

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 16	Decision date:	5 June 2024	Res judicata: Yes
Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	102 SchH 42/24 e			
Keywords:	Inadmissibility, validity of arbitration clause, defects of the main contract, invalidity ex tunc			
Key legal provisions:	Sections 1032 German Code of Civil Procedure (ZPO) Section 1040(1) sentence 2 German Code of Civil Procedure (ZPO) Section 142 German Civil Code (BGB)			

The Highest Regional Court of Bavaria confirms that defects in the main contract do not invalidate arbitration clauses

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In its decision of 5 June 2024, the Highest Regional Court of Bavaria (BayObLG) confirmed that the invalidity of the main contract does not affect the validity of the arbitration agreement. The court confirmed that under Section 1040(1) sentence 2 German Code of Civil Procedure (ZPO), the arbitration clause constitutes an agreement independent of the other contractual provisions. Only if the threat, misrepresentation or error which caused the main contract to be concluded also directly influenced the conclusion of the arbitration clause, can the latter be declared void.

Facts

The proceedings before the BayObLG are based on a request for arbitration filed with the German Arbitration Institute (DIS) against the applicant in the state court proceedings. The request for arbitration seeks an order to payment of a fee claim under a service contract for tax research funding ("fee contract"). The fee contract contains an arbitration clause in its general terms and conditions, according to which disputes between the parties are subject to arbitration under the DIS Rules.

The applicant filed a claim with the BayObLG, seeking a declaratory judgment pursuant to Section 1032(2) ZPO that (1) the initiated arbitration proceedings are inadmissible and (2) that the arbitration clause invoked is invalid. Section 1032(1) ZPO stipulates that if an action is brought before a court in a matter that is subject to an arbitration agreement, the court is to dismiss the action as inadmissible if the respondent raises a corresponding objection before the commencement of the hearing, unless the court finds that the arbitration agreement is null and void, ineffective or incapable of being performed. According to Section 1032(2) ZPO, a party may request a ruling on the admissibility of arbitral proceedings only until the arbitral tribunal has been formed.

The applicant justifies the invalidity of the arbitration clause mainly by stating that it has successfully contested the fee contract on the grounds of fraudulent misrepresentation, or alternatively on the grounds of error. In the applicant's view, due to the invalidity of the fee contract the arbitration clause should also be considered invalid ex tunc since the arbitration clause is part of the general terms and conditions and thus

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part of the fee contract. The applicant further argues that the arbitration clause is null and void if it has no effect from the outset and that the general invalidity of the arbitration agreement may be procedural or substantive in nature but is in any case covered by Section 1032(2) ZPO.

The respondent argues, however, that the grounds for invalidity relate exclusively to the fee contract and cannot affect the validity of the arbitration agreement. Furthermore, the respondent considers that the applicant raised a substantive issue that cannot be clarified in proceedings under Section 1032(2) ZPO.

Key findings

The court ruled that the application was admissible, but unfounded.

In the context of admissibility, the court confirmed that filing the request for arbitration with the DIS does not mark the formal constitution of the arbitral tribunal. It also confirmed that Section 1032(2) ZPO allows for a declaration on the validity or invalidity of the arbitration clause, but not for a declaration on the (in)admissibility of individual procedural acts.

However, the court found that the application is unfounded. Under Section 1032(2) ZPO, the state court's review is limited to determining whether a valid arbitration clause exists, whether it is enforceable and whether the subject matter falls within its scope. The mere challenge to the fee contract does not render the arbitration clause invalid under Section 142(1) German Civil Code (BGB). According to Section 142(1) BGB, a voidable legal transaction is deemed void from the outset once it has been successfully contested. However, pursuant to Section 1040(1) sentence 2 ZPO, the arbitration clause constitutes an agreement separate of the other contractual provisions, the validity of which is to be assessed independently of the existence of the main contract. In general, the invalidity of the main contract does not affect the validity or continuation of the arbitration clause, even if it is included in the same contract. The only exception to this is if it can be demonstrated that the threat or deception or a corresponding error that was the cause of the conclusion of the main contract also directly influenced the agreement on the arbitration clause.

The invalidity of the arbitration clause would only be conceivable in exceptional cases if the clause itself were vitiated by a defect of intention. However, it has not been argued in the present case that the alleged deception or error related to the arbitration clause itself.

Comment

The decision reinforces the separability doctrine confirming that an arbitration clause is independent of the main contract. The decision confirms that German courts will only consider an arbitration agreement to be invalid in exceptional cases of misrepresentation and threat, and will generally seek to uphold the validity of the arbitration agreement whenever possible. The decision strengthens arbitration by limiting judicial interference reaffirming that challenges to a contract's validity must generally be resolved within arbitration proceedings.