

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 14	Decision date:	23 January 2025	Res judicata: Yes
Court:	German Federal Court of Justice (Bundesgerichtshof, BGH)			
Case No. :	I ZB 42/24 Case No. other instances: 1 Sch 1/24 (Higher Regional Court of Stuttgart, OLG Stuttgart)			
Keywords:	Public policy, award obtained through a crime, nemo tenetur se ipsum accusare, enforcement being immoral			
Key legal provisions:	Section 1059(2) No 2 German Code of Civil Procedure (ZPO) Section 580 German Code of Civil Procedure (ZPO) Section 826 German Civil Code (BGB)			

German Federal Court of Justice sets out when an arbitral award can be set aside because (i) it was obtained through a criminal act, (ii) the enforcement would violate the principle of nemo tenetur se ipsum accusare, or (iii) the enforcement would be immoral in the meaning of Section 826 German Civil Code

Dr. Markus Altenkirch, LLM (Baker McKenzie)

On 23 January 2025, the German Federal Court of Justice (BGH) declined requests to set aside an arbitral award for allegedly violating public policy. The BGH examined: (i) whether the award was obtained through a criminal act (Section 1059(2) No 2 German Code of Civil Procedure (ZPO) in connection with Section 580(4) ZPO), (ii) whether enforcing the award would violate the principle of nemo tenetur se ipsum accusare, and (iii) whether enforcing the award would be considered immoral.

Facts

In 2018, the applicant (award creditor) – or more specifically its legal predecessor – and the respondent (award debtor) entered into an IP agreement granting the respondent the right to use certain intellectual property. Under this agreement, the respondent was obligated to maintain specific accounts and permit the applicant to conduct a financial audit ("Buchprüfung").

In 2022, the applicant initiated arbitration proceedings because the respondent refused to allow the applicant a financial audit. Additionally, in 2023, the applicant filed a criminal complaint against the respondent and participated as joint plaintiff ("Nebenklägerin") in the criminal proceedings.

On 5 July 2023, the respondent in the arbitration acknowledged the claim raised by the applicant ("Anerkenntnis"). Consequently, the arbitral tribunal ordered the respondent to permit the applicant to conduct a financial audit. At the time of acknowledging the claim, the respondent was unaware that the applicant had filed a criminal complaint and had also joined the criminal proceedings as a joint plaintiff. The respondent asserted that it would not have acknowledged had he been informed about the criminal proceedings, arguing that the non-disclosure amounted to fraud. Moreover, the respondent declared his intention to withdraw ("Widerruf") or rescind ("Anfechtung") the acknowledgement. Lastly, the respondent contended that enforcing the award and obliging the respondent to allow a financial audit would contravene the principle that no one is compelled to provide self-incriminating evidence. The applicant subsequently

applied for the enforcement of the arbitral award. The respondent requested that the application be rejected and the award be set aside.

Key findings

The BGH found that the enforcement of the award would not violate public policy.

The respondent suggested that the award violated German public policy because it was obtained through a criminal act. The BGH found that an award – similar to a final and binding German judgment – could be set aside on public policy grounds if the award was obtained through a criminal act (Section 1059(2) No 2 ZPO in connection with Section 580(4) ZPO). The mere allegation of a criminal act was, however, insufficient. The respondent failed to show that either the applicant or its lawyers were in fact convicted of a criminal act (cf. Section 581 ZPO).

The respondent also argued that the award violated German public policy because the enforcement would compel the respondent to incriminate himself: The BGH rejected a violation of public policy and the principle of *nemo tenetur se ipsum accusare*. In essence, the BGH found that as per the award, the respondent would not be compelled to incriminate itself, but merely allow and enable a financial audit. The court found that this would not be tantamount to producing incriminating evidence.

Finally, the respondent reasoned that the award violated German public policy because its enforcement would offend common decency (Section 826 BGB): Under German law, a creditor must be denied the enforcement of a legally binding but materially incorrect title (award or judgment) in particularly serious, narrowly defined exceptional cases in which it would be absolutely incompatible with a sense of justice for it to exploit its formal legal position to the detriment of the debtor. In addition to the substantive incorrectness of the award or judgement and the creditor's knowledge of this, this requires additional special circumstances that make obtaining or exploiting the enforcement order appear immoral. The BGH analysed whether the fact that the respondent withdrew his acknowledgement of the claim or alternatively rescinded his acknowledgement would constitute special circumstances that would make enforcing the award appear immoral. In the end, the BGH held that the acknowledgement could not be withdrawn. What is more, the BGH held that the respondent could not rescind its acknowledgement for the reason that the applicant had not disclosed that it filed a criminal complaint. The BGH failed to see why the respondent would not have acknowledged that he had a contractual obligation to allow a financial audit if he had known of the criminal complaint. Second, the court held that the respondent should have expected a criminal complaint under the circumstances. For that reason, the applicant did not have an obligation to disclose the criminal complaint.

Comment

Award debtors seeking to set aside an arbitral award in exceptional circumstances can rely on Section 580 ZPO or Section 826 BGB to set aside an arbitral award on the basis of a public policy violation under Section 1059(2) No 2 ZPO, though the threshold remains very high.