GAD No.:	GAD 2025, 15	**Decision date:**	17 November 2023	**Res judicata:** Yes
Court:	Higher Regional Court of Cologne (OLG Cologne)			
Case No. :	19 Sch 4/23			
Keywords:	Foreign arbitral award, declaration of enforceability, public policy, arbitration agreement, arbitration clause, Swiss Rules of International Arbitration, right to be heard, expedited procedure			
Key legal provisions:	Section 1061 German Code of Civil Procedure (ZPO) Article 178 Swiss Federal Act on Private International Law (PILA) Article V New York Convention (NYC)			

Higher Regional Court of Cologne: imprecise arbitration clauses to be upheld if the parties' intent is clear; incompatibility with mandatory law violates public policy only if fundamental values are affected.

Dr. Mauritius Nagelmüller, LL.M. (Tulane) (BODENHEIMER)

In its decision dated 17 November 2023, the Higher Regional Court of Cologne (OLG Cologne) addressed the validity and enforceability of arbitration agreements. The court emphasized that an arbitral tribunal must be either specified or at least determinable; however, incomplete, unclear, or contradictory provisions in an arbitration agreement do not necessarily render it invalid if it is clear that the parties intended to submit their dispute to arbitration rather than to the state courts. Additionally, the court clarified that a violation of public policy would only occur if an arbitral award contravened fundamental norms that underpin the state or economic order, or if it starkly contradicts notions of justice, such as affecting the right to be heard. This was not necessarily the case for an award rendered through an expedited procedure, as long as the obligation to provide a reasoning – aimed at protecting against arbitrary decisions – was sufficiently fulfilled.

Facts

The parties were in dispute over the declaration of enforceability of a Swiss arbitration award in Germany.

The parties were connected through two sales and purchase agreements. After the respondent, a German company, failed to deliver goods owed under the agreements to the applicant, a Turkish company, and instead terminated the agreements, the applicant asserted claims for damages, requesting arbitration before a Swiss arbitral tribunal. The arbitral tribunal established its jurisdiction under the Swiss Rules of International Arbitration (Swiss Rules), applying expedited procedure provisions pursuant to Article 42(1)(b) Swiss Rules. Article 42(1)(b) Swiss Rules envisages an expedited procedure in particular if the aggregate of all claims does not exceed CHF 1.000.000, taking into account all relevant circumstances.

The underlying agreements contained the following arbitration clause:

"All disputes in the connection with the execution of this contract shall be settled through friendly negotiations. Failing the friendly negotiation does not relieve both of any of the parties from fulfilling the contract. In the case of unable to settle disputes each party shall have right to appoint one arbitrator and both arbitrators shall turn nominate one umpire to thus from an arbitration committee of the arbitration

commission as per L., Switzerland's laws in L., Switzerland. The award of arbitration committee shall be accepted by both parties here to as final and binding by both of the parties for settlement."

The respondent argued that the recognition and enforcement of the award should be refused based on Article V(1)(a) and (d) as well as Article V(2)(b) New York Convention (NYC), asserting that the arbitral tribunal is neither clearly defined nor determinable in the arbitration clause. Rather, a large number of arbitral tribunals or compositions could be considered, between which a decision is impossible. The respondent further argued that the arbitration award violates German public policy, as there was no valid arbitration agreement between the parties and the right to be heard was restricted due to the use of the expedited procedure under the Swiss Rules.

The OLG Cologne declared the award enforceable.

Key findings

The OLG Cologne held the arbitration clause to be valid.

In principle, it must be specified, or at least determinable, which arbitral tribunal has been appointed to decide the dispute. However, incomplete, unclear or contradictory arbitration clauses do not automatically render the arbitration agreement invalid, if it is clear that the parties intended to submit the dispute to arbitration for a binding decision and to exclude state court jurisdiction. This also applies to an incorrect or imprecise identification of the competent arbitral tribunal.

In such a case, a solution must be sought through contractual interpretation and, if necessary, an amendment to the contract by way of supplementation, which respects the fundamental intention of the parties to submit to arbitration and accordingly leaves the arbitration agreement in place (according to Swiss judicature on Article 178 Swiss Federal Act on Private International Law (PILA) which is decisive pursuant to Article V(1)(a) NYC – see Swiss Federal Supreme Court, 7 November 2011, BGE 138 III 29, 35).

The OLG Cologne interpreted the arbitration clause to the effect that the jurisdiction of the arbitral tribunal was not in conflict with the above-mentioned requirements, as the arbitration clause permits the determination of the arbitral tribunal which issued the award.

Furthermore, the OLG Cologne clarified that a violation of public policy would only occur if an arbitral award violated a legal provision that governs the foundations of state or economic life, or if it was in unacceptable contradiction to German concepts of justice; it would therefore have to violate the elementary foundations of the German legal system. This includes a violation of the right to be heard. The OLG Cologne found that the expedited procedure under the Swiss Rules had left the applicant sufficient opportunity to comment and influence the arbitral proceedings. Furthermore, it found that the award rendered went beyond the mere summary reasoning allowed under the expedited procedure, so that the OLG Cologne did not have to consider in the case at hand whether insufficient reasoning constituted a violation of the right to be heard. However, the OLG Cologne also stated that the protection against an arbitrary decision, as intended by the obligation to provide reasons in an award, would also be sufficiently satisfied with a summary reasoning. Moreover, even Section 313(2) German Code of Civil Procedure (ZPO) would not stipulate any higher requirements for the reasoning of a judgment.

Comment

This decision reinforces a pro-arbitration stance by validating imprecise or incomplete arbitration clauses and maintains the restrictive approach of German courts when assessing arbitral awards for potential public policy violations. The court also addressed the peculiarities of expedited proceedings with a potentially trend-setting clarity.