

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2026, 2	Decision date:	9 October 2025	Res judicata: Yes
Court:	German Federal Court of Justice (BGH)			
Case No. :	I ZB 20/25 Case No.(s) other instances: 1 Sch 2/23 (Higher Regional Court of Jena, OLG Jena)			
Keywords:	Declaration of enforceability, remedy for violation of the right to be heard, public policy, surprise decision, need for legal protection, annulment, preclusion			
Key legal provisions:	Sections 321a, 1059(1)(3), 1060(2) sentence 1 German Code of Civil Procedure (ZPO) Article 103(1) Basic Law for the Federal Republic of Germany (GG)			

BGH: No obligation to lodge a right-to-be-heard complaint prior to state court review of an arbitral award - reinforcing a concentrated, arbitration-friendly review system

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The German Federal Court of Justice (BGH) held that a separate application to set aside an arbitral award lacks the required legal interest when an application for a declaration of enforceability under Section 1060 German Code of Civil Procedure (ZPO) is pending, because the enforcement court must, pursuant to Section 1060(2) sentence 1 ZPO, refuse enforcement and set aside the award if any of the grounds listed in Section 1059(2) ZPO are established, thereby fully encompassing the review of annulment grounds within the enforcement proceedings. The BGH further clarified that the supplementary reference to the ZPO in Section 16(5) Arbitration and Conciliation Rules for Construction Disputes (SO Bau 2004) does not impose a requirement to conduct a procedure pursuant to Section 321a ZPO, which provides redress in the event that a party's right to be given an effective and fair legal hearing has been violated.

Facts

The applicant was a construction company, the respondent a German municipality. The parties concluded a construction contract which contained an arbitration clause referring disputes to an arbitral tribunal on the basis of the SO Bau 2004. Section 16(5) SO Bau 2004 states that the ZPO, in particular Section 1025 et seqq. ZPO, shall apply supplementarily.

When disputes arose after termination of the contract, the respondent initiated arbitration seeking damages for completion and defect rectification costs, while the applicant counterclaimed for outstanding payments. The arbitral tribunal dismissed the respondent's claim in full and upheld the applicant's counterclaims in part.

The applicant applied to the Higher Regional Court of Jena (OLG Jena) for a declaration of enforceability of the arbitral award under Section 1060 ZPO. The respondent sought to have the award set aside under Section 1059 ZPO, alleging a violation of its right to be heard.

The OLG Jena found the set-aside application admissible and justified, holding that no prior procedure pursuant to Section 321a ZPO was required despite the SO Bau 2004 reference to the ZPO. It set aside the

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arbitral award on the basis of a violation of the respondent's right to be heard due to a so-called surprise decision ("Überraschungsentscheidung") and remitted the case to the arbitral tribunal.

The applicant lodged a complaint on points of law (complaint) with the BGH and pursued the declaration of enforceability of the arbitral award. The respondent sought dismissal of the complaint.

Key findings

First, the BGH held that the review of an application for enforcement under Section 1060 ZPO includes an examination of the grounds for setting aside pursuant to Section 1059(2) ZPO. Where no such grounds are found, enforcement must be granted accordingly. Consequently, a separate application to set aside the award lacks the required legal interest ("Rechtsschutzbedürfnis").

Second, unlike Section 90(2) Act on the Federal Constitutional Court (BVerfGG), Section 1059 ZPO does not require prior exhaustion of remedies. The failure to pursue a procedure pursuant to Section 321a ZPO does not affect the admissibility of an application to have an arbitral award set aside; it may only preclude certain grounds.

Third, the BGH clarified that the reference to the ZPO in Section 16(5) SO Bau 2004 does not impose a requirement to initiate a procedure pursuant to Section 321a ZPO before approaching the state courts. Such an obligation would require an express agreement to ensure legal certainty as to the applicable legal remedy ("Rechtsmittelklarheit"). The arbitration rules are interpreted according to their objective content and typical meaning, with the wording and interests of the parties involved being decisive. The BGH held that the explicitly referenced provisions of Sections 1025 et seqq. ZPO take precedence over the procedure pursuant to Section 321a ZPO. Therefore, failure to conduct such a procedure does not bar a party from relying on a violation of the right to be heard in setting-aside or enforcement proceedings.

Fourth, the BGH confirmed that under Section 1059(2) No 2b) ZPO in conjunction with Article 103(1) Basic Law for the Federal Republic of Germany (GG), an arbitral award can be set aside if the arbitral tribunal decides a legal issue that was neither addressed nor reasonably foreseeable by the parties. Such a surprise decision violates the procedural ordre public and justifies refusing enforcement of the award.

Comment

The decision reinforces procedural clarity and judicial efficiency. By clearly delineating the relationship between set-aside proceedings under Section 1059 ZPO and enforcement proceedings under Section 1060 ZPO, the BGH ensures effective legal protection through a concentrated, single-track judicial review and facilitates the swift enforcement of arbitral awards. The court's refusal to recognise an implied agreement on a right-to-be-heard complaint procedure under Section 321a ZPO enhances legal certainty and limits such a remedy to cases of express party agreement. This interpretation promotes speed and finality without compromising a narrow but robust public-policy control and provides clear guidance for contract drafting in future arbitration agreements.