

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2024, 10	Decision date:	5 March 2024	Res judicata: Yes
Court:	Higher Regional Court of Frankfurt (OLG Frankfurt)			
Case No. :	26 SchH 8/23			
Keywords:	Inadmissibility of arbitration proceedings, conflict of jurisdiction clauses, interpretation of a jurisdiction clause not expressly giving jurisdiction to state courts; requirements for waiver of a formal requirement by implied, form-free agreement			
Key legal provisions:	Sections 1062(1) No 2, 1032(2) German Code of Civil Procedure (ZPO)			

Higher Regional Court of Frankfurt sheds light on the demarcation of jurisdiction between state courts and arbitral tribunals, upholding the German courts' strict approach to waiving a form requirement

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On 5 March 2024, the Higher Regional Court of Frankfurt (OLG Frankfurt) declared arbitration proceedings between the parties inadmissible for lack of a valid arbitration agreement. The court held that a jurisdiction clause generally confers jurisdiction on state courts even if it does not expressly state this but merely designates an (exclusive) place of jurisdiction. The OLG Frankfurt further emphasised that in order for a formal requirement to be waived by implied agreement, the parties' intent to override the formal requirement must be clearly discernible.

Facts

The applicant was an automotive supplier, and the respondent a manufacturer of brake systems.

The contractual relationship between the parties for the supply of goods by the applicant was based on several contracts: a supply agreement for 2022-2025 (YPSA) with accompanying terms (Prerequisites), and a framework agreement (SSC) signed between the legal predecessors of the parties and applicable due to an express reference in the YPSA.

Article 2 No 2 SCC provided that "the terms and conditions set forth herein govern all Individual Agreements, unless the Parties expressly deviate from the terms herein by the process set forth below". The process required an express agreement of the parties to deviate from the SSC with a specific wording. Article 2 No 2 SCC stipulated that if the process was not complied with, the SCC should supersede any other agreements.

Article 18 No 9 SCC provided that "[t]he exclusive place of jurisdiction [...] shall be Frankfurt/Main, Germany." No 11 of the Prerequisites contained an ICC arbitration clause with the seat of arbitration in Frankfurt on the Main, which the parties did not particularly discuss during the negotiations.

The applicant sought an order from the OLG Frankfurt under Section 1032(2) German Code of Civil Procedure (ZPO), declaring arbitration proceedings between the parties inadmissible with regard to all disputes arising from or in connection with the YPSA and its Prerequisites. It argued that there was no valid arbitration

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agreement as Article 18 No 9 SCC conferred jurisdiction on state courts, and the arbitration clause in No 11 of the Prerequisites was invalid.

The respondent sought dismissal of the application, arguing that No 11 of the Prerequisites constituted a valid arbitration agreement which was an addition to (and not a deviation from) Article 18 No. 9 SCC, with the result that the deviation procedure set out in Article 2 No 2 SCC did not apply. According to the respondent, Article 18 No 9 SCC did not confer jurisdiction on the state courts but only designated Frankfurt on the Main as an exclusive place of jurisdiction.

The OLG Frankfurt granted the application and declared arbitral proceedings under the YPSA and the Prerequisites inadmissible. The decision has become final.

Key findings

The OLG Frankfurt held that arbitration proceedings between the parties are inadmissible as there is no valid arbitration agreement.

First, the court found that Article 18 No 9 SSC confers jurisdiction on state courts although this is not expressly stated in the provision. The jurisdiction of state courts does not require explicit agreement, since it is a general legal principle that those seeking legal recourse have a right of access to state courts. Consequently, it is not the establishment of jurisdiction of state courts that requires a specific agreement but rather its exclusion. The court further noted that Article 18 No 9 SSC does not leave the issue of jurisdiction open to determination by a supplementary agreement.

Second, the OLG Frankfurt found that the arbitration clause was invalid as it deviated from the provision in Article 18 No 9 SSC by conferring jurisdiction on an arbitral tribunal without fulfilling the contractual requirements for a deviation. The court held that the arbitration clause was not expressly agreed pursuant to Article 2 No 2 SSC, rejecting the respondent's argument that Article 2 No 2 SSC would not apply to supplementary agreements. The OLG Frankfurt clarified that a deviation within the meaning of Article 2 No 2 SSC encompasses both supplementary ("additional") and deviating ("conflicting") agreements in a narrower sense.

Finally, the court held that the formal requirements of Article 2 No 2 SSC were not waived by implied agreement. Referring to well-established case law, including the decision of the German Federal Court of Justice (BGH), 2 June 1976, VIII ZR 97/74, the OLG Frankfurt noted that contractual provisions requiring a specific form can, in principle, be waived by implied agreement. However, to prevent undermining the form requirement, the parties' will to override it through a form-free agreement must be clearly discernible. The court concluded that these conditions were not met as the arbitration clause had indisputably not been specifically discussed between the parties.

Comment

The decision makes a valuable contribution to the demarcation of jurisdiction between state courts and arbitral tribunals by strengthening the general legal principle of access to state courts (as part of the "Justizgewährungsanspruch"). Furthermore, the decision upholds the strict approach of German courts with regard to the conditions for waiving a form requirement through an implied, form-free agreement, thus providing legal certainty that is likely to be welcomed in international legal practice.