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## German Court Declares an ICC Award Enforceable Against a Foreign State, Rejecting Sovereign Immunity in a Commercial Arms-Supply Dispute

*The Bavarian Highest Regional Court has held that a foreign State may not invoke sovereign immunity to resist the recognition and enforcement of an arbitral award arising from a commercial arms-supply contract, and that a State which participates in the arbitration – all the more so where it brings a counterclaim – is precluded from later challenging the arbitration agreement before the German courts.*

### **I. Introduction**

In a decision of 19 December 2025 (case no. 101 Sch 61/24e), the Bavarian Highest Regional Court (Bayerisches Oberstes Landesgericht, **BayObLG**) declared an ICC award enforceable against a foreign State, rejecting the State's reliance on sovereign immunity, its challenge to the validity of the arbitration agreement, and its application for security for costs. The ruling reaffirms Germany's standing as an enforcement-friendly jurisdiction and addresses three issues that recur in the enforcement of awards against sovereign States: the scope of State immunity, the treatment of security for costs following Brexit, and the preclusion of jurisdictional objections raised for the first time at the enforcement stage. A Rechtsbeschwerde (appeal on points of law) is pending before the Federal Court of Justice (Bundesgerichtshof, **BGH**; case no. I ZB 107/25).

## **II. Background**

The claimant, a company domiciled in the United Kingdom, contracted in 2008 with the procurement authority of a foreign State for the supply and installation of tactical communication systems in the vehicles of that State's armed forces, together with associated training. The contract contained an ICC arbitration clause providing for a seat in Geneva and the application of Swiss substantive law.

After unrest broke out in the State in 2011, the claimant terminated the contract, and a dispute arose over the lawfulness and consequences of that termination. The claimant commenced ICC arbitration in 2013; the State defended on the merits and brought a substantial counterclaim. In its 2016 award, the tribunal ordered the State to pay a principal sum in respect of the State's unjustified call on standby letters of credit, plus interest, and to bear the bulk of the costs of the arbitration.

The claimant sought partial recognition and enforcement (*Vollstreckbarerklärung*) of the award before the BayObLG, relying on the fact that the State owns two plots of land within the court's district. The State asserted immunity, contested the validity of the arbitration agreement, and applied for an order requiring the claimant to provide security for costs.

## **III. Key Holdings**

### **1. State immunity**

The court reaffirmed that, proceedings for a declaration of enforceability (*Vollstreckbarerklärung*) of an arbitral award are not enforcement proceedings (*Zwangsvollstreckung*) but a recognition proceeding *sui generis* (*Erkenntnisverfahren eigener Art*). The applicable test is therefore the one under the law of jurisdictional immunity, not the (narrower) law of enforcement immunity.

Germany adheres to the restrictive (as opposed to absolute) theory of sovereign immunity. Under the doctrine of restrictive immunity, a State enjoys **immunity only for sovereign acts** (*acta iure imperii*), not for conduct it undertakes like a private party (*acta iure gestionis*). The distinction turns on the *nature* of the act or legal relationship, not on its motive or purpose. Critically, the court held that, although national defense and the maintenance of armed forces are sovereign functions, this does not prevent contracts connected with the sale of arms and munitions from being concluded on a private-law footing. By entering into the contract and calling on the guarantees, the State had acted like a private party; the fact that the goods were destined for military use, or that contract was said to form part of bilateral defense cooperation between the two governments, did not alter the private-law nature of the transaction.

Although jurisdictional immunity governed the merits, the State also invoked enforcement immunity to dispute the court's local jurisdiction, which rested on the land the State owns in the district (the asset-based venue under Section 1062 ZPO). As a matter of general international law, **enforcement against a foreign State's assets is barred where those assets are dedicated to sovereign purposes** (*Zweckbestimmung*) and such property is placed beyond the reach of execution. This protection does not require the asset to be already in actual sovereign use; it is enough that a competent organ of the State attests a sovereign dedication. On the facts,

the court ruled that the planned offices for “economic” and “technical cooperation” on the plots of land in question were not by their nature a sovereign activity and were not comparable to the representation of culture and science abroad; the State had also failed adequately to attest a sovereign dedication of the land. The Federal Foreign Office had moreover noted that exercising sovereign functions on German soil would require Germany’s consent, which the State had not obtained. The court therefore found no enforcement immunity, and the asset-based venue – and with it German jurisdiction – held.

