

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 4	Decision date:	20 November 2023	Res judicata: Yes
Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	102 Sch 173/23 e			
Keywords:	Foreign arbitral award on agreed terms, (partial) declaration of enforceability, most favoured nation principle			
Key legal provisions:	Sections 1061, 1064 German Code of Civil Procedure (ZPO) Article VII New York Convention			

Highest Regional Court of Bavaria: Arbitral award "approved" by the arbitral tribunal might still be an arbitral award on agreed terms

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On 20 November 2023, the Highest Regional Court of Bavaria (BayObLG) declared a decision by a Czech arbitral tribunal (partially) enforceable. It held that even though the operative part of the award verbatim "approves" a settlement between the parties, it was still an arbitral award on agreed terms, and not a settlement agreement. Thus, the court applied Section 1061 German Code of Civil Procedure (ZPO) in connection with the New York Convention.

Facts

The applicant and the respondent had been involved in Czech arbitration proceedings, which were eventually settled. The parties applied to the Czech arbitral tribunal to render a decision that corresponded to the agreed settlement. On 12 July 2022, the arbitral tribunal issued an "award" with, among others, the following wording:

"[...] It is ruled as follows: The following settlement concluded between the Claimant and the Respondent [...] is approved:

1. [...]
2. [...]
3. [...]"

The arbitral tribunal referred to a specific provision in the applicable arbitration rules which stipulate that the parties may ask the tribunal to issue an award in respect of an agreed settlement.

On 20 November 2023, the BayObLG declared the decision (partially) enforceable. The decision is res judicata.

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Key findings

The BayObLG held that the decision was an arbitral award on agreed terms and could thus be declared enforceable in Germany pursuant to Section 1061 ZPO.

First, the BayObLG found that it had jurisdiction. The respondent had its corporate seat in Bavaria. According to a decision by the state of Bavaria to concentrate all arbitration-related proceedings at one single court as from 1 May 2020 onwards, the BayObLG was competent to decide on the matter.

Second, the BayObLG found that the applicant had met the formal requirements for a declaration of enforceability of an arbitral award. In particular, it ruled that it was sufficient to submit the original arbitration award with a simple translation and only a copy of the contract containing the arbitration clause. It held that the declaration of enforceability was primarily governed by the European Convention on International Commercial Arbitration 1961 (ECA), which takes precedence over the New York Convention. However, it is generally accepted that the most favoured treatment principle applies so that an applicant can rely on the more enforcement-friendly regime, which compared to the ECA is the New York Convention. Via the most favoured treatment principle in Article VII New York Convention, the applicant can thus rely on Section 1064 (1) and (3) ZPO. These provisions allow the submission of the original arbitration award without legalization and do not impose any requirements for the submission of the arbitration clause.

Third, the BayObLG discussed whether the fact that the settlement was "approved" by the arbitral tribunal precluded a declaration of enforceability. In doing so, it distinguished an arbitral award from a (foreign) settlement. The latter cannot be declared enforceable under German law. It concluded that the decision issued by the arbitral tribunal corresponds to an arbitral award on agreed terms pursuant to Section 1053(2) ZPO, meaning that it can be declared enforceable in accordance with the general rule of Section 1061 ZPO. The BayObLG focused in particular on the fact that (i) the decision was labelled as an "arbitral award" (and not as a settlement or similar), (ii) the arbitral tribunal had introduced the decision with the phrase "ruled" (*für Recht erkannt*) and (iii) the decision contained a reasoning and an instruction on its enforceability. All of this, according to the BayObLG, indicated that the arbitral tribunal intended to issue an arbitral award. The mere reference to the fact that the tribunal had "approved" a settlement was subordinate to these indications.

Fourth, the BayObLG held that only a partial declaration of enforceability was possible, as the corresponding clause of the arbitral award was divisible and separable from the rest of the operative part.

Comment

With this decision, the BayObLG not only allowed the successful party in the arbitration to submit the original arbitral award without further formal evidence. It also held that even if a settlement by the parties to the arbitral proceedings is "approved" by the arbitral tribunal, such settlement can still be an "award on agreed terms", and not a settlement agreement, and may thus be declared enforceable. This is in line with earlier decisions by the Higher Regional Court of Munich regarding German arbitral awards (see 12 June 2012, 34 Sch 07/10, SchiedsVZ 2012, 2017). However, arbitral tribunals may be able to avoid such disputes before state courts following arbitration proceedings if they make it (even) clearer that they intend to issue a decision in the sense of an arbitral award, and do not merely approve an agreement between the parties.