



BGH confirms arbitration-friendly approach in setting aside decision

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In a decision published on 18 February 2022, the German Federal Court of Justice (BGH) partially set aside an EUR 142 million ICC award for the violation of the respondent's right to be heard. The case is part of a complex, long-standing and still ongoing pharma dispute that is also the subject of another multi-billion ICC arbitration. Although the BGH decision resulted in a partial set aside of the award, the Court actually confirmed its arbitration-friendly approach to the review of awards.

Background

The case arises from a dispute between the Taiwanese biotechnology company PharmaEssentia (PE) and the Austrian company AOP Orphan Pharmaceuticals (AOP). In 2009, the Parties entered into a Manufacture Agreement and a License Agreement regarding a prospective drug for the treatment of rare blood cancers. While PE was responsible for the production, AOP obtained the license to further develop and market the drug in Europe as well as in several Asian and African countries. PE, however, remained entitled to market the drug outside the territory licensed to AOP, and PE had the right to request certain information from AOP *inter alia* for that purpose.

A dispute arose as to whether AOP had breached its information duties towards PE, and from November 2017, PE repeatedly sought to terminate its agreements with AOP. In response thereto, AOP initiated ICC arbitration proceedings in March 2018.

In October 2020, the ICC tribunal held that both the License Agreement and the Manufacture Agreement were still in effect (item 1). It also ordered PE to pay to AOP EUR 142 million in damages (item 2) and EUR 1.35 million in arbitration costs (item 3). Finally, the ICC tribunal dismissed all other claims, including PE's counterclaims (item 4). In particular, the ICC tribunal found that PE had willfully breached its cooperation and supply obligations and, because of the willfulness, decided that the contractual liability cap to previous license payments (approximately EUR 2 million) was inapplicable.

In March 2021, the Higher Regional Court of Frankfurt (OLG Frankfurt) declared the award enforceable, rejecting all setting aside arguments raised by PE ([26 Sch 18/20](#)).

PE then went on to challenge this declaration of enforceability before the BGH.

Key Findings

In its decision of 9 December 2021 (I ZB 21/21), the BGH partially overruled the decision of the OLG Frankfurt and set aside items 2 and 3 of the award, by which the ICC tribunal had ordered PE to pay damages and costs to AOP. By contrast, the BGH confirmed the decision of the OLG Frankfurt not to set aside items 1 and 4 of the award.

The BGH based the partial setting aside of the award on the finding that the ICC tribunal had violated PE's right to be heard in two instances.

First, the BGH held that the ICC tribunal had **failed to provide reasons** for a key aspect of its decision.

In reaching this conclusion, the BGH confirmed its settled case law that under German law arbitral tribunals only have to provide a short summary of the material considerations (*tragende Erwägungen*) underlying their decisions. They have to address the central issues of the case (*zentrale Fragen*) as well as the parties' main defenses (*wesentliche Verteidigungsmittel*) but not deal with every point of the parties' submissions. Notably, the BGH stated that it would be far-fetched (*fernliegend*) to require arbitral tribunals to reason their findings and convictions in as much detail as it is required for German state courts.

Applying this standard, the BGH still accepted the ICC tribunal's reasoning as to why PE had willfully breached its cooperation obligations. The BGH noted that, with respect to this first breach, the ICC tribunal had at least impliedly provided reasons for its finding of willfulness by using the wording "*clear disregard for PE's duty to cooperate*" and by assessing certain statements made by PE's CEO. By contrast, the BGH found that the ICC tribunal had failed to provide any reasons for its finding that PE willfully breached its supply obligations. With respect to this second breach, the BGH thus found that the ICC tribunal had violated PE's right to be heard.

Second, the BGH held that the ICC tribunal had **treated disputed facts as undisputed**.

In the course of the arbitration, PE had argued that AOP's expert report was "*useless and to be disregarded*". However, the ICC tribunal had only dealt with PE's specific objections to the expert's findings on AOP's so-called Selling, General & Administrative Expenses (SG&A), and considered the other cost items to be undisputed. The BGH found that, by raising general objections to the AOP's expert report, PE had effectively disputed all of the findings made therein. From the ICC tribunal's statement that it "*consider[ed] the costs assumed by AOP to be appropriate*", the OLG Frankfurt inferred that the ICC tribunal had dealt with and formed an independent view on all cost items. The BGH disagreed with this reading and found that the aforementioned statement only referred to the SG&A.

Based on its settled case law, the BGH concluded that by treating disputed facts as undisputed, the ICC tribunal had committed a second violation of PE's right to be heard.

As these two violations of PE's right to be heard only affected the ICC tribunal's findings on damages and costs (items 2 and 3) but not its other findings (items 1 and 4), the BGH only partially set aside the award. Finally, the BGH noted that neither party had (timely) requested that the case be remitted to the ICC tribunal pursuant to Section 1059 (4) ZPO.

Commentary

Contrary to what the outcome might suggest, the BGH's decision is a confirmation of the Court's arbitration-friendly approach. The BGH's harsh criticism of the material findings under *Finnish* law by a DIS tribunal in the *Olkiluoto* decision (Order of 18 July 2019, [I ZB 90/18](#)) had raised certain concerns that the BGH could (mis)use the right to be heard defense as a vehicle to 'double-check' the material reasoning of arbitral awards. However, in the present decision, the BGH confirmed its previous long-standing, non-interventional approach and did not question the material findings to the extent that the ICC tribunal had at least impliedly provided reasons for them. The BGH only intervened to the extent that the ICC tribunal had not provided any reasons at all and had, at least based on the information publicly available, failed to engage with one of PE's key defenses.

Based on the information publicly available, the dispute between PE and AOP is not over yet. AOP has started enforcement proceedings in several jurisdictions, and may try to pursue them (despite the present BGH decision) or partially relaunch its claims. In addition, another multi-billion ICC arbitration is said to be pending.

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