GERMAN
ARBITRATION
DIGEST

GAD No.:	GAD 2025, 18	**Decision date:**	27 March 2025	**Res judicata:** Yes
Court:	German Federal Court of Justice (Bundesgerichtshof, BGH)			
Case No. :	I ZB 64/24 Case No.(s) other instances: 101 Sch 146/23e (Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)) (*see* GAD 2024, 8)			
Keywords:	Foreign arbitral award, cost decision, cost award, declaration of enforceability, invalid arbitration agreement, investor-state arbitration, European Court of Justice, Achmea, UNCITRAL Rules, inherent powers, good faith			
Key legal provisions:	Section 1061 German Code of Civil Procedure (ZPO) Articles III and V New York Convention (NYC) Articles 267 and 344 Treaty on the Functioning of the European Union (TFEU)			

German Federal Court of Justice refuses to enforce cost award in in intra-EU investment arbitration

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On 27 March 2025, the German Federal Court of Justice (BGH) refused to enforce a cost award in favour of an EU member state issued in an intra-EU investment arbitration. The BGH found that the jurisprudence of the European Court of Justice (ECJ) – holding that arbitration clauses in intra-EU bilateral investment treaties are incompatible with EU law – prevents not only the enforcement of an arbitral decision on the merits, but also the enforcement of a cost award.

Facts

In the underlying arbitration, German investors, the respondents, filed claims against the Czech Republic (CZE), the applicant, alleging that legislative changes in the energy sector had harmed their renewable energy investments, violating the protections of the bilateral investment treaty between Germany and CZE (BIT) as well as the Energy Charter Treaty (ECT).

The parties agreed to conduct the arbitration under the 1976 UNCITRAL Arbitration Rules (UNCITRAL Rules) and to have it administered by the Permanent Court of Arbitration in The Hague, Netherlands (PCA). The arbitral tribunal first designated The Hague, Netherlands, as the seat of the arbitration, later moving it to Geneva, Switzerland. During the proceedings, CZE requested to introduce the ECJ's Achmea decision and the resulting jurisdictional objections into the proceedings. The arbitral tribunal rejected the request as belated, noting that CZE had stated in an earlier submission that it would not pursue such objections.

The arbitral tribunal affirmed its jurisdiction but dismissed the investors' claims on the merits and awarded costs of approximately USD 1.75 million to CZE. The arbitral tribunal's cost decision referred to the BIT as well as Article 40 of the UNCITRAL Rules.

CZE subsequently sought a declaration of enforceability of the cost award pursuant to Section 1061 German Code of Civil Procedure (ZPO) and Article III of the New York Convention (NYC). The Highest Regional Court of Bavaria (BayObLG) dismissed the application. CZE filed a complaint on points of law (complaint) with the BGH.

Key findings

The BGH upheld the decision of the BayObLG and dismissed CZE's complaint, holding that the BayObLG rightly refused enforcement on the basis of Article V(1)(a) NYC.

The BGH found that the arbitration agreement based on Article 26 ECT and Article 10 BIT was invalid under EU law. The court referred, inter alia, to the ECJ's Achmea and Komstroy decisions, noting that Articles 267 and 344 TFEU preclude a provision in an international agreement concluded between member states under which an investor from one of those member states may, in the event of a dispute concerning investments in the other member state, bring proceedings against the latter member state before an arbitral tribunal. The BGH clarified that the invalidity of the arbitration agreement does not only prevent the enforcement of an award on the merits but also prevents the enforcement of the cost decision itself. The BGH rejected CZE's argument that cost awards should be afforded different treatment from awards on the merits, holding that refusing to enforce a cost award in these circumstances was necessary to uphold the effectiveness of EU law (effet utile).

The BGH also rejected the existence of a separate arbitration agreement regarding the decision on costs based on the UNCITRAL Rules or the arbitral tribunal's "inherent powers". It held that the UNCITRAL Rules, to which the cost decision referred, cannot establish a separate arbitration agreement for the arbitral tribunal's decision on costs. Rather, the application of the UNCITRAL Rules presupposes an (effective) arbitration agreement, on the basis of which the parties can then agree on a set of arbitration rules. The BGH further ruled that an arbitral tribunal has no "inherent powers" to allocate costs independent from its jurisdiction to decide the dispute on the merits. The court explained that such potential inherent powers of the arbitral tribunal do not exist in isolation or independently of a valid arbitration agreement; they merely supplement it. It is only on the basis of such an agreement that the question arises as to whether and what powers the arbitral tribunal has.

The BGH also found that the German investors were not precluded from challenging the validity of the arbitration agreement, even though they were the party that had initiated the arbitration proceedings. CZE had argued that the investors were precluded from relying on the invalidity of the arbitration agreement pursuant to Section 242 German Civil Code (BGB), the principle of good faith. The BGH noted that under German law, a party acts in bad faith if it has maliciously initiated the arbitration proceedings and then invokes the invalidity of the arbitration agreement after an award has been issued against it. The BGH ruled, however, that that jurisprudence does not apply in the present case because of EU law. According to the BGH, recognising an objection based on good faith in the present case would conflict with member states' obligation to effectively apply EU law, as it would partially render the assignment of disputes to an arbitral tribunal, contrary to EU law, effective in practice.

Comment

The BGH's decision highlights the continuing reach of the ECJ's Achmea ruling, extending its effects to cost awards issued in intra-EU investment arbitrations. Perhaps unusual for a post-Achmea ruling, the decision operates to the detriment of the host state rather than the investor. Notably, the ruling also allows investors – despite being the party that initiated the arbitration proceedings – to later resist enforcement of a cost award if unsuccessful on the merits of the dispute, revealing a clear imbalance in the current framework.