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ARTICLE

The Effectiveness of Arbitration Agreements in Germany

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Abstract

The following Article deals with the prerequisites required for effective arbitration agreements in Germany, thereby comparing it with US law. It will be shown that the main obstacle for the effectiveness of arbitration agreements in consumer contracts is the requirement of a formally separated, personally signed written document as set out in § 1031 Sec. 5 ZPO. Contrary to consumer contracts, there is no specific form requirement in business contractual. This statutory concept surprises because the effectiveness mainly depends on formal, non-material requirements. Taking this into account, the following Article will highlight the question whether the current legal framework is ensuring an informed consent.

Keywords: effectiveness; arbitration agreement; standard business terms; unconscionability

A. Introduction

What requirements does an arbitration agreement have to fulfill in order to be binding? One could expect that this question is a long time settled legal issue. Even though this is true to a certain extent, several developments of the recent past give new relevance to the debate. Corporate mechanisms of arbitration particularly used by tech companies constitute a new form of out-of-court dispute resolution. Whereas binding corporate dispute resolution mechanisms in Europe tend to be rare at the moment, this is different in the U.S. Corporate arbitration schemes are in widespread use and may even provide for arbitration clauses that do not just exclude individual access to state courts, but also participation in class actions; the Supreme Court of the United States has dealt with respective clauses contained in contracts of adhesion in several judgments of the recent past. Therefore, in order to understand the relevance of the topic, it is first necessary to take a look at these developments, explored in Section B, before turning to the German law, explored in Sections C and D.

The effectiveness of arbitration agreements in Germany is thereby governed by the §§ 1025 ss. ZPO. In a practical perspective, the main obstacle for the effectiveness of arbitration agreements in consumer contracts is the requirement of a formally separated, personally signed written document as set out in § 1031 Sec. 5 ZPO. Consequently, there is a basic differentiation between consumer and business arbitration agreements whereas for the latter, the specific form requirement does not apply. A recently proposed reform of the arbitration law would likely deepen this difference, considering that even oral agreements can be valid.[1] This statutory concept surprises because the effectiveness mainly depends on formal, non-material requirements. Taking

[1]Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen [BT] 20/13257 p. 26 ff. (Ger.) (providing however, the reform has not been enacted yet; it remains to be seen whether implementation will still take place even though the government has changed in the meantime).

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this into account, the following Article will highlight the question whether the current legal framework is ensuring an informed consent.

B. Recent Developments and the Effectiveness of Arbitration Agreements in the USA

As mentioned in the introduction, corporate arbitration schemes have gained a huge relevance over the last decades. Particularly, American tech companies have established tailormade corporate arbitration schemes that are commonly described under the label "corporation as a courthouse."[2] The arbitration framework of these dispute resolution mechanisms may be based on the Rules of the American Arbitration Association[3] or follows rules that are particularly developed for the respective arbitration scheme.[4] Legal tech is an essential part of these arbitration mechanisms; often, algorithm-based so-called Online Dispute Resolution mechanisms provide for a solution for a specific legal problem against which only upon objection, arbitration, or litigation before courts may become available.[5] If no objection is raised, the outcome of the ODR-mechanism may be binding.

Another in the meantime widespread trend concerns the use of arbitration agreements in contracts of adhesion.[6] Arbitration agreements contained in the contractual framework often exclude litigation before state courts—so-called mandatory arbitration clauses—thereby even barring participation in class actions.[7] In general, arbitration clauses, even if contained in contracts of adhesion, are deemed to be binding according to U.S. law.[8] This development has been heavily supported by the U.S. Supreme Court.[9] The Federal Arbitration Act (FAA) thereby provides in Art. 2 that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[10] Based upon this provision, the Supreme Court holds that arbitration clauses are generally valid and binding, thereby curtailing the power of the States to provide differently by law; invalidity can only be based upon grounds of general contract law.[11] The use of State law unconscionability clauses to invalidate arbitration agreements has been heavily restricted by the Supreme Court in its decision in *AT&T Mobility v. Concepcion* (2011),[12] where even clauses prohibiting the participation in class actions and class

[2]*See* Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. Rev. 605, 633 (2018).

[3]Linda J. Silberman, Allan R. Stein, & Tobias Barrington Wolff, Civil Procedure: Theory and Practice 118 (4th ed. 2013).

