

# GERMAN ARBITRATION DIGEST

<b>GAD No.:</b>	GAD 2025, 8	<b>Decision date:</b>	4 October 2024	<b>Res judicata:</b> Yes
<b>Court:</b>	Higher Regional Court of Karlsruhe (OLG Karlsruhe)			
<b>Case No. :</b>	10 Sch 3/24			
<b>Keywords:</b>	Foreign arbitral award, declaration of enforceability, New York Convention, grounds for refusal, inclusion and written form of arbitration agreement, most-favoured nation principle, expedited procedure, public policy, révision au fond			
<b>Key legal provisions:</b>	Section 1061 German Code of Civil Procedure (ZPO) Articles II, V and VII New York Convention (NYC)			

## Higher Regional Court of Karlsruhe strengthens enforcement of arbitral awards with most-favoured nation principle

*Benita Schwung, Ludwig Maximilians University Munich*

On 4 October 2024, the Higher Regional Court of Karlsruhe (OLG Karlsruhe) declared an arbitral award of the Singapore International Arbitration Centre (SIAC) enforceable. In a scholarly manner, the court examined the requirements of Article V New York Convention (NYC), delving into the specifics of Singapore contract law. The court emphasized, firstly, that the burden of proof for a ground of refusal lies with the respondent and, secondly, applied the most-favoured nation principle in several instances. The OLG Karlsruhe further reaffirmed the restrictive approach of German courts concerning an impairment of the right to be heard as well as public policy violations.

### Facts

The applicant, a Singapore company, was commissioned by the respondent, a German company, to prepare an expert opinion on the potential scope of damages asserted against the applicant in a separate arbitration.

The applicant's "Standard Business Terms and Conditions" (SBTCs) contained an arbitration agreement. Any disputes were to be finally resolved by arbitration administered by the SIAC under the SIAC Rules, with Singapore as seat of arbitration and Singapore law as law of the arbitration clause. The SBTCs were referenced on the first page of the letter of engagement and annexed thereto. The letter sent to the respondent by the applicant concluded with: "Please confirm Client's acceptance of this letter and attached terms, by signing and returning to us the enclosed duplicate of this letter." The respondent signed and returned the letter, not however the SBTCs.

The respondent refused to pay the remuneration requested by the applicant, claiming that the draft expert opinion did not meet the contractual requirements. As a result, the applicant initiated an arbitration before the SIAC. The arbitration, conducted by a sole arbitrator in accordance with the Expedited Procedure under Rule 5 SIAC Rules 2016, resulted in a decision in favour of the applicant.

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## Key findings

The OLG Karlsruhe declared the arbitral award enforceable. None of the grounds for refusal of recognition and enforcement set forth in Article V NYC were fulfilled. While the applicant bears the burden of proof for the requirements of the declaration of enforceability, the burden of proof regarding the grounds for refusal lies with the respondent.

Firstly, the OLG Karlsruhe held that the arbitration agreement was valid and, therefore, there was no ground for refusal according to Article V(1)(a) NYC. The form requirements were fulfilled despite the fact that the arbitration clause was contained in general terms and conditions (GTCs) and was not separately signed. For purposes of enforcement, arbitration agreements generally have to be agreed in writing (cf. Article II(2) NYC). Based on both Singapore law and Article II(2) NYC, the court stated that it was irrelevant whether the arbitration agreement was included in the main contract or in GTCs, as long the contract either specifically referred to the arbitration clause or generally referenced the GTCs containing it, and there was a close connection between the contract and the GTCs. Moreover, if the applicable national law has more generous form requirements than the NYC, it is sufficient for enforcement purposes if the more lenient standard is met (most-favoured nation principle or "Meistbegünstigtengrundsatz", cf. Article VII(1) NYC). Since Singapore law, governing the arbitration clause, does not require said clauses to be signed, the formal requirements of the arbitration agreement at hand were fulfilled, despite the absence of a signature on the GTCs. Notably, the court examined at length the requirements of Singapore law through its own research of publicly available case law pursuant to Section 293 German Code of Civil Procedure (ZPO).

Secondly, the OLG Karlsruhe held that there were no procedural deficiencies amounting to grounds for refusal according to Article V(1)(b) and (d) NYC. The respondent's right to be heard ("rechtliches Gehör") was not impaired. The respondent's decision to cease participation in the proceedings, alleging the arbitration was flawed, did not amount to a violation of the right to be heard. Short deadlines, inherent to the expedited procedure, are permissible under the SIAC Rules and, therefore, did not constitute a procedural deficiency. Lastly, the court considered the respondent's challenge of the sole arbitrator, which was left undecided by the SIAC, irrelevant for the enforcement, particularly since the respondent had failed to sufficiently substantiate the challenge.

Thirdly, the OLG Karlsruhe held that the enforcement of the award did not violate public policy ("ordre public") according to Article V(2)(b) NYC. The requirements are strict due to the prohibition of a révision au fond. On procedural grounds, the declaration of enforceability can only be refused if the arbitration proceedings reveal a severe material defect that undermines the foundations of national and economic life in Germany. None of the procedural issues raised by the respondent reached this level. On substantive grounds, the specific outcome of the foreign decision must be completely contrary to the fundamental values of the German legal system. The court held that this threshold was not met either.

## Comment

The requirements for grounds for refusal of enforcement are generally high. This is aggravated by the fact that the respondent insofar bears the burden of proof and that the most-favoured nation principle renders the enforcement-friendliest law applicable in case of doubt or differences. The thresholds for impairments of the right to be heard as well as public policy violations are significant.