

# GERMAN ARBITRATION DIGEST

<b>GAD No.:</b>	GAD 2025, 20	<b>Decision date:</b>	13 December 2024	<b>Res judicata:</b> Yes
<b>Court:</b>	Higher Regional Court of Cologne (OLG Cologne)			
<b>Case No. :</b>	19 Sch 34/22 Case No.(s) other instances: I ZB 37/23 (German Federal Court of Justice) (Bundesgerichtshof, BGH) ( <i>see</i> GAD 2024, 6)			
<b>Keywords:</b>	Foreign arbitral award, declaration of enforceability, right to be heard, public policy, révision au fond, China, New York Convention, arbitration agreement, grounds for refusal			
<b>Key legal provisions:</b>	Section 1059 German Code of Civil Procedure (ZPO) Section 1061 German Code of Civil Procedure (ZPO) Article V New York Convention			

**The Higher Regional Court of Cologne reinforced the prohibition of révision au fond by denying that there had been a violation of public policy through procedural fraud that would justify refusing to recognise the arbitral award**

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On 13 December 2024, the Higher Regional Court of Cologne (OLG Cologne) granted the applicant's request to recognise and declare a CIETAC arbitral award enforceable. The OLG Cologne reversed its earlier refusal of May 2023. This was after the German Federal Court of Justice (BGH) had overturned that decision and had referred the matter back to the OLG Cologne in December 2023. The OLG Cologne now found no grounds for refusal under Article V(1)(b) or Article V(2)(b) New York Convention (NYC). The court concluded that the respondent's allegations of procedural misconduct and fraud did not meet the threshold required to refuse enforcement on public policy grounds under Article V(2)(b) NYC, and that the respondent's rights to present its case under Article V(1)(b) NYC had not been infringed.

## Facts

The parties concluded a contract on 10 February 2015 for a tinning line intended for copper and copper-alloy strips. The contract included an arbitration clause, stipulating that arbitration should be held in Shanghai under the remit of the China International Economic and Trade Arbitration Commission (CIETAC). The respondent (a German company) agreed to deliver, install, and commission the equipment. In 2016, the respondent supplied and set up the production line. Disagreements arose regarding the quality of the line. The applicant (a Chinese company) conducted its own acceptance tests in March and June 2020, which were recorded on video by a notary. The applicant subsequently submitted a claim to a Chinese arbitral tribunal for partial repayment, damages, and notary fees. The respondent contested the notarised acceptance certificate provided by the applicant, arguing that it lacked an assessment of the operating personnel's expertise, which was crucial for the production line. On 10 December 2021, the tribunal largely upheld the applicant's claims in its award.

The applicant sought enforcement of the award in Germany. In May 2023, the OLG Cologne denied the application, holding that the award could not be recognized domestically due to grounds for refusal under Article V NYC, such as a violation of the respondent's right to be heard. The applicant successfully filed an

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appeal on a point of law with the BGH against this decision. The BGH then referred the matter back to the OLG Cologne, as the OLG Cologne had not examined the additional grounds for refusal asserted by the respondent. The respondent argued that COVID-19 restrictions had limited its ability to defend itself because it could not participate in the June 2020 test. The respondent also argued that the applicant had misinformed the arbitral tribunal about the operational status of the line, allegedly amounting to fraud. The applicant refuted these submissions, emphasising that the notarial recording and internal test runs were intended solely to improve or diagnose the equipment.

## **Key findings**

The OLG Cologne confirmed that the enforcement of the arbitral award was in accordance with Section 1061(1) German Code of Civil Procedure (ZPO), in conjunction with Article V(1)(a), (b) and Article V(2)(b) NYC. The court found no evidence that the respondent had been prevented from presenting its case. The arbitral tribunal's refusal to conduct a proposed "remote test" did not violate the respondent's right to be heard, since the tribunal's procedural rules and discretion permitted it to rely on other evidence. The court stated that ordinary disagreements about evidence do not amount to a due process violation. In addition, the court found that the arbitral tribunal also adequately addressed the respondent's argument that any issues with the operation of the plant were due to the operating personnel's lack of competence. Therefore, no violation of the respondent's right to be heard could be identified in this regard.

Furthermore, the respondent's allegations of fraud did not meet the required standard for enforcement to be denied on public policy grounds. The OLG Cologne explained that state courts do not review the correctness of the arbitral tribunal's application of the law (prohibition of *révision au fond*), but only whether the arbitral award leads to a result that is manifestly incompatible with the essential principles of German law or constitutes a violation of fundamental procedural guarantees. Additionally, the court emphasised that the enforcement of a foreign arbitral award was at issue in the present case. Therefore, in the interests of international trade, the less stringent standard of review of international public policy applies rather than that of domestic public policy. Recognition and enforcement of a foreign arbitral award can only be refused if the arbitration proceedings suffer from a serious defect affecting the foundations of state and economic life. This was not the case here. Accordingly, the OLG Cologne declared the award enforceable and rejected the respondent's objections.

## **Comment**

The OLG Cologne confirmed the limited scope of judicial review in recognition proceedings. Following the case law of the BGH, it emphasised the prohibition of *révision au fond*, which prohibits state courts from reviewing the substance of an arbitral award. The decision upheld the restrictive approach of German courts when reviewing arbitral awards regarding a potential violation of public policy under the NYC.