".

In the final award, the arbitral tribunal used its own methodology to determine the quantum of damages to be paid by the applicant taking into account the presentations of the experts and the witness. Furthermore, the applicant was ordered to delete and handover any media product containing the respondent's trade secrets.

Upon the respondent's request, the Oberlandesgericht Frankfurt am Main (OLG Frankfurt am Main) declared the award enforceable. The applicant filed a complaint against this decision on points of law before the BGH.

GERMAN ARBITRATION DIGEST

It argued that the award violates public policy because it infringes the applicant's right to a fair trial and the prohibition of arbitrary decisions ("Willkürverbot"), as well as Directive (EU) 2017/745 which deals with medicinal devices and establishes obligations to keep records on documentation concerning their conformity with EU law.

Key findings

The BGH held that an arbitral award does not violate the right to a fair trial and does not constitute an arbitrary decision only because the arbitral tribunal's interpretation of an expert's testimony differs from the interpretation of the party that nominated the expert. Rather, such an infringement only exists in case the arbitral tribunal demonstrably gives no consideration at all to the arguments raised by that party.

Additionally, the BGH held that an award is not contrary to public policy due to logical errors, where those logical errors are alleged by one party based on the argument that the tribunal misinterpreted the evidence. The BGH clarified that arbitral tribunals have discretion in evaluating the evidence. Moreover, when determining the quantum of damages, arbitral tribunals have additional discretion that is also not subject to judicial review, given that there is, in principle, no *révision au fond*.

The BGH further held that the award also did not violate the applicant's right to a fair trial for a lack of analysis of the legal basis of the claim. Such violation does not arise from a general assertion that the arbitral tribunal did not sufficiently consider the facts in determining liability or the fact that a party has a different legal opinion than the arbitral tribunal. Such a violation requires substantiation to the end that the arbitral tribunal did not consider the facts at all and misapplied the law.

Regarding the violation of EU law due to the handover obligation of media, the BGH held that the EU regulation in question does not provide for an obligation to store of the media in the present case. In any case the respondent had not substantiated in its submissions that such an obligation existed.

Comment

In its decision, the BGH underlines the high threshold under which arbitral awards can be challenged on public policy grounds in Germany. This high threshold applies to alleged violations of substantive law and procedural rules. The BGH also emphasizes the wide discretion of arbitral tribunals when evaluating the evidence and determining the quantum of damages.