GERMAN
ARBITRATION
DIGEST

GAD No.:	GAD 2025, 11	**Decision date:**	9 January 2025	**Res judicata:** Yes
Court:	German Federal Court of Justice (Bundesgerichtshof, BGH)			
Case No. :	I ZB 48/24 Case No.(s) other instances: 12 SchH 6/23 (Higher Regional Court of Berlin, Kammergericht, KG)			
Keywords:	determination of admissibility of arbitration, waiver to challenge jurisdiction, contradictory behaviour, arbitration agreement, principle of separability, choice of law			
Key legal provisions:	Sections 1031(6), 1032(2), 1040(2) sentence 1 German Code of Civil Procedure (ZPO) Sections 305 to 310 German Civil Code (BGB)			

German Federal Court of Justice rules that the commencement of arbitration proceedings does not preclude a challenge to the proceedings' admissibility and extends the principle of separability to procedural agreements

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On 9 January 2025, the German Federal Court of Justice (BGH) held that the commencement of arbitration proceedings does not constitute a waiver of the right to have them determined inadmissible by the competent state courts on grounds other than formal defects in the arbitration agreement. The BGH also held that the possible invalidity of procedural provisions, such as a choice of law provision, does not affect the validity of an arbitration agreement contained in the same contract, thus extending the principle of separability to procedural agreements.

Facts

The dispute arose out of a contract between the parties for the construction of a solar carport facility in the Netherlands. Section 28.3 of the contract contained an arbitration agreement in accordance with the model clause of the German Arbitration Institute (DIS). While subsection (i) provided that all disputes shall be referred to arbitration without recourse to the ordinary courts of law, subsection (v) contained a choice of law provision under which the parties excluded the applicability of Sections 305 to 310 German Civil Code (BGB), i.e., the sections of the BGB governing general terms and conditions.

On 4 July 2022, the applicant, the contractor, filed a request for arbitration, seeking outstanding payments. On 5 October 2022, the respondent filed a counterclaim seeking, inter alia, contractual penalties. An arbitral tribunal had not yet been constituted.

In October 2023, the applicant filed an application pursuant to Section 1032(2) German Code of Civil Procedure (ZPO) with the KG seeking a declaration that the arbitration proceedings are inadmissible. Section 1032(2) ZPO allows the parties to file a request with the competent state court to have it determine the admissibility or inadmissibility of arbitral proceedings, until an arbitral tribunal has been constituted. The applicant argued that the arbitration agreement was invalid because it precluded the arbitral tribunal from

reviewing the contractual penalty under Sections 305 to 310 BGB, which would render the contractual penalty invalid.

On 24 June 2024, the KG dismissed the application as admissible but unfounded. It held that the fact that the applicant, having initiated arbitration, subsequently sought to have the arbitration declared inadmissible by the state courts did not constitute contradictory behaviour ("widersprüchliches Verhalten"). Furthermore, the court found that the actual arbitration agreement in Section 28.3(i) and the choice of law provision in Section 28.3(v) were two independent contractual provisions. Therefore, the potential invalidity of the choice of law provision was irrelevant to the validity of the arbitration agreement.

Key findings

The BGH dismissed the applicant's complaint on points of law (complaint) and upheld the decision of the KG.

The BGH held that the application under Section 1032(2) ZPO was admissible because the applicant had not acted in a contradictory manner that would render the application inadmissible. According to the BGH, it is admissible and consistent with the objective of expeditious proceedings to first submit a dispute to arbitration and then to request the state courts to resolve any doubts as to the jurisdiction of the arbitral tribunal.

However, like the KG, also the BGH held that the applicant's application and its complaint were unfounded, because the arbitration agreement was valid.

First, the BGH clarified that the filing of a request for arbitration does not preclude a challenge to the admissibility of the arbitration before the state courts. The only exception to this would be a challenge to formal defects in the arbitration agreement, which would be remedied by a request for arbitration pursuant to Section 1031(6) ZPO. Furthermore, Section 1040(2) sentence 1 ZPO, which provides that an objection to the jurisdiction of the arbitral tribunal must be raised at the latest with the statement of defence, does not apply until the arbitral tribunal has been constituted.

Second, the BGH held that the actual arbitration agreement in Section 28.3(i) must be considered independently of the other supplementary procedural provisions contained in Section 28.3, including the choice of law provision in Section 28.3(v). Therefore, the validity of the arbitration agreement was not affected by the possible invalidity of the choice of law provision.

Third, the BGH clarified that the independent assessment of the validity of the arbitration clause does not mean that the choice of law clause is not subject to any arbitral or judicial review. Rather, the arbitral tribunal must assess the validity of the choice of law clause. In addition, the state courts may review the arbitral award for violation of public policy in enforcement and set-aside proceedings.

Comment

This decision extends the internationally recognised principle of separability, which reduces the risk of an arbitration agreement being invalid, by emphasising that not only the substantive provisions of the main contract, but also further procedural agreements, such as a choice-of-law clause, are independent of the arbitration agreement. Furthermore, while the commencement of arbitration proceedings does not preclude an application on the (non-)admissibility of the arbitration, it should be noted that such an

application is inadmissible once the arbitral tribunal is constituted. The arbitral tribunal is then competent to decide on its own jurisdiction (so-called Kompetenz-Kompetenz).