

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 01	Decision date:	11 June 2024	Res judicata: No (complaint pending – BGH, I ZB 41/24)
Court:	Higher Regional Court of Stuttgart (OLG Stuttgart)			
Case No. :	1 Sch 2/24 Case No. other instances: I ZB 41/24 (German Federal Court of Justice, BGH)			
Keywords:	Domestic arbitral award on agreed terms, declaration of enforceability, public policy, privilege against self-incrimination ("nemo tenetur-Grundsatz"), contractual duty to inform, legal interest ("Rechtsschutzbedürfnis") for application to set aside an arbitral award			
Key legal provisions:	Section 1059(2) No. 2 (b) German Code of Civil Procedure (ZPO) Section 826 German Civil Code (BGB) Section 37b German Plant Variety Protection Act (SortSchG)			

Arbitral award for information disclosure does not violate public policy because contractual duty to inform outweighs privilege against self-incrimination

Dr. Alexander Urhahn, SZA Schilling, Zutt & Anschutz

The Higher Regional Court of Stuttgart upheld a domestic arbitral award granting information disclosure. The court rejected the public policy defence of invoking the privilege against self-incrimination since the respondent had contractually agreed on a duty to inform.

Facts

The respondent, a company dealing in agricultural products, entered into a combination propagation contract with 14 plant breeders, including P. L., in 2018. The contract contained obligations of the respondent regarding bookkeeping and documentation, as well as penalties in case of non-compliance. The applicant is an association of plant variety rights holders. P. L. authorised the applicant to assert claims on P. L.'s behalf. In 2020 and 2021, the applicant repeatedly requested information from the respondent. Respondent failed to provide information or allow bookkeeping review. Since 2021, the respondent's managing director has been under criminal investigation for violations of the German Seed Marketing Act ("SaatG"). P. L. joined the investigation in 2023, suspecting further violations of plant variety rights. In 2022, the applicant initiated arbitration for information disclosure and bookkeeping review against the respondent. Following a settlement during the oral hearing, an arbitral award on agreed terms was issued in late 2023. The award entitled the applicant to review respondent's bookkeeping and ordered respondent to pay EUR 63,745.00.

In January 2024, the respondent claimed that it became aware of P. L.'s involvement in the criminal investigation and thus any information disclosure was precluded due to the constitutional privilege against self-incrimination. Enforcing the arbitral award would therefore violate public policy. In addition, the respondent alleged that the applicant had deceitfully concealed its dual motive for claiming information disclosure, which included aiding the criminal investigation. This would constitute intentional malicious harm under Section 826 BGB, warranting the non-recognition of the award. The applicant asserted that no public policy violations existed and that the arbitral award only addressed civil claims.

GERMAN ARBITRATION DIGEST

The applicant requests the arbitral award on agreed terms to be declared enforceable. The respondent requests the enforcement application to be rejected and the arbitral award to be set aside.

Key findings

The OLG Stuttgart declared the arbitral award enforceable and dismissed the respondent's application to set aside the award as inadmissible.

The court ruled that there were no grounds for setting aside the award. In particular, it held that the award does not lead to a result which contradicts public policy according to Section 1059(2) No. 2 (b) ZPO. In line with the case law of the BGH, the OLG Stuttgart laid down that a violation of public policy requires the award's result to be obviously incompatible with fundamental principles of German law. This would require the award to contradict a mandatory provision that expresses a fundamental value decision of the German legislator for the legal order. While the privilege against self-incrimination is part of the German constitution, the OLG Stuttgart held that German law does not recognise an absolute mandate not to compel anyone to provide information or take actions that would reveal a criminal act they have committed. In the case of a contractually agreed duty to inform, the privilege against self-incrimination, as a defensive right against the state, would not apply directly. Rather, it would be a factor to be considered when interpreting the contract.

In applying these principles to the present case, the OLG Stuttgart referred to Section 37b German Plant Variety Protection Act ("SortSchG"), which requires the infringer of a plant variety right to inform the holder of the infringed right of the details of the infringement and further provides that this information may be used in criminal proceedings against the infringer if the infringer consents. The court therefore concluded: If the risk of self-incrimination does not exempt the infringer of a plant variety right from their statutory duty to inform, this must apply even more so to a contractual duty to inform. As regards criminal proceedings, the OLG Stuttgart determined that a potential exclusion of evidence ("Beweisverwertungsverbot") would adequately safeguard any legitimate interests of the respondent.

Since the privilege against self-incrimination was not violated, the court also found no justification for an exceptional non-recognition of the award on the basis of Section 826 BGB. The respondent was aware of the ongoing criminal investigation. Thus, there was no room for fraudulent misrepresentation by the applicant. Rather, the respondent ought to have known that the information disclosure agreed upon in the settlement might be of interest to the criminal investigation.

Lastly, the OLG Stuttgart held that the respondent's application to set aside the award lacked the required legal interest. Since the application for a declaration of enforceability was admissible, the court examined the grounds for setting aside in any event. The respondent should have made its application to set aside the award conditional on the court holding the application for a declaration of enforceability inadmissible.

Comment

The decision illustrates the high thresholds required for both the public policy defence and the non-recognition of an award based on Section 826 BGB. It thus reinforces the final and binding effect of arbitral awards. In a procedural side note, the court provides guidance on how an application to set aside an arbitral award can be formulated if an application for a declaration of enforceability of the arbitral award is pending at the same time.