GERMAN
ARBITRATION
DIGEST

GAD No.:	GAD 2026, 17	**Decision date:**	16 July 2026	**Res judicata:** Yes
Court:	German Federal Court of Justice (BGH)			
Case No. :	I ZB 107/25 Case No.(s) other instances: 101 Sch 61/24 e (Highest Regional Court of Bavaria, BayObLG)			
Keywords:	Foreign arbitral award, declaration of enforceability, nature of state conduct, state immunity, motive, lack of capacity to enter into an arbitration agreement, international jurisdiction			
Key legal provisions:	Article 25 German Constitution (GG) Sections 1025(4), 1061(1) German Code of Civil Procedure (ZPO) Article V(1)(a) and Article V(2)(b) New York Convention (NYC)			

German Federal Court of Justice facilitates enforcement against States in commercial arbitration

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Whether conduct is sovereign or commercial depends on its nature, not its motive or purpose. In enforcement proceedings, the respondent State may not rely on a lack of capacity to conclude the arbitration agreement. When determining jurisdiction over an application for a declaration of enforceability, the court disregards any immunity that may attach to particular assets.

Facts

In 2008, the applicant, a UK company, entered into a contract with the Libyan Ministry of Defence for the supply and installation of tactical communication systems and related training for the Libyan armed forces. The contract was governed by Swiss law and provided for ICC arbitration seated in Geneva.

After the outbreak of the Libyan civil war, the applicant terminated the contract. A dispute then arose over Libya's call on the payment guarantees. In 2016, the arbitral tribunal ordered Libya to pay GBP 16.1 million plus interest and dismissed its counterclaim.

In April 2024, the applicant sought a declaration of enforceability in Germany. The Highest Regional Court of Bavaria (BayObLG) granted the application, and the BGH dismissed the respondent's complaint.

Key findings

The BGH held that the distinction between commercial and sovereign conduct turns on the legal nature of the State's actions, not its sovereign motives or the purpose of the transaction. The use of private-law contracts is decisive. The purchase of goods and services for military use is therefore generally commercial where the State acts through such contracts rather than exercising sovereign powers. Neither the contract nor the calls on the guarantees fell within the core sphere of sovereign military activity.

When assessing German jurisdiction over a foreign State, the court must both identify non-sovereign conduct and establish that it is attributable to the State. The relevant conduct in this case was attributable to Libya: a non-sovereign act performed by a State authority in the exercise of administrative functions is attributable

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to the State. Breaches of internal approval rules or rules allocating responsibilities are generally irrelevant to attribution, reflecting the principle in Article 46(1) of the Vienna Convention on the Law of Treaties.

The BGH also rejected Libya's reliance on Article V(1)(a) of the New York Convention. A State that engages in private commerce and agrees to arbitration is generally barred from subsequently invoking its own law to assert that it lacked capacity to conclude the arbitration agreement. Otherwise, it could evade that agreement through its own legislation. This principle is reflected in international instruments and national arbitration laws. The BGH therefore did not need to decide whether Libya had forfeited the objection by failing to raise it before the tribunal.

The BGH confirmed that German courts have international jurisdiction under section 1025(4) ZPO to declare foreign awards against foreign States enforceable. The presence of Libyan assets in Germany established a sufficient domestic connection. Any immunity those assets might enjoy from enforcement did not deprive the applicant of its legal interest in obtaining a declaration of enforceability. Immunity from individual enforcement measures is assessed only when those measures begin, since the status or intended use of the assets may change.

Finally, the applicant was exempt from security for costs because the 1960 German-British Convention permits enforcement of a German costs order in the United Kingdom. In general, a foreign claimant who seeks enforcement in Germany must provide security for costs unless a treaty permits enforcement against the claimant of the preceding arbitration.

Comment

The decision strengthens the position of private parties in arbitration against States and State entities. It draws a clear distinction between a State's sovereign objectives and the legal nature of the transactions through which it pursues them. It also limits a State's ability to invoke internal approval defects to avoid responsibility for commercial acts performed by its authorities, aligning the BGH with the prevailing view in international arbitration. By distinguishing adjudicative immunity, proceedings for a declaration of enforceability and immunity from enforcement, the BGH strengthens the framework for enforcing awards against States. An award creditor may obtain a German declaration of enforceability even where particular assets are currently immune from enforcement.