## 2. Security for costs

The court confirmed that the rules on security for costs (*cautio iudicatum solvi*, Section 110 of the German Code of Civil Procedure (**ZPO**)) apply by analogy to proceedings for a declaration of enforceability of an arbitral award, and that, following Brexit, a claimant seated in the United Kingdom is in principle no longer relieved of the obligation as an EU/EEA party.

That said, the court concluded that the claimant was nonetheless exempt under the exception in Section 110(2) No. 2 ZPO, because an international treaty – the German-British Convention of 14 July 1960 on the reciprocal recognition and enforcement of judgments in civil and commercial matters – secures the enforcement of any cost order in the claimant’s home State. Notably, the court treated this as independent of Brexit. That is because, the EU regime (the 1968 Brussels Convention and the Brussels I and Brussels Ia Regulations) has always excluded arbitration from its scope, so the 1960 Convention was never superseded in arbitration-related matters and simply remained in force throughout. The court therefore did not need to resolve the disputed question whether the Convention “revived” for other civil and commercial matters after Brexit, and it rejected the argument that enforcement of the costs order had to be “beyond doubt”: it suffices that enforcement is secured, and the abstract risk of divergent interpretation does not defeat a treaty that is in force and has not been terminated.

## 3. Validity of the arbitration agreement: preclusion of the objection

The State also argued that the procurement authority had lacked capacity under its domestic law to conclude an arbitration agreement without ministerial approval, rendering the clause invalid. In deciding whether the State was entitled to raise this point at the recognition stage, the court distinguished two situations:

- **Failure to seek annulment at the seat is not preclusive.** The State was *not* barred from raising it merely because it had not brought set-aside proceedings against the award in Switzerland; a party does not forfeit grounds for resisting recognition simply by declining to use a (time-barred) remedy in the State of origin.
- **Participation without objection is preclusive.** The State *was*, however, barred because it had not raised the invalidity of the arbitration agreement in the arbitration itself and had even advanced a counterclaim. While the New York Convention contains no express preclusion rule, the prohibition of contradictory conduct (*venire contra factum proprium*) – rooted in good faith and recognized as a principle inherent in the Convention – applies. By bringing a counterclaim, the State signaled that it treated the arbitration agreement as binding and would not later contest it before national courts; it thereby deprived the tribunal of the opportunity to rule on its own jurisdiction and deprived the claimant of the chance to resort to the national courts instead. The objection could not be

revived at the recognition and enforcement stage, and barring it did not offend international public policy (*ordre public international*).

#### **IV. Practical Takeaways**

The decision is a robust signal to award creditors that German courts will not allow sovereign respondents to escape recognition through immunity arguments where the underlying transaction is commercial in nature – even in the sensitive field of defense procurement.

- **The character of transaction determines State immunity.** Counterparties contracting with States or State entities should not assume that a connection to defense, security, or other sovereign functions automatically confers immunity; what matters is whether the State acted like a private party. Conversely, a State seeking to preserve immunity from execution over its assets must be prepared to demonstrate a genuine sovereign dedication of the asset and, where relevant, to obtain host-State consent for any sovereign use.
- **Raise jurisdictional objections in the arbitration or forfeit them.** A respondent that intends to contest the existence or validity of an arbitration agreement must do so within the arbitration itself. Participating in arbitral proceedings without challenging jurisdiction – and especially counterclaiming – will, as a rule, preclude the objection at the recognition and enforcement stage. This is a powerful tool for award creditors and a trap for respondents that participate without reserving the point, since failure to raise it may forfeit the objection.
- **Security for costs is unlikely for UK-seated claimants enforcing awards.** The court held that the 1960 German-British Convention applies to arbitration-related recognition and enforcement applications regardless of Brexit, since arbitration was always carved out of the EU regime. UK-seated award creditors enforcing in Germany can therefore expect, as a rule, not to be required to post security for costs.

The ruling consolidates Germany's standing as a reliable forum for the enforcement of arbitral awards, including against sovereign debtors, and rewards parties that conduct their arbitrations consistently and in good faith.

**The following Gibson Dunn lawyers prepared this update: Dr. Finn Zeidler, Dr. Annkathrin Schmoll, Marc Kanzler, and Simon Ruhland.**

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. For additional information about how we may assist you, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of the firm's [Judgment & Arbitral Award Enforcement](#) or [International Arbitration](#) practice groups:

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