

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 33	Decision date:	8 October 2025	Res judicata: - Unknown
Court:	Higher Regional Court of Stuttgart (Oberlandesgericht Stuttgart, OLG Stuttgart)			
Case No.	21 Sch 4/25			
Keywords:	Foreign arbitral award, declaration of enforceability, preclusion, lack of jurisdiction of the arbitral tribunal, absence of an arbitration agreement, contradictory behaviour			
Key legal provisions:	Section 1061 German Code of Civil Procedure (ZPO) Article V New York Convention (NYC)			

OLG Stuttgart: By challenging only the contract conclusion in arbitration, the respondent does not preserve jurisdictional defenses for recognition and enforcement proceedings

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May a respondent challenge the existence of a valid arbitration agreement at the enforcement stage if, during the arbitration, it disputed the conclusion of the contract (that included the arbitration agreement), but did not specifically object to the tribunal's jurisdiction? No, says the Higher Regional Court of Stuttgart (OLG Stuttgart) in a recent decision that also touches upon other interesting aspects of preclusion in enforcement proceedings.

Facts

The claimant in the arbitration and applicant in the enforcement proceedings before the OLG Stuttgart was a Chinese citizen, whereas the respondent was a German limited liability company.

In the preceding ICC arbitration, the applicant raised commission claims arising from a purported consultancy agreement containing an arbitration agreement. The respondent disputed that the consultancy agreement had ever been concluded. The sole arbitrator granted the claim and expressly noted in the award that, while the respondent had argued against the validity or even existence of any consultancy agreement, it had never challenged the arbitrator's jurisdiction to render an award.

When the applicant applied for recognition and enforcement of the arbitral award, the respondent sought a dismissal of the application based on Section 1061(1) German Code of Civil Procedure (ZPO) in conjunction with Article V(1)(a) New York Convention (NYC), arguing that no arbitration agreement existed between the parties, let alone a written agreement as required under Article II NYC.

The OLG Stuttgart declared the award enforceable.

Key findings

The OLG Stuttgart held the respondent to be precluded from invoking the lack of an arbitration agreement at the enforcement stage.

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As an initial matter, the court – in line with established case law (see BGH, 16 December 2010, III ZB 100/09, SchiedsVZ 2011, 105, paras. 4 et seqq.) – rejected such preclusion on the grounds that the respondent had not applied for the award to be set aside at the seat of the arbitration (Stockholm).

However, the court did find the respondent to be precluded for its failure to raise jurisdictional objections in the arbitration. Under Section 1040(2) ZPO, objections to the jurisdiction of the arbitral tribunal generally cannot be raised after the statement of defence, either in the arbitration or in subsequent recognition or enforcement proceedings. While this provision applies only to arbitrations seated in Germany (Section 1025 ZPO) and has no equivalent in the NYC, the OLG Stuttgart found the prohibition of contradictory behaviour (*venire contra factum proprium*) to be recognized in international arbitration and under the NYC.

In the court's view, such contradictory behaviour occurs when a party does not object to the arbitral tribunal's lack of jurisdiction due to the absence of an arbitration agreement during the arbitration proceedings, only to raise this objection before state courts. If such an approach were permissible, a "silent" respondent could only benefit from the arbitration: Either by obtaining a favourable arbitral award on the merits or by having the opportunity to have an unfavourable award set aside or not declared enforceable later. The court thus emphasized that Article V(1)(a) NYC can only be invoked by a party that has already raised the objection of lack of jurisdiction before the arbitral tribunal.

According to the OLG Stuttgart, the respondent's defence in the arbitration, asserting that the contract – which included the arbitration agreement – had never been concluded, does not constitute a sufficient objection to the arbitrator's jurisdiction. With this defence, the respondent requested the arbitrator to dismiss the claim on the merits rather than to declare himself incompetent. Because the respondent never sought to prevent the arbitrator from rendering an award on the merits, it cannot resist the enforceability of such an award on the grounds of a lacking arbitration agreement.

Disagreeing with a decision of the OLG Frankfurt (26 June 2006, 26 Sch 28/05, BeckRS 2007, 9801), the OLG Stuttgart held that this principle also applies to the objection that the arbitration agreement was not concluded in writing (Article II(2) NYC). The OLG Stuttgart based this finding on the more-favourable-right-provision in Article VII NYC in conjunction with Section 1031(6) ZPO which provides that a defect of form is remedied if both parties participate in the arbitration without objection. Such indirect application of Section 1031 ZPO to arbitrations seated outside of Germany is subject to dispute in legal academia but is in line with the BGH's jurisprudence (BGH, 30 September 2010, III ZB 69/09, SchiedsVZ 2010, 332, para. 11).

Finally, the OLG Stuttgart emphasised the prohibition of a *révision au fond*, rejecting the respondent's claim that the award was wrong on the merits.

Comment

To ensure the efficacy of the arbitral process, respondents must generally file jurisdictional challenges at an early stage of the proceedings. The court's finding that a denial of contract conclusion constitutes no jurisdictional objection is convincing on the law and leads to appropriate results. It prevents the respondent from cherry-picking between accepting the arbitral tribunal's jurisdiction when the award is favourable and rejecting it when it is not. At the same time, it does not curtail the respondent's right to combine jurisdictional and substantive defences in the arbitration.