[4]Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L. J. 2804, 2852 (2015); *cf.* Peter B. Rutledge & Christopher R. Drahozal, *Contract and Procedure,* 94 Marq. L. Rev. 1103, 1115 (2011).

[5]*See* Robert Condlin, *The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype*, 14 Cardozo J. of Conflict Resol. 621, 621 (2013) (online dispute resolution); Ethan Katsh & Orna Rabinovich-Einy, Digital Justice: Technology and the Internet of Disputes 709, 709 (2017); Resnik, *supra* note 2, at 633; Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 Ariz. L. Rev. 213, 242, 245 (2016); Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Alogrithm be Deciding Your Case?*, 35 Mich. J. Int'l L. 485, 485 (2014).

[6]*See* Stephen J. Ware, *Contracting Away Constitutional Rights in the United States: Adhesive Consent (Blanket Assent) to Arbitration and Other Agreements*, in this issue; Peter B. Rutledge & Christopher R. Drahozal, *Sticky Arbitration Clauses - the Use of Arbitration Clauses after Concepcion and Amex*, 67 Vand. L. Rev. 955, 990 (2014); Schmitz, *supra* note 5, at 223.

[7]*See* Ware, *supra* note 6, at 181 (critiquing the term "mandatory arbitration clause"); *see also* Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 La. L. Rev. 739, 773 (2018) (explaining further the privatization of justice).

[8]*See* Ware, *supra* note 6, at 205; *see also* Schmitz, *supra* note 5, at 220.

[9]*See* Ware, *supra* note 6, at 205; *see also* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L. J. 3052, 3058 (2015); *see also* Miller, *supra* note 7.

[10]Federal Arbitration Act, 9 U.S.C. § 1.

[11]*See* Ware, *supra* note 6, at 174-78; *Silberman et al., supra* note 3.

[12]AT&T Mobility v. Concepcion, 563 U.S. 333, 346 (2011).

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arbitration were deemed to be valid. Invalidity can thus only be inferred if "the effective vindication of rights" is essentially excluded by the use of arbitration or the costs associated therewith are expected to be "prohibitively high cost."[13] Congress has since acted and excluded some legal areas from the scope of Art. 2 FAA, thereby (re-)enabling access to state courts in these legal disputes by declaring the respective arbitration agreements unenforceable.[14] Apart from those, the use of arbitration clauses in contracts of adhesion is generally deemed to be valid.[15] Relating to form, Art. 2 FAA provides for the prerequisite of a written agreement ("written provision"); apart from that, no real form requirements are put into place.[16]

C. The Relevance of the Effectiveness and the Applicable Law

I. Relevance

Taking this as a reference, one may now compare the legal framework in Germany. In German law, the effectiveness of arbitration agreements is regulated in the §§ 1025 ss. ZPO. The competence to decide on whether arbitration agreements are valid and binding is conveyed to the state judiciary (§ 1040 Sec. 3 ZPO).[17] However, the question of the effectiveness is not an isolated topic to be determined on its own. Rather, it depends on the procedural remedies by the means of which the validity of the respective agreements is to be determined. If one looks at the legal consequences, the question of the effectiveness of arbitration agreements can become relevant in three procedural contexts before state courts: First, when the defendant raises the objection of an arbitration agreement when they are sued before an ordinary court of the state judicial system (§ 1032 Sec. 1 ZPO); second, the question of effectiveness can be the object of a lawsuit before the state courts, aiming at a declaratory judgment on whether an arbitration proceeding is admissible or not; third, the question of effectiveness becomes relevant when an arbitration award has been rendered and shall now be either set aside or declared enforceable by the state courts (§§ 1059, 1060 Sec. 1 ZPO).

These remedies against the arbitral award, however, differ depending on the status of the arbitration, that means whether it involves an out-of-state, i.e. a foreign or domestic arbitration. When it comes to a foreign arbitral award, it cannot be set aside or declared ineffective according to § 1059 ZPO. Rather, it can only be recognized and declared enforceable in accordance with § 1061 Sec. 1 S. 1 ZPO which complies with Arts. III to VI of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Contrary, a foreign arbitral award cannot be set aside by a domestic court decision according to Art. 5 Sec. 1 lit. e) of the New York Convention.

What statute applies, i.e. whether it is a foreign or a domestic arbitration proceeding, depends on the place of arbitration, which can primarily be determined by an agreement between the parties according to § 1043 Sec. 1 S. 1 ZPO. If there is no explicit agreement on the place of arbitration proceeding, the tribunal has to determine the place of arbitration proceeding, whereas the circumstances of the respective case, such as the suitability of the arbitration proceeding for the parties, have to be taken into account, § 1043 Sec. 1 S. 2 and 3 ZPO.

[13]Am. Express Co. v. Italian Colors Rest., 579 U.S. 228, 234 (2013); *see* Glover, *supra* note 9, at 3058, 3067, 3072; Schmitz, *supra* note 5, at 222; Resnik, *Diffusing, supra* note 4, at 2886.

[14]*See* Ware, *supra* note 6, at 180.

[15]*Id.*

[16]9 U.S.C. § 2 ("A written provision .... or agreement in writing .... shall be valid, irrevocable, and enforceable ...."); *cf.* Resnik, *Diffusing, supra* note 4, at 2890.

[17]Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 13, 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1125 (2005) (Ger.); MÜNCH, IN MUNICH COMMENTARY ON THE CODE OF CIVIL PROCEDURE: ZPO, § 1040 ZPO Rn. 46 f. (2022, 6th ed.).

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It is only after one has determined whether it the arbitration proceeding is foreign or domestic, that one can proceed to the question of effectiveness of arbitration agreements, given that the relevant prerequisites differ according to the different procedural settings.

II. Applicable Law for In-State Arbitration

When it comes to domestic arbitration, the relevant preconditions to be met are outlined in § 1059 Sec. 2 Nr. 1 a) and Nr. 2 a) ZPO.[18] First, it is necessary that the arbitration agreement is valid according to substantive law; second, there has to be subjective arbitrability; third, objective arbitrability has to be given; fourth, the form requirements applying to arbitration agreements have to be met. The distinction between these prerequisites by the Zivilprozessordnung is necessary because each of these prerequisites can be subject to different applicable law; therefore one has to determine by the way of private international law which law is applicable to the different preconditions.

With regard to the first precondition, i.e. the validity of the arbitration agreement according to substantive law, the applicable law is determined by the general private international law.[19] In the past, the German courts did so by resorting to the rules of Private International Law. However, this way seems to be blocked now by Art. 1 Sec. 2 lit. e) of the Rome I-Convention that expressly excludes arbitration agreements from its scope of application. Therefore, a strong case can be made in favor of determining the applicable law in accordance with procedural law, which could be § 1059 Sec. 2 lit. a) ZPO.[20] § 1059 Sec. 2 lit. a) Var. 2 ZPO stipulates that the law the parties opt for is applicable and that in lack of a party agreement, subsidiarily German law applies. Seemingly, the scope of this rule is limited to setting aside arbitration awards or declaring them enforceable, and hence does not encompass generally the determination of the applicable law for arbitration agreements.[21] However, because the decision on setting aside and declaring enforceable stands at the very end of the proceeding, this decision has implications for the whole proceeding; it determines the relevant criteria that need to be met.[22] This is essentially the reason why the majority of legal opinion answers the question on what law applies according to § 1059 Sec. 2 Nr. 1 a) ZPO[23], even though it remains controversial whether some of the rules, particularly the protective norms of the Rome I-Regulation have to be applied or at least be considered.[24]

As mentioned, according to § 1059 Sec. 2 Nr. 1 a) Var. 2 ZPO the law applying to the arbitration agreement is determined by party agreement and in lack of such a choice of law, German law applies.[25] The norm directly forwards to the relevant German substantive law, without reference to the rules of the Rome-Regulations.[26] When it comes to a choice of law, it becomes relevant whether there can also be implied or indirect agreements; some argue that if

[18]*Cf.* Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 1029 Rn. 27 (Ger.); Münch, *supra* note 17, at § 1029 Rn. 27.

[19]*Cf.* Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 1029 Rn. 29 (Ger.); Münch, *supra* note 17, at § 1029 Rn. 29.

[20]*See* Voit, in Hans-Joachim Musielak & Wolfgang Voit, Zivilprozessordnung mit Gerichtsverfassungsgesetz, § 1029 ZPO Rn. 28 (2025, 22nd ed.); *see also* Nils Schmidt-Ahrendts & Philipp Höttler, *Anwendbares Recht bei Schiedsverfahren mit Sitz in Deutschland*, SchiedsVZ 267, 272 (2011); *see also Ute König*, SchiedsVZ 2012, 129 ff.; *cf.* Münch, *supra* note 17, at § 1