

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2024, 6	Decision date:	21 December 2023	Res judicata: No, matter remanded to OLG Cologne
Court:	German Federal Court of Justice (BGH)			
Case No. :	I ZB 37/23 Case No.(s) other instances: 19 Sch 34/22 (Higher Regional Court of Cologne)			
Keywords:	Foreign arbitral award, declaration of enforceability, right to be heard, public policy, "révision au fond", China, New York Convention, arbitration agreement, grounds for refusal			
Key legal provisions:	Section 1059 German Code of Civil Procedure (ZPO) Section 1061 German Code of Civil Procedure (ZPO) Article V New York Convention			

German Federal Court of Justice bolsters the principle of "révision au fond", confirming that the allegedly wrongful consideration of evidence does not preclude the recognition of foreign arbitral awards

Author: Felix Mayer, Freshfields

On 21 December 2023, the German Federal Court of Justice (BGH) overruled a decision of the Higher Regional Court of Cologne (OLG Cologne) that had rejected an application for declaration of enforceability of a foreign arbitral award. The OLG Cologne had held that the respondent's right to be heard was violated because the arbitral tribunal had wrongfully relied on evidence brought forward by the applicant without taking into account the respondent's submission and without demonstrating the necessary expertise. The BGH, however, emphasized that objections must be raised promptly and clearly in writing during the arbitration and further stressed that the principle of "révision au fond" also applies to the taking of evidence, holding that domestic courts are barred from reviewing the arbitral tribunal's consideration of evidence.

Facts

The China-based applicant purchased a production line for copper tinning from the German-based respondent in 2015. The contract included an arbitration clause with arbitration to be held in Shanghai under the remit of the China International Economic and Trade Arbitration Commission (CIETAC). The parties agreed on payment terms of 20 % upon signing, 60 % upon delivery, and 20 % after commissioning and acceptance. The applicant paid the first two instalments but refused the final payment.

Between 2017 and 2019 the parties disputed the final payment. In December 2019, the applicant informed the respondent in two letters that the production line could not produce defect-free products in mass production and requested negotiations for a partial refund or joint acceptance. The respondent did not reply in substance to the first letter and did not reply at all to the second letter. On 15 June 2020, the applicant conducted the acceptance itself and instructed a notary to record the process on video.

The applicant subsequently filed for arbitration, seeking a price reduction and damages. The respondent contested the notarized acceptance certificate provided by the applicant, arguing it lacked an assessment of the operating personnel's expertise, which was crucial for the production line. The arbitral tribunal largely upheld the applicant's claims in its award dated 10 December 2021.

GERMAN ARBITRATION DIGEST

The applicant sought enforcement of the award in Germany, but in May 2023, the OLG Cologne denied the application, holding that the award could not be recognized domestically due to violations of the respondent's right to be heard. The court found that when relying on the notarized acceptance that was conducted without the respondent's participation, the arbitral tribunal had relied on evidence adduced by the applicant without (i) demonstrating the necessary expertise to evaluate the evidence, (ii) taking into account the limited evidential value, and (iii) taking into account the respondent's submission.

The applicant filed an appeal on a point of law with the BGH against the decision.

Key findings

The BGH granted the appeal on a point of law against the decision and referred the matter back to the OLG Cologne, which has not yet examined the other grounds for refusal asserted by the respondent.

First, the BGH held that the respondent was not precluded from asserting grounds for the refusal of recognition before the OLG Cologne, even though it did not file an application for setting aside the arbitral award with the Chinese state court. The BGH argued that Section 1060(2)(3) German Code of Civil Procedure (ZPO), which refers to the three-month time limit for challenging arbitral awards, applies only to domestic arbitral awards since the provision refers to the setting aside proceedings under Section 1059 ZPO. It is not analogously applicable to foreign arbitral awards since German legislation is not authorized to provide for proceedings for setting aside foreign arbitral awards, as it would otherwise be interfering with the sovereign authority of foreign states.

Second, however, the BGH ruled that the grounds for refusal were not proven by the respondent in the case at hand. Based on the CIETAC Rules agreed upon by the parties, the respondent was precluded from asserting a violation of its right to be heard as it failed to promptly and clearly raise this objection in writing during the arbitration. The BGH further found that the objections that were in fact raised by the respondent were discussed during the arbitration proceedings. Additionally, the BGH highlighted the principle of "révision au fond", which prevents state courts from examining the substance of an arbitral award, and pointed out that the OLG Cologne incorrectly conducted a substantive review of the arbitral award. The BGH explained that, by itself, an incorrect application of the law is not sufficient to deny the recognition and enforcement of an arbitral award. In this regard, the BGH emphasized that domestic courts are typically restricted from reassessing the evidentiary evaluation carried out by the arbitral tribunal.

Comment

The BGH's decision highlights the autonomy of arbitral tribunals and thus strengthens Germany as a place of arbitration: On the one hand, the BGH has established that the three-month time limit for challenging arbitral awards is not applicable to foreign arbitral awards due to the sovereign autonomy of foreign states. On the other hand, the BGH has strengthened the principle of "révision au fond" by holding that a domestic court may not review the substantive correctness of the arbitral award in the proceedings for the declaration of enforceability. This also bars domestic courts from reviewing the arbitral tribunal's consideration of the evidence.