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German Federal Supreme Court Underlines Non-Intervenistic and International Approach of German Arbitration Law

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In an order dated 28 January 2014 (file number III ZB 40/13), the German Federal Supreme Court (*Bundesgerichtshof*, the "Court") clarified that an arbitral award can only be set aside in recognition or enforcement proceedings by a state court in "extremely exceptional cases", i.e. if an award breaches the fundamental principles of the German legal system in a **manifest** way.

The Court considered this clarification was necessary because by its wording, the relevant provision of the German arbitration law, Sect. 1059 para. 2 no. 2 b) of the code of civil procedure (*Zivilprozessordnung* – "ZPO"), does not require such "manifest" breach of the fundamental legal principles. The wording of the prior version of the arbitration law which had been in force until 1997, did however contain this limitation. This offered some room for debate as to whether the standard for the setting aside of arbitral awards had changed in 1998 when the new arbitration law entered into force.

The Court ruled that, nevertheless, the "manifest" criterion must be applied when reviewing arbitral awards under the current German arbitration law. To explain this, the Court referred to the motives of the German legislator. According to the motives of the legislator, the scope of the control of arbitral awards was not meant to change when the current arbitration law was enacted. To the contrary, the legislator wanted to promote arbitration as an equal alternative to the state court system. Therefore, a *révision au fond* remained prohibited. The changes to the wording of Section 1059 were, according to the Court, for linguistic reasons only.

The Court referred in its arguments on the prohibition of the *révision au fond* to precedents and legislation under European law. The Court made particular reference to two rulings of the European Court of Justice ("ECJ", judgment of 28 March 2000 – C-7/98 para. 37 and judgment of 11 May 2000, C-38/98 para. 30), which were rendered after the current German arbitration law had been enacted. In these judgments, the ECJ confirmed that a breach of law in a court's decision has to be manifest for such decision to be set aside in a different Member State, otherwise the prohibition of the *révision au fond* would be bypassed. Also, the Court stated that the prohibition of the *révision au fond* is an important element of European legislation since it is contained in various acts of European legislation such as, for example, Art. 21 of the Rome-I Regulation, Art. 26 of the Rome-II Regulation, Article 12 of the Rome-III Regulation and Art. 34 no. 1 of the Brussels Regulation.

The Court rendered the order in respect of a domestic arbitral award. The order does however also

apply to foreign awards subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Germany is a signatory. This is because the order shows the general understanding of the Court of the German *ordre public*: in the official headnotes, the Court does not distinguish between domestic and foreign awards. Also, in the reasoning of the order, the Court, without reservation, referred to laws and decisions which deal with the enforcement of foreign court decisions and foreign arbitral awards.

With this decision, the German Federal Supreme Court has again underlined the non-intervenistic and international approach followed by German arbitration law ever since Germany enacted the UNCITRALModel Law on International Commercial Arbitration in 1998.

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