German Court on Validity of Arbitration Clause: Partial Invalidity of Arbitration Clause; Notarization Requirement for Institutional Arbitration Rules

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An arbitral tribunal's preliminary ruling on its jurisdiction can be challenged by application for state court decision according to Sec. 1040 (3) German Code of Civil Procedure, following the example of Art. 16 of the UNCITRAL Model Law. Such a case has been decided by the Higher Regional Court of Munich (OLG Munich, decision dated 10 September 2013, Case Number 34 SchH 10/13) in a constellation where one party (the respondent in the arbitration case) invoked the invalidity of the arbitration clause on the grounds that (I) it contained an additional invalid competence-competence provision and (II), as part of a contract requiring notarization, the institutional arbitration rules referred to were not notarized themselves.

The OLG Munich rejected the application, thus upholding the arbitral tribunal's jurisdiction.

I. The arbitration clause to be assessed by the OLG Munich contained a so called competence-competence provision, i.e. it provided, in its second part, for final and binding arbitration with regard to the validity of the arbitration clause itself. German law, after its revision on the basis of the UNCITRAL Model Law, does not anymore allow for such power to be vested in the arbitral tribunal.

However, the OLG Munich held that the parties had validly submitted their dispute to arbitration as the main part of the arbitration clause could not be affected by the invalidity of the additional competence-competence provision. According to the OLG Munich, the latter constitutes a second, independent arbitration agreement (in the meaning of Sec. 1040 (1) 2 German Code of Civil Procedure). Consequently, any invalidity due to the inclusion of the competence-competence provision has no effect on the validity of the main arbitration clause as such. The court has further pointed out that, even under the assumption that both parts constitute one single arbitration clause, the invalidity of the competence-competence provision would not render the remaining agreement invalid. Rather, one could assume (in line with Sec. 139 German Civil Code) that the parties had wanted to agree on arbitration for conflicts arising out of their contractual relationship, irrespective of whether it is possible to provide the arbitral tribunal with the additional power to decide on its own jurisdiction.

II. The second issue that the OLG Munich had to consider was whether and to what extent the requirement of notarization (which, under German law is required, *inter alia*, for contracts for the transfer of real estate or of shares in a limited liability company) also applies to arbitration clauses. In the case at hand, the arbitration clause itself was contained in the main contract and duly notarized. However, the clause made reference to institutional arbitration rules that were not notarized.

The OLG Munich held that the arbitration clause met the applicable requirements and clarified that arbitration agreements are generally not subject to other formal requirements than the requirement of writing as set out in Sec. 1031 (1) German Code of Civil Procedure. However, if the parties include an arbitration clause into their main contract (as opposed to forming a separate arbitration agreement) and if this main contract is subject to notarization, this also applies to the arbitration clause contained therein. Nevertheless, according to the OLG Munich, this does not necessarily mean that institutional arbitration rules, referred to by the arbitration clause, have to be notarized as well. In the case at hand, a dynamic reference, *i.e.* a reference to arbitration rules as applicable at the time of initiation of arbitration proceedings, was included. Such a dynamic reference does, according to the OLG Munich, not subject the rules themselves to the requirement of notarization.