

Jointly, severally or both – To what extent can state courts adjust the dispositive part of arbitral awards at the enforcement stage?

By Dr Tilman Niedermaier and Vincent Voerster

On 18 January 2022, the *Bayerisches Oberstes Landesgericht* (Bavarian Highest Regional Court seated in Munich) ruled on the enforceability of the cost decision in an arbitral award rendered in a LCIA arbitration in favour of the prevailing respondents, a UK and a German company, against the German claimant (docket number 101 Sch 60/21). In the decision, the court confirmed the standing jurisprudence on the extent evidence submitted during the arbitration needs to be expressly addressed in the arbitral award and on how setting aside proceedings abroad impact enforcement proceedings in Germany. In addition, the ruling discussed the conditions under which the court of enforcement is allowed to adjust the dispositive part of the arbitral award as to render it enforceable under German law. As these questions regularly arise at the enforcement stage, this decision is of considerable practical relevance.

I. Facts of the case and prior proceedings

In the LCIA arbitration in London, which preceded the enforcement proceedings before the Bavarian Highest Regional Court, a German company sought damages for alleged breaches of two distribution agreements by its English and German distribution partners. The LCIA tribunal found that no such breaches had occurred and therefore dismissed the claims. Regarding the costs of the arbitration, the arbitral tribunal made the following cost decision based on Article 28.4 of the LCIA Rules:



The Claimant shall pay EUR 9,441,445.07 and GBP 366,160.23 to the Respondents, on a full indemnity basis, in respect of their costs incurred in this arbitration.

Hereupon, the UK-based respondent in the arbitration (**Applicant**) applied for a declaration of enforceability of the arbitral award (**Application**) before the Oberlandesgericht München (Higher Regional Court Munich), which referred the matter to the Bavarian Highest Regional Court. In parallel, the claimant in the LCIA arbitration and respondent at the enforcement stage (**Respondent**) introduced setting aside proceedings against the award before the High Court of London.

II. Court's subject-matter jurisdiction

In its decision on the Application, the Bavarian Highest Regional Court first clarified that it had jurisdiction to decide on the matter. While in most German states (*Bundesländer*) the Higher Regional Courts in whose district the respondent in the enforcement proceedings is seated are competent to decide on the recognition of foreign arbitral awards, this competence has been contributed to the Highest Regional Court in Bavaria.

Bavaria is the only state in Germany who has established such a court ranking in the hierarchy above the Higher Regional Courts. The Bavarian Highest Regional Court was reestablished in 2018 after it had been abolished in 2006. Today, the court mostly functions as an appellate court in civil and penal matters, but also as first instance in all arbitration-related matters listed in the catalogue of Section 1062 of the German Code of Civil Procedure (**ZPO**).

III. Impact of setting aside proceedings before the High Court of London

The Respondent objected to the Application on the basis that it had initiated setting aside proceedings before the High Court of London. Referring to Article V (1) lit. e of the New York Convention, pursuant to which the enforcement of an arbitral award may be refused where the arbitral award has not yet become binding on the

parties or has already been set aside by a national court at the place of arbitration or is temporarily suspended, the Respondent argued that, in view of those proceedings, German courts were prevented from declaring the arbitral award enforceable.

The court, however, did not follow this argument, holding that the award was fully binding on the parties. The court reasoned that the mere possibility of successful setting aside proceedings cannot justify the refusal of enforcement under the NYC. Instead, the court stated that in such a situation Article VI NYC gives a court discretion to suspend the proceedings.

Exercising its discretion under Article VI NYC, the court rejected the Respondent's request to suspend the enforcement proceedings. Although the High Court of London had declared during a hearing that, in its view, the setting aside application had a real prospect of success, the Bavarian Highest Regional Court was unconvinced that such prospects were predominant. The court opined that the statement by the High Court was not made in the context of an in-depth analysis of the merits, but of a decision on the deposit of a security. In these circumstances, the court took the view that the Applicant's interest in the pursuit of the proceedings outweighed the Respondent's interest in a stay of the proceedings.

IV. No violation of the right to be heard

In addition, the Respondent objected to the Application on the grounds that the arbitral award would violate German public policy pursuant to Article V (2) lit. b NYC. The Respondent argued that the arbitral tribunal had violated its right to be heard because it had not expressly mentioned in its reasoning a particular statement that one of the witnesses had made during his examination at the hearing. In the Respondent's view, this omission itself amounted to a violation of the *ordre public procédural*. Furthermore, the Respondent complained that the arbitral award had been rendered 16 months after the hearing and, after this long interlude, could not be based on an immediate impression of the witness testimony, which likewise amounted to a violation of the right to be heard.

In accordance with standing jurisprudence, the court rejected this objection, recalling that,

while a tribunal is held to take into account the main arguments of the parties and review them in its legal analysis, it need not expressly consider every single evidence in this analysis, notably when a witness testimony is not of particular relevance to the facts or material for the parties' cases.

The court concluded that in the case at hand there was no indication that the tribunal had failed to fully analyse the claims and the evidence submitted by the parties. The mere fact that the court did not mention a particular statement by a witness was insufficient to justify any concerns in this regard.

The same, in the court's view, applied to the 16-month period between the hearing and the release of the final award. The court held that, considering the complexity of the case and the volume of the file, there was no reason to assume that the arbitral tribunal did not fully recollect the respective witness testimonies when writing the arbitral award. In this regard, the court rejected the Respondent's allegation that a general principle of constitutional rank existed in Germany according to which decisions need to be rendered within five months after the oral hearing.

V. Court's clarification of the dispositive part of the arbitral award

Regarding the dispositive part of the cost decision, the court noted that the decision was not enforceable because it left open whether the respondents were entitled to compensation for the costs as joint creditors (*Gesamtgläubiger*) or several creditors (*Anteilsgläubiger*) even though, under German law, a decision obliging one party to make payment to more than one other party must clearly state to what extent each of the other parties is entitled to request payment.

The Respondent argued that, due to this ambiguity, enforcement of the award had to be rejected. The Respondent argued that under English law, even assuming that the respondents in the arbitration were joint creditors, only jointly could all creditors pursue enforcement proceedings against the Respondent as debtor and not, as in the present case, by one creditor individually. The Applicant, by contrast, took the view that it was entitled to pursue the full amount

individually and that any ambiguity in the cost decision in this regard could be resolved by way of interpretation.

Against this background, the court observed that the ambiguity of dispositive part of the cost decision did not result in the rejection of the Application if the dispositive part could be adjusted in an enforceable manner in the declaration of enforceability without changing the content of the arbitral award. Upon analysis of the reasoning of the cost decision, the court concluded that it was sufficiently clear that each of the two respondents in the arbitration could request the full amount from the claimant in the arbitration as joint creditors (*Gesamtgläubiger*) and not as only *pro rata* as several creditors (*Anteilsgläubiger*):

- First, the respondents in the arbitration filed a joint cost statement. The arbitral tribunal therefore had no reason to allocate cost items or shares of the costs to the respondents individually. Instead, this internal allocation was left to the respondents without involvement of the arbitral tribunal.
- Second, if the court had intended to oblige the claimant in the arbitration to compensate each of the respondents *pro rata*, it must have expressly fixed the individual shares pursuant to Section 63 (3) Arbitration Act 1996 and Article 28.3 LCIA Arbitration Rules. The fact that the arbitral tribunal did not do this reveals that it considered the respondents to be joint creditors.
- Third, the court observed that there was no indication whatsoever in the award that payment by the claimant could only be made to both respondents collectively.

The court was therefore convinced that the respondents in the arbitration were joint creditors. In this regard, the court further noted that it was without relevance to the outcome whether the respondents in the arbitration were also to be considered joint and several creditors. While under English law merely joint creditors in the absence of a special provision may in principle pursue enforcement proceedings against the debtor only jointly and not severally, the court observed that the declaration of enforceability does not form part of the enforcement procedure but antecedes the enforcement stage. The court therefore did not have to decide on the question whether English enforcement requirements can play any role in German enforcement proceedings.

VI. Conclusion

In its decision, the Bavarian Highest Regional Court recalled and confirmed the standing jurisdiction in Germany on the right to be heard in arbitral proceedings. In addition, the decision is a reminder for parties and arbitrators to bear in mind, to the extent possible, the requirements of the rules at the place of enforcement when formulating the request for relief and their decisions, respectively. Where the court of enforcement is unable to adjust the dispositive part of the decision on its own motion, most arbitration laws and rules provide for the possibility to seek clarification from the arbitral tribunal.

This article was written by CMS partner Dr Tilman Niedermaier and research associate Vincent Voerster and was first published on CMS Law-Now on 11 March 2022 available [here](#).



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