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Terms and conditions under German law – New ways of limiting court interference with B2B contracts?

Under German law, statutory restrictions on terms and conditions will also apply to B2B contracts, leading to significant uncertainty for commercial actors since it will often be unclear whether contractual provisions will hold up in court. The newly constituted German government has now made a commitment to exempt certain business contracts from these provisions. Simultaneously, a recent decision by the Federal Court of Jus-tice indicates that modified choice of law clauses in arbitration agreements may also be an option.

I. Introduction

Under German law, statutory provisions restricting standard business terms will apply not only to contracts with consumers, but even as between businesses. Simultaneously, the German courts will only see an agreement as individually negotiated where that specific clause was the subject of negotiations, not where the parties negotiated the contractual agreement in general. German law does provide that the provisions on unfair contract terms will only apply to contracts between businesses in a modified way. However, since most of the case law concerning statutory restrictions on terms and conditions concerns consumers, there is often a significant lack of clarity on how the courts will apply these provisions to contracts between businesses. This leads to a significant amount of risk for commercial actors, since any provision that was not separately discussed risks potentially not holding up in court, with key provisions such as limitations on liability or contractual penalties subject to particular uncertainty.

Recent legislative proposals by the newly constituted government attempt to address this issue by suggesting an exemption from this type of control for contracts between certain entities. Moreover, a recent decision by the Federal Court of Justice provides much-needed clarity regarding one way of resolving the problem through contract drafting, by combining an arbitration agreement with a partial choice of German law.

II. Proposals to reform German standard terms law

The new German government's coalition agreement, concluded on 05 May 2025, emphasises the need to ensure Germany's continued attractiveness as a business location. As concerns terms and conditions, it makes a bold commitment:

"*We will reform the law on terms and conditions to ensure that large share capital companies in the sense of sec. 267 (3) Commercial Code can be sure that their agreements will be upheld by the courts even where they make agreements between each other on the basis of standard terms*."

This welcome development comes as the result of considerable academic debate over possible delimitations of the scope of the courts' control over standard terms. While its concrete implementation is unclear, this does mean that there is significant political will to resolve a pressing problem.

III. Federal Court of Justice: Partial choice of German law does not vitiate arbitration agreement

Until this legislative change comes into force, creative solutions will continue to be required. In a recent case dated 09 Jan. 2025 (case no. I ZB 48/24), the Federal Court of Justice, Germany's highest civil court, ruled on one possible contractual solution that has been steadily gaining ground in recent years. Unlike German civil procedure, under German arbitral law it is open to the parties to choose the law of a country, parts of the law of a country or indeed an entirely anational set of rules to apply to their dispute. Building on this greater freedom, some contract drafters have combined an arbitration agreement with, for the main contract, a choice of German law while expressly excluding the application of provisions on terms and conditions control.

In the past, there has been significant debate as to whether such a choice of law provision renders the arbitration agreement invalid. The Federal Court of Justice has now decided that the arbitration agreement remains valid even when combined with this type of choice of law for the main contract. However, the Federal Court of Justice explicitly made no determination as to whether this partial choice of German law would be a valid choice of law.

In the case before the Federal Court of Justice, two businesses concluded a contract containing an arbitration agreement and a choice of German law to the exclusion of the German provisions on terms and conditions control. Substantively, the contract provided inter alia for contractual penalties for delays, an area where German terms and conditions control sets comparatively strict limits on parties' freedom to contract. Using the German mechanism for isolated judicial determination of forum (discussed eg in Steinbrück, Ben, and Krahé, Justin Friedrich, "Isolated court determinations on the admissibility of arbitration: a case study of the German Federal Court of Justice's recent decision on intra-EU ICSID proceedings", Arbitration International 2024, 375-382, https://doi.org/10.1093/arbint/aiae011), one contract partner later applied for a judicial determination that arbitration was inadmissible because there was no valid arbitration agreement. In particular, the applicant argued that the choice of German law to the exclusion of terms and conditions control was invalid and that this meant that the arbitration agreement was invalid as well.

Both the first-instance Berlin Higher Regional Court and the Federal Court of Justice dismissed this argument. They found, instead, that under the general principles of the law of arbitration, an arbitration agreement is severable from the main contract. The possible invalidity of provisions in the main contract therefore does not affect the validity of the arbitration agreement.

In its decision, the Federal Court of Justice explicitly held that the doctrine of severability applies even where an arbitral tribunal may reach a different decision on the merits than a state court would have done, since the doctrine of severability reflects the parties' presumed intention to separate the question of forum from questions of merit. While the Federal Court of Justice adverted to the possibility that in some cases parties may wish to link forum and merits, on the facts of the case the Federal Court of Justice held that there had been no intention to make the arbitration agreement dependent on the validity of the choice-of-law clause, as evidenced by the typical boilerplate clause that the invalidity of any individual contractual provision was not to affect that of other clauses. On this basis, the Federal Court of Justice dismissed the application and found that the arbitration agreement was valid.

The Federal Court of Justice therefore did not need to make any determination as to the validity of the choice-of-law clause itself, since the arbitration agreement was in any case severable from that

provision's fate. However, this does provide much-needed clarity that a partial choice of German law will not, of itself, lead to the invalidity of the arbitration agreement. Experience indicates that arbitral tribunals will be sensitive to the need for agreements made between commercial actors to be upheld at a later stage, since ultimately additional risk will be factored into the contract price.

While it is now clear that this choice of law does not lead to the invalidity of the arbitration agreement, the Federal Court of Justice left open the question whether it would be possible to challenge a later award on public-order grounds. Until this point has been decided, some residual uncertainty remains. Parties willing to live with this uncertainty may wish to reduce the risk of their arbitration agreement being found invalid by ensuring that they use a model clause and separate clearly between the arbitration agreement and the choice of law to highlight that they intend for these provisions to be severable.

IV. Summary

Recent developments therefore show that the application of terms and conditions control to contracts between businesses continues to be a hot topic in German law. However, attempts to limit the courts' intervention into contracts negotiated and agreed between commercial actors are steadily gathering steam. The Federal Court of Justice's recent decision highlights that, even on the law as it stands, modifications to ensure that commercial bargains are upheld may be possible by clever contract drafting. In the meantime, the new government's commitment to modify the German law of terms and conditions promises a root-and-branch review of one of German law's trickiest areas.

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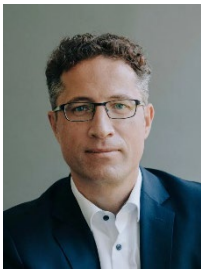

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