

GERMAN ARBITRATION DIGEST

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Court:	German Federal Court of Justice (BGH)			
Case No. :	I ZB 34/23 Case No. other instances: 26 Sch 14/22 (Higher Regional Court of Frankfurt)			
Keywords:	Form requirements, signature of award, omission of signature, obstructive arbitrator			
Key legal provisions:	Section 1054 (1) German Code of Civil Procedure (ZPO)			

"Signature could not be obtained" – but arbitral award is valid

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An award must be signed by the arbitrators. But German law, adopting a provision of the UNCITRAL Model Law, allows exceptions. The German Federal Court of Justice (BGH) has now interpreted these exceptions liberally: In case of a majority decision, a signature can be replaced by the statement: "Signature could not be obtained".

Facts

The dispute was between the German chemical companies BASF and Bayer. Surrounding its acquisition of Monsanto in 2018, Bayer (the respondent) sold its seed and herbicide business to BASF (the applicant) for EUR 7.4 billion. The underlying contracts provided for ICC arbitration seated in Frankfurt (Main). The applicant later claimed EUR 1.6 billion in damages from the respondent on allegations of misrepresentation. The arbitral tribunal dismissed the applicant's claims in August 2022. The applicant was ordered to pay over EUR 15 million in legal and further costs.

The arbitral award, however, was only signed by two arbitrators. Under the name of the third arbitrator, a machine-written note explained: "Signature could not be obtained".

The applicant applied to the Higher Regional Court of Frankfurt to set aside the arbitral award or, alternatively, to declare it invalid. The applicant argued that the award did not comply with Section 1054 (1) German Code of Civil Procedure (ZPO). This provision (almost identical to Article 31 of the UNCITRAL Model Law) allows omitting a signature if at least a majority of the tribunal has signed the award. However, it requires stating a reason for the missing signature.

The applicant argued that an award lacking a signature needs to specifically explain why one of the arbitrators did not sign the award. In the applicant's view, the statement "signature could not be obtained" only states the obvious without explaining why the arbitrator did not sign. The applicant also argued that the explanation must be signed separately by another arbitrator.

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On 27 April 2023, the OLG Frankfurt declared the award invalid, ruling that it was a "non-award": without proper reasons for a missing signature, it cannot be treated as an award because it violates a mandatory form requirement.

In the court's view, the "reason" for omission of a signature must explain the arbitrator's reason not to sign. The signature should not only ensure that the decision is final. Instead, it should also force the arbitrators to assume responsibility for proper conduct of the proceedings. By explaining why an arbitrator's signature is missing, the parties should be able to assess the prospects of set-aside proceedings.

Key Findings

The BGH overturned the decision of the OLG Frankfurt and remanded the matter for a new decision on the applicant's set-aside request.

The BGH held that Section 1054 (1) ZPO only requires a reason for the missing signature, not for the arbitrator's refusal to sign. Further, the arbitrator's refusal to sign does not need to be signed separately. However, the BGH agreed that an award that lacks a mandatory form requirement cannot be treated as an arbitral award.

The BGH found that signing an award is meant to distinguish it from a mere draft. By their signature, the arbitrators acknowledge the award as final and binding. A statement under Section 1054 (1) ZPO shall only allow the parties to identify whether the award is the final result of the arbitration or not.

The BGH refused to apply the requirements for court judgments under Section 315 (1) ZPO to arbitral awards. It explained that judges must state a "reason for hindrance" if they do not sign a judgment. Arbitrators are not subject to the same threshold. The BGH further relied on the legislator's intention: Section 1054 (1) ZPO was introduced to facilitate international arbitrations. Creating new form requirements would be contrary to this purpose.

Perhaps most importantly, the BGH explained that Section 1054 (1) ZPO also aims to keep an obstructive arbitrator under control. No arbitrator should be able to prevent a valid award – let alone by refusing to participate in a formality.

Lastly, the BGH held that it is not necessary to sign the statement on the missing signature separately. However, the BGH left open if the award must specify who takes the responsibility for the statement – which was the case here through the allocation of the presiding arbitrator's signature on the machine-written note "Signature could not be obtained".

Comment

The decision is in line with a similarly liberal interpretation in many jurisdictions.

Under Article 31 UNCITRAL Model Law, an arbitrator can refuse to sign an award for any reason. The adopting states have largely refrained from introducing additional thresholds (see Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* 417-427 (Kluwer Law International 2019)). The same is true for jurisdictions not based on the UNCITRAL Model Law: In some of them, the signature of the presiding arbitrator is sufficient (Switzerland: Bundesgesetz über das Internationale Privatrecht [IPRG], Article 189). In others, a dissenting arbitrator may choose whether

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or not to sign the award without affecting its validity (China: Zhong Hua Ren Min Gong He Guo Zhong Cai Fa (中华人民共和国仲裁法) [Arbitration Law of the People's Republic of China] (promulgated by Order No 31 of the President of the People's Republic of China on August 31, 1994), Article 54).

The arbitrator's requirement to sign the award appears to primarily serve the purpose of ensuring legal certainty: The parties must be sure when the arbitration is over (and the result is binding). Only a signed award is a final award. However, this should not allow an obstructing arbitrator to delay the end of the arbitration. Additional requirements on the omission of a signature could leave the parties in a legal limbo.

For BASF and Bayer, the fight is not over. The BGH remanded the matter to the OLG Frankfurt for a new decision on other aspects of the set-aside proceedings.