

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 27	Decision date:	17 February 2025	Res judicata: Yes
Court:	Higher Regional Court of Cologne (Oberlandesgericht Köln, OLG Köln)			
Case No. :	19 Sch 24/24			
Keywords:	Security for costs, proceedings for the recognition and declaration of enforceability of foreign arbitral awards, international treaty obligations, Hague Convention relating to civil procedure of 1 March 1954, sanctions			
Key legal provisions:	Section 110 German Code of Civil Procedure (ZPO) Art. 17 Hague Convention relating to civil procedure of 1 March 1954			

Security for costs in proceedings for the recognition and declaration of enforceability of arbitral awards: German courts adhere to Germany's international obligations – regardless of the political situation

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In a decision of 17 February 2025, the Higher Regional Court of Cologne (OLG Cologne) refused to impose an obligation to provide security for costs under Section 110 German Code of Civil Procedure (ZPO) on a Belarusian applicant in proceedings for the recognition and declaration of enforceability of a foreign arbitral award. The court held that security for costs may, in principle, be ordered in proceedings concerning the recognition and enforcement of domestic or foreign arbitral awards. However, the court ruled that no such order may be made where there is a valid international treaty between Germany and the applicant's home state, pursuant to which the issuance of an order for the provision of security for costs is excluded. According to the court, this holds true even if sanctions have been imposed on the applicant's home state in consequence of its involvement in a war of aggression. It further holds true in cases where there are uncertainties as to whether a decision awarding the respondent reimbursement of the costs of the state court proceedings can be enforced in that state.

Facts

The applicant, a limited liability company seated in Belarus, applied to the OLG Cologne to recognize and declare enforceable a foreign arbitral award issued by the International Arbitration Court of the Belarusian Chamber of Commerce and Industry.

The respondent requested the court, pursuant to Section 110 ZPO, to order the applicant to provide security for all of the respondent's expected litigation costs.

The court dismissed the respondent's request.

Key findings

The OLG Cologne considered the respondent's application to be admissible. In particular, the court found that Section 110 ZPO could be applied by analogy in proceedings concerning the recognition and declaration of enforceability of domestic or foreign arbitral awards. In doing so, the court aligned itself with the position recently expressed by the German Federal Court of Justice (BGH) (see BGH, 12 January 2023, I ZB 33/22, ZIP (Zeitschrift für Wirtschaftsrecht) 2023, 715).

Nevertheless, the OLG Cologne rejected the respondent's application. It ruled that the conditions for ordering security for costs were not satisfied in this case. The court held that a (still applicable) international treaty within the meaning of Section 110(2) No 1 and No 2 ZPO existed between Germany and Belarus, i.e., the Hague Convention relating to civil procedure of 1 March 1954 ("Hague Convention"). Pursuant to Article 17 Hague Convention, German courts are prohibited from requiring Belarusian nationals to provide security for costs. According to the OLG Cologne, the sanctions imposed on Belarus in connection with Russia's war of aggression against Ukraine could not alter this treaty-based prohibition. The same applied to the practical unenforceability in Belarus of any potential cost-reimbursement order in favour of the respondent. The OLG Cologne reasoned that Section 110(2) No 1 ZPO referred solely to Germany's international obligation to refrain from ordering security for costs. The actual possibility of enforcing cost-reimbursement orders in the applicant's home state was, by contrast, not relevant in this context.

Comment

With its decision, the OLG Cologne aligned itself with a view expressed by the BGH in 2023. According to both courts, security for costs under Section 110 ZPO may, in principle, also be ordered in proceedings for the recognition and declaration of enforceability of domestic or foreign arbitral awards. This, however, does not mean that parties from outside the EU or the EEA seeking recognition and declaration of enforceability of an arbitral award in Germany must generally expect to be required to provide security for costs in such proceedings. Where a valid and still applicable international treaty between Germany and the applicant's home state prohibits the ordering of security for costs, German courts will give effect to such a prohibition. According to the decision of the OLG Cologne, this applies even in cases where a serious foreign policy conflict exists between the two states. It also holds true where the applicant's home state, for its part, fails to comply with its international obligations.