

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 22	Decision date:	23 January 2025	Res judicata: Yes
Court:	German Federal Court of Justice (Bundesgerichtshof, BGH)			
Case No. :	I ZB 41/24 Case No.(s) other instances: 1 Sch 2/24 (Higher Regional Court of Stuttgart, OLG Stuttgart)			
Keywords:	Enforceability, grounds for setting aside, public policy, award obtained through a crime, enforcement being immoral, nemo tenetur se ipsum accusare			
Key legal provisions:	Section 1059 (2) No 2 lit. b 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 upholds enforceability of arbitral award despite possible violation of nemo tenetur principle and immorality (Section 826 German Civil Code)

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On 23 January 2025, the German Federal Court of Justice (BGH) confirmed the enforceability of a domestic award on agreed terms and thereby rejected the public policy concerns raised by the respondent. The BGH in particular found that the applicant's conduct could neither be regarded as immoral within the meaning of Section 826 German Civil Code (BGB), nor as a violation of the principle of nemo tenetur se ipsum accusare.

Facts

The applicant is an association of plant variety rights holders. In 2018, the applicant's legal predecessor, as one of 14 plant breeders, had entered into a contract with the respondent, a company dealing in agricultural products. Under the contract, the respondent was commissioned to propagate and distribute certain seeds. Also, the respondent had to maintain specific accounts while the applicant was entitled to conduct a financial audit. The contract also contained penalties in case of non-compliance as well as an arbitration clause.

In 2022, after having repeatedly requested the respondent to facilitate an audit, the applicant initiated arbitration proceedings to gain access to the respondent's accounts. Since 2021, the managing director of the respondent had been under criminal investigation for alleged violations of the German Seed Marketing Act ("SaatG"). In June 2023, the applicant's legal predecessor also filed a criminal complaint against the managing director of the respondent, suspecting violations of its plant variety rights under the Plant Variety Protection Act ("SortSchG").

In July 2023, the parties to the arbitration irrevocably settled the matter at the oral hearing. The arbitral tribunal issued an award on agreed terms, ordering the respondent to permit the applicant to conduct an audit of its accounts.

The applicant applied for the enforcement of the arbitral award, while the respondent requested that the application be rejected and the award be set aside. The Higher Regional Court of Stuttgart (OLG Stuttgart) declared the arbitral award enforceable. The respondent filed an appeal on points of law with the BGH and pursued its application to set aside the arbitration award. The BGH dismissed the appeal.

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Key findings

The BGH rejected the respondent's assertion that an enforcement of the award would violate public policy on three grounds.

First, while the BGH confirmed that an award could be set aside on public policy grounds if it was obtained through a criminal act (Sections 1059(2) No 2, 580(4) ZPO), the mere allegation of such a criminal act was insufficient. The BGH held that the respondent failed to substantiate the requirements pursuant to Section 581 ZPO.

Second, the arbitral award was not to be set aside because its enforcement would offend common decency within the meaning of Section 826 BGB ("sittenwidrige Schädigung"). Denial of enforcement on this basis is reserved for rare and exceptional circumstances. The BGH examined whether the applicant's conduct – specifically, the filing of criminal charges against the respondent's managing director before the settlement agreement and the failure to disclose this fact prior to both the settlement and the arbitral tribunal's decision – constituted such an exceptional case. In this context, the BGH emphasised that even if the settlement agreement was void due to a successful challenge of fraudulent misrepresentation ("arglistige Täuschung"), this would not automatically affect a subsequent award on agreed terms. The validity and integrity of an award on agreed terms are not dependent on the validity of an underlying settlement agreement. Rather, the setting aside of an award requires sufficient cause as defined in Section 1059 (2) ZPO.

However, when examining whether the enforcement of an award would offend common decency within the meaning of Section 826 BGB, all circumstances of the case must be considered. Particularly, it can be decisive whether the applicant was obliged to inform the respondent of the criminal charges filed before the settlement was concluded. Such a duty of disclosure may be assumed if, without such disclosure, the purpose of the settlement agreement would be frustrated, and disclosure could therefore be expected in good faith. In the present case, however, this was not the case, as the purpose of the settlement - to bring the pending dispute to an end - would not obviously be undermined by the criminal charges filed. Moreover, the respondent had to anticipate a criminal complaint by the applicant in any case.

Third, the BGH refused to set aside the award due to coercion to self-incriminate. The BGH analysed the constitutional rule of *nemo tenetur se ipsum accusare*, which does not categorically prohibit forcing anyone to take actions that would reveal a criminal offence. In particular, obligations to cooperate are permissible if they do not violate one's individual right to refuse to testify or provide evidence in criminal proceedings. Against this background, the BGH ruled that the enforceability of the award did not result in unlawful coercion of the respondent to self-incriminate. The award was based on a binding settlement agreement to which the respondent had voluntarily agreed. Further, the obligations in question were limited to cooperation requirements intended to facilitate an audit. However, such duties do not constitute a coercion to self-incriminate.

Comment

The decision underscores the high threshold for refusing enforcement of arbitral awards on public policy grounds in Germany. Parties can rely on Section 580 ZPO or can argue that the award's enforcement would offend common decency (Section 826 BGB). However, a party's conduct can only be classified as immoral within the meaning of Section 826 BGB in exceptional cases, based on an overall assessment of all circumstances.