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No Signature – No Problem? German Court Addresses Arbitral Award's Signature Requirement Under UNCITRAL Model Law

Antonios Politis (Clyde & Co) · Monday, December 9th, 2024

In a noteworthy decision, the German Federal Court of Justice (*Bundesgerichtshof*, "BGH") (Case No. I ZB 34/23, 11 July 2024 – "Decision") addressed the German arbitration law provision mirroring Article 31(1) 1985 UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). It found that the note "signature could not be obtained" provides sufficient reason for an omitted signature under an arbitral award. This blog post introduces Article 31(1) of the Model Law and its German counterpart, highlights the key findings of the BGH, and concludes with insights on the Decision's potential relevance for other Model Law jurisdictions.

Relevant Model Law and German Provision

According to Article 31(1) Model Law, arbitral awards "shall be signed by the arbitrator or arbitrators" and in "arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, **provided that the reason for any omitted signature is stated**" [emphasis added]. In German arbitration law, contained in Book 10 of the German Code of Civil Procedure ("German CCP"), the relevant provision is set out in Section 1054(1) German CCP and mirrors Article 31(1) Model Law. This requirement is reflected in numerous jurisdictions around the globe that have based their national arbitration laws on the Model Law, for example, Japan (Article 39(1)) or Greece (Article 40(1)).

While this may seem like a formalistic requirement for some, its importance is significant. Failure to sign an arbitral award may result in its invalidity, a successful annulment or set aside proceeding, or the refusal of national courts to enforce the award. It is therefore no surprise that similar rules can also be found in many major arbitration rules (e.g., Art. 34(4) 2021 UNCITRAL Rules, Art. 33(2) 2021 ICDR Rules, Art. 26(6) 2020 LCIA Rules, Art. 36(3) 2021 VIAC Rules, and Art. 39(4) 2018 DIS Arbitration Rules).

Background

The ICC award at the centre of the Decision was rendered by a three-member arbitral tribunal seated in Germany. On the last page of the award, below its place and date, the words "*The Arbitral Tribunal*" indicated the signature field: While the arbitrator appointed by the respondent

and the presiding arbitrator duly signed on their respective lines, the arbitrator appointed by the claimant did not sign the award. Instead, below his printed name and designation as co-arbitrator, the printed phrase "*signature could not be obtained*" appeared in parentheses.

In the set aside proceeding, the parties were in dispute, inter alia, over the signature requirement. The Higher Regional Court (*Oberlandesgericht*) Frankfurt ruled on 27 April 2023 (Case No. 26 Sch 14/22) that this requirement was not met by the mere statement "*signature could not be obtained*" and that the award would therefore not constitute a valid arbitral award. In the case of an omitted signature, the award would have to state the reason why the signature could not be obtained – i.e. the reason for the respective arbitrator's inability or refusal to sign.

German Federal Court of Justice's Statutory Interpretation

The BGH reversed the decision of the Higher Regional Court Frankfurt and held that the arbitral award was valid because the additional note "*signature could not be obtained*" constitutes a sufficient reason for its omission pursuant to Section 1054(1) German CCP. The Court distinguished between the substantive and formal requirements of the provision, both of which were satisfied.

With respect to the substantive requirements, the Decision is based on the BGH's statutory interpretation of Section 1054(1) German CCP. The BGH starts its interpretation with the wording of the provision, according to which a reason must only be given for the absence of a signature – not for an arbitrator's inability/refusal to sign. The statement "*signature could not be obtained*" is sufficient in this respect. The BGH confirms this with a historical interpretation, as the requirements for a valid award in the absence of an arbitrator's signature were lowered when Germany amended its arbitration law to reflect the Model Law.

This is also supported by the BGH's teleological interpretation of the provision, according to which the signature of an absolute majority of arbitrators is required, but also sufficient to prevent obstructive arbitrators from hindering the issuance of an effective award. The sole purpose of giving a reason is to clarify that the award is the final result of the arbitration and that the signature is not missing by accident.

As to the formal requirements, the BGH held that there was no need for a separate signature on the note itself. Neither Section 1054(1) German CCP nor Article 31(1) Model Law specify who has to state the reason for the missing signature. While the rules governing German litigation (Section 315(1)(2) German CCP) prescribe who (generally the presiding judge) has to note the reason for a missing signature, no such formalistic requirement for arbitral awards exists.

Whether the notification on the omission must clearly indicate the person assuming responsibility for this statement – as the Higher Regional Court Frankfurt had indicated – is left open by the BGH. In any case, arbitrators wishing to err on the side of caution should ensure that this requirement is also met to ensure the validity of the award.

Hardly any International Guidance

From an international perspective, guidance on the particular question faced by the BGH is scarce: for example, the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration does not address this question. Case law from other jurisdictions on Article 31(1) Model Law available in the Case Law on UNCITRAL Texts(CLOUT) database is likewise very limited.

A Canadian decision (Clout Case No. 12) concerned the omission of an arbitrator's signature in a three-arbitrator panel but the case digest merely notes that the reason for the missing signature was given to the court by the president of the tribunal and that the annulment application was subsequently dismissed.

A Russian decision (Clout Case No. 1353) concerned the absence of the dissenting arbitrator's signature that was certified by the president of the governing arbitral institution. The dissenting opinion was later sent to the parties, and the award was registered in accordance with the institution's regulations and Russian law. This procedure – certification by the president of the arbitral institution instead of explanation by the Tribunal – was held in line with Article 31 Russian International Commercial Arbitration Act corresponding to Article 31(1) Model Law. An Austrian decision concerning the same arbitral award agreed that the procedure was compliant with Article 31 Model Law.

The Dutch Supreme Court ruled that failing to include a notification explaining an arbitrator's refusal to sign was not in compliance with Dutch arbitration law (Art. 1057(3) of the Dutch Code of Civil Procedure, which largely corresponds with Article 31 Model Law). It emphasized that the requirement for proper notification is a crucial procedural safeguard. Such a defect could not be remedied by a dissenting opinion issued after the award or by a subsequent notification.

However, even though some of these cases discuss the rationale behind the notification requirement to ensure transparency and collegial decision-making, they only address the question of whether a notification and/or explanation is necessary at all.

Case law on the question of what constitutes a "sufficient" explanation is, conversely, not readily available. This is not necessarily surprising, as some well-frequented jurisdictions – such as Switzerland in Article 189(2) Swiss PILA – do not require an explanation for the omission, which means that the specific issue at hand is not pertinent there.

Concluding Remarks

The above-mentioned cases from other jurisdictions indicate, if at all, a rather lenient approach regarding the required explanation for the omitted signature, which the BGH now joins. In view of the lack of readily available case law, it is perhaps not surprising that the BGH did not take a comparative view in its Decision. However, given that it expressly acknowledges the influence of Article 31(1) Model Law, one might have hoped for at least an attempt to identify other jurisdictions' views on the rationale behind this provision and its corresponding national laws. Such a comparative examination would have been in the interest of further establishing a common understanding of the Model Law and thereby strengthening international arbitration as a whole.

However, the Decision – in particular the BGH's commendable textbook-like statutory interpretation of the provision's wording and rationale – can be used as a (non-binding) point of

reference for the interpretation of Article 31(1) Model Law. Whether other Model Law jurisdictions will follow the lenient approach remains to be seen, but one can hopefully expect that, going forward, any stricter approach to the application of Article 31(1) Model Law will have a heightened burden of justification from the perspective of the international arbitration community.

In any case, the question at hand will not become irrelevant despite recent discussions (also at the UNCITRAL Working Group II) about whether electronic signatures can replace wet ink signatures of arbitral awards under Article 31 Model Law. While this might make it easier to obtain signatures from arbitrators in the first place, providing sufficient reason for an omitted signature under an award will remain an issue.

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