

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 19	Decision date:	5 February 2025	Res judicata: No
Court:	German Federal Court of Justice (Bundesgerichtshof, BGH)			
Case No.:	I ZB 78/24 Case No. previous instance: 26 Sch 2/24 (Higher Regional Court of Frankfurt)			
Keywords:	foreign arbitral award, interim suspension of enforcement measures, declaration of enforceability, prohibition of objective arbitrariness, right to be heard, public policy, révision au fond, damage calculation			
Key legal provisions:	Sections 1061, 1065(2), 707(1) German Code of Civil Procedure (ZPO) Article V New York Convention			

BGH denies interim suspension of enforcement measures in complex trade secret dispute because underlying arguments against recognition and enforcement lack sufficient prospects of success

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The German Federal Court of Justice (BGH) recently rejected an application for the interim suspension of enforcement measures. In essence, the court held that the applicant's arguments against the recognition and enforcement of the arbitral award lacked sufficient prospects of success, thereby confirming its longstanding case law on the high thresholds for establishing (i) the objective arbitrariness of a decision, (ii) a violation of the right to be heard and (iii) public policy violations.

Facts

The case concerns a trade secret dispute between two former contract partners and mainly revolves around the damage calculation adopted by the arbitral tribunal.

The Brazilian respondent used to deliver silicone breast implants to the German applicant, who in turn used to distribute these products in Europe. After their contractual relationship ended in 2008, the parties became direct competitors.

In 2019, the respondent accused the applicant of several trade secret violations in an arbitration seated in Brazil. The arbitral tribunal confirmed two of the alleged trade secret violations in a partial award. In its final award, the arbitral tribunal essentially ordered the applicant (i) to pay several million Euros in damages, (ii) to cease the trade secret violations and to call back all infringing products, and (iii) to return all data and objects which contain or embody the infringed trade secrets. The arbitral tribunal calculated the damages based on the applicant's efficiency gains and determined the applicant's savings in investments, costs and expenses due to the 'theft' of the two trade secrets by way of a comparative analysis with another implant manufacturer.

In late 2024, the Higher Regional Court of Frankfurt am Main (OLG Frankfurt) recognized the award and declared it enforceable in Germany. The applicant appealed this decision with a complaint on points of law (complaint) and requested the BGH to order an interim suspension of the respondent's enforcement measures pending the decision on the complaint.

Key findings

The decision of 5 February 2025 solely deals with the application for an interim suspension of enforcement measures. Such a suspension requires special circumstances that exceptionally warrant a deviation from the statutorily implied default rule that the creditor's interest in enforcement outweighs the debtor's interest in protection. As part of this weighing of interest exercise, the BGH examined the applicant's prospects of success on the merits.

The BGH held that no such exception was justified in the case at hand because the applicant's arguments against the recognition and enforcement of the award were not convincing.

First, the court looked at the arbitral tribunal's quantum assessment. Reiterating the high thresholds for the review of foreign arbitral awards, the BGH held that the calculation method used by the arbitral tribunal neither amounted to an objectively arbitrary decision nor violated the applicant's right to be heard. While the court agreed with the applicant that the arbitral tribunal had been imprecise and had described the object of reference for the figures it relied upon in its calculation in an inconsistent manner ("infringing products", "implants", "units" as opposed to merely the "shell implant", "shells", "shell production"), a footnote in the award showed that the arbitral tribunal did, in fact, use the figure that was in line with its finding on the trade secrets violations, which only encompassed part of the shell production process as opposed to the entire implant production process. The court also denied a violation of public policy. In particular, the court rejected the applicant's argument that the amount of damages awarded by the arbitral tribunal was so disproportionate to the trade secrets violations that it was punitive rather than compensatory in nature and thus unconscionable, noting that this argument was aimed at an impermissible *révision au fond*.

Second, the BGH considered the arbitral tribunal's findings on the applicant's liability in principle (specifically the issue of the applicant's fault). The applicant had failed to properly substantiate the alleged violations of the right to be heard with concrete and specific submissions on the arbitral tribunal's reasoning.

Third, the BGH dismissed the applicant's arguments regarding the order to return all data and objects which contain or embody the infringed trade secrets. The applicant failed to substantiate how the enforcement of this order would violate its retention obligations under the EU Medical Device Regulation.

Comment

The decision highlights the high threshold for successfully resisting recognition and enforcement of foreign arbitral awards on the basis of three of the most frequently invoked grounds – the violation of the right to be heard, public policy and the prohibition of objective arbitrariness. It also serves as a reminder that applicants must present their objections with great care and a detailed analysis of the arbitral tribunal's reasoning.

Note: Setting-aside proceedings initiated by the applicant in Brazil appear to still be pending.