

GERMAN ARBITRATION DIGEST

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Court:	Higher Regional Court of Cologne (Oberlandesgericht Köln)			
Case No. :	19 Sch 11/24			
Keywords:	Setting aside proceedings, ad hoc arbitration, distribution agreement, arbitration agreement, right to be heard, public policy, procedural order, limitation of submissions, exclusion of new evidence, révision au fond, binding effect, form requirements			
Key legal provisions:	Sections 1027, 1029, 1031, 1032, 1040, 1042, 1059, 1062 German Code of Civil Procedure (ZPO) Article 103 Basic Law (GG) Section 89b German Commercial Code (HGB) Sections 781, 242, 147, 154 German Civil Code (BGB)			

Higher Regional Court of Cologne rejects application to set aside arbitral award – limitation of final submissions within tribunal's discretion and tribunal not bound by prior court ruling on contract validity

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On 13 December 2024, the Higher Regional Court of Cologne (OLG Köln) dismissed an application to set aside an ad hoc arbitral award concerning a disputed distribution agreement. The court confirmed that neither the arbitral tribunal's limitation of final submissions nor its assessment of the evidence amounted to a violation of the right to be heard or public policy. This decision highlights the German courts' consistently high threshold for annulling arbitral awards and their deference to the procedural autonomy of arbitral tribunals.

Facts

The applicant, a company, sought to set aside an ad hoc arbitral award rendered on 7 September 2023. The arbitral tribunal had dismissed both the applicant's claims for compensation under Section 89b HGB (allegedly arising from a "Distribution Agreement 2013" or "DA2013") and the respondent's counterclaims. The dispute arose following the death of Mr E., with the respondent being his daughter and heir. The applicant relied on the DA2013, which contained an arbitration clause referring disputes to arbitration in accordance with the German Arbitration Code (10th Book of the ZPO). The DA2013 was never signed by either party.

Prior to the arbitration, the respondent had sought a declaration from the Kammergericht Berlin that arbitration was inadmissible, but this was rejected, with the Kammergericht finding a valid arbitration agreement existed, binding the respondent as successor. Consequently, the parties and arbitrators reached a consensus and formally documented this agreement, commonly referred to as an "Arbitrators' Agreement". This legally binding instrument expressly confirmed the tribunal's jurisdiction, thereby establishing a formal framework for the resolution of disputes.

During the arbitration, the tribunal heard witnesses and the respondent. Following the hearing, the tribunal initially indicated that the DA2013 had at least been concluded by conduct. However, in a later procedural

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communication, the tribunal revised its preliminary position, inviting final submissions (limited to ten pages and excluding new facts or evidence). In its final award, the tribunal found that the DA2013 had not been validly concluded, as the contract was unsigned and there was insufficient evidence of a binding agreement. The tribunal dismissed all claims and counterclaims, determining that the arbitration agreement's invalidity had been cured by the parties' conduct and the Arbitrators' Agreement.

The applicant sought to set aside the award, alleging violations of the right to be heard, in particular insufficient consideration of their submissions and evidence, improper limitation of final submissions, and disregard of the findings of the Kammergericht.

Key findings

The Higher Regional Court of Cologne dismissed the application to set aside the award.

The court found no violation of the right to be heard (Art. 103 GG, Section 1042 ZPO). The arbitral tribunal had duly considered the applicant's submissions, including arguments regarding the respondent's conduct, witness statements, and correspondence. The tribunal's assessment of the evidence and legal characterization did not constitute a disregard of submissions, but rather a different evaluation.

The limitation of the parties' final submissions to ten pages and the exclusion of new facts and evidence were within the tribunal's procedural discretion (Section 1042 ZPO), especially as the parties previously had ample opportunity to present their case. There was no indication of unequal treatment or of the applicant being unable to respond within the specified page limit. The applicant was precluded from raising objections to the procedural order (Section 1027 ZPO), as no timely objection was made during the proceedings.

The tribunal was not bound by the Kammergericht's earlier decision on the existence of the arbitration agreement. According to Section 1032 (2) of the German Code of Civil Procedure (ZPO), the binding effect of the preliminary court ruling is limited solely to the existence of an arbitration agreement, but not to the substantive validity of the underlying contract. Accordingly, the arbitral tribunal was able to examine independently whether a valid contract had been concluded without violating the parties' right to a fair hearing.

The court reaffirmed the principle of *révision au fond*: a state court may not review the substantive correctness of the arbitral award in setting aside proceedings. Only violations of public policy or fundamental procedural principles may justify setting aside.

It was determined that public policy had not been violated. The applicant's complaints related to the tribunal's assessment of the evidence and the legal conclusions, which are not subject to review.

Comment

This decision emphasises the high threshold for setting aside arbitral awards in Germany, particularly in cases involving alleged violations of the right to be heard and public policy. The court has confirmed the extensive procedural discretion of arbitral tribunals, including limitations on submissions and evidence, on the condition that parties are treated equally and have been granted a fair opportunity to present their case. The judgment also reiterates the limited scope of judicial review in setting aside proceedings, in line with the principle of finality and autonomy of arbitration.