

# Kluwer Arbitration Blog

## Business Continuation and Arbitration Agreements under German Law

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Can an arbitration agreement be binding on a party that did not sign it? Generally, an arbitration agreement only binds its signatories. This is a transnational principle, also anchored in the German Constitution. There are, however, widely accepted exceptions. This article examines the extension of arbitration agreements to third parties under the requirements of Sec. 25(1) of the German Commercial Code (*Handelsgesetzbuch*, HGB), according to which a commercial entity may be liable if it continues a business under its prior name. This approach has been confirmed in a current unreported CAS award and subsequent enforcement proceedings before the Higher Regional Court of Berlin (*Kammergericht*) in which the authors have acted as counsel and which inspired this article.

### Consensual Character of Arbitration Agreements

Generally, under German law, arbitration agreements are only binding between the respective parties to the agreement (see [Bundesgerichtshof 3.5.2000 – XII ZR 42/98](#), *Neue Juristische Wochenschrift* (NJW) 2000, 2346). Regarding the *ratio personae*, German law favors a restrictive approach, in line with the constitutional “right to the lawful judge” (Art. 101(1) German Constitution (*Grundgesetz*)). One highly relevant exception to this principle is made in cases of legal succession. The underlying *ratio* is simple: a party should not be able to benefit from the rights under an agreement, without accepting the conditions and obligations that come with it.

### Liability for Claims According to Section 25 HGB

While the extension of arbitration agreements in cases of succession or assignment appears to be rather well-known, German law contains a less common exception – the liability for claims in cases of a “business continuation” under [Sec. 25 HGB](#).

According to this provision, prior liabilities may extend to a new business operator if the new owner continues the business under the same name.

The provision applies to anyone who acquires (i) a commercial business (ii) *inter vivos* and (iii) continues it under the previous business name. Importantly (and in contrast to the common cases of

assignment or succession), the prerequisite of an “acquisition” under Sec. 25 HGB does not require any contractual agreement or transaction between the parties (see [Bundesgerichtshof 28.11.2005 – II ZR 355/03](#), [NJW 2006](#), 1001 para. 9). Rather, the relevant criterion is solely whether the outer appearance indicates a continuation of the previous business. The continuation occurs “under the previous business name” even when the business name is amended, as long as the former and the new business names share the same “defining” or formative elements. Accordingly, amending, removing or complementing additional or descriptive parts of the business name (e.g. “trade company”, “sales and distribution”) may be irrelevant if the distinctive element remains.

As a result, both the new and the former owner of the business are liable for all “prior liabilities” incurred in the operation of the business ([Bundesgerichtshof 8.5.1989 – II ZR 237/88](#), [NJW-RR 1989](#), 1055; subject to [Sec. 26 et seq.](#) HGB).

In an international context, Sec. 25 HGB applies as part of the law applicable to the seat of the commercial business. Accordingly, Sec. 25 HGB must be considered where the relevant party is seated in Germany, irrespective of the law applicable to the arbitration agreement, or to the merits of the case ([Bundesgerichtshof 23.10.2013 – VIII ZR 423/12](#), [Neue Zeitschrift für Gesellschaftsrecht 2014](#), 511 (512 *et seq.*))

### **Application of Sec. 25 HGB to Arbitration Agreements**

The question remains whether Sec. 25 HGB may also lead to an extension of an arbitration agreement to the new business entity, if the business is being held liable under Sec. 25 HGB for claims out of or in connection with a contract containing the arbitration agreement.

Confirming an arbitration-friendly stance, the *Kammergericht* confirmed the binding effect towards third parties in two separate decisions by two different chambers (see [Kammergericht 13.4.2015 – 20 Sch 9/14](#), [BB 2016](#), 397 and [Kammergericht 25.1.2022 – 12 Sch 3/21](#), including the referenced case). The German Federal Court of Justice (*Bundesgerichtshof*) has not rendered any decision on the issue yet. Legal commentators largely affirm the applicability of Sec. 25 HGB to arbitration agreements (instead of many: [Geimer in Zöller, ZPO](#), 34th ed. 2022, Sec. 1029 para. 67; [Münch in MüKoZPO](#), Sec. 1029 para. 57), even though the original decision by the *Kammergericht* was met with some criticism as well (see e.g. [Burianski, Betriebsberater 2016](#), 397, 400).

Since the dogmatic and systematic classification of Sec. 25 HGB remains controversial, the interpretation of the provision should be based primarily on its wording and purpose. In this blog post, we will focus on the more decisive arguments concerning the *telos*. For a thorough discussion, see our article in [SchiedsVZ 2023](#), 154.

In summary, we believe that the better arguments speak for an application of Sec. 25 HGB to arbitration agreements.

While the legal justification of Sec. 25 HGB is subject to extensive discussions and different theories, the German legislator clearly stated that the underlying rationale is the market’s legitimate expectations regarding a company’s liabilities. The reasoning behind this is that the market will likely identify the company under its name as the bearer of rights and obligations (without necessarily having regard to the owner’s identity).

One may argue that the “entrance into business relationships” necessarily extends to arbitration agreements. In this context, the *Kammergericht* has referred to the case law of the *Bundesgerichtshof* dealing with cases of assignments of claims which were subject to arbitration agreements (see *Kammergericht* 25.1.2022 – 12 Sch 3/21). In these cases, the *Bundesgerichtshof* found that – for reasons of legal certainty – claims may only be purchased and transferred together with the underlying arbitration agreement. According to the *Kammergericht*, the same *telos* applies to the transfer of a commercial business under Sec. 25 HGB in order to do the protective purpose of the provision justice. In application of such *ratio*, the creditor is only sufficiently protected if it can rely on the arbitration clause priorly agreed.

In contrast and arguing against the application of Sec. 25 HGB to arbitration agreements, one could invoke a difference between an intentional and contractual assignment of rights and a statutory liability by law and based on the market’s perception. Not only will a party generally consider the terms of a contract before agreeing to any voluntary assignment, but it is required to expressly agree to such transfer of rights and obligations. An extension of the arbitration agreement (as part of the assigned agreement) is therefore based on deliberate contractual declarations. In contrast, a party could be subject to the application of Sec. 25 HGB without being aware of or agreeing to an extension of an arbitration agreement.

However, we believe that such criticism is unwarranted.

Firstly, it is a general principle of party autonomy and the privity of contracts that a party may contractually only bind itself. Extending liabilities or duties to third parties always requires a legal justification. Sec. 25 HGB explicitly provides such justification and there is no obvious reason why an exception should be made for arbitration agreements.

Secondly, the acquirer of a business who continues the business under the same name, organization and business address expresses its intent to enter into the existing business relationships and benefit from the continuation of a prior business.

Thirdly, any other interpretation could potentially lead to inconsistency and potential legal uncertainty: According to Sec. 25(1) HGB, the acquirer of a business is not only liable for claims *against the company*, but is also often entitled to invoke prior claims *of the company* against the company’s debtors. In these cases, it can hardly be justified to deprive the company’s debtors of an agreed arbitration clause and allow the new operator to initiate state court proceedings. In addition, this could also lead to jurisdictional uncertainties where reciprocal or counterclaims exist.

## Conclusion

Both acquirers as well as creditors of companies that continue to operate under the same or a similar business name after an acquisition should be aware of the legal effects of Sec. 25 HGB.

There are valid reasons to assume that the new operator of a continued business is not only bound by substantive claims against the former business but also by corresponding arbitration agreements. While the highest German civil court has not rendered a decision in this regard yet, the wording and the objective of Sec. 25 HGB justify such an application. The *Kammergericht* has followed this decisive pro-arbitration approach in two cases.

The above is an abbreviated version of an article published in the [SchiedsVZ | German Arbitration Journal](#), Vol. 21, No. 3 (2023), which is also included on [Kluwer Arbitration](#). See [here](#) for more information on and other contributions to the Journal.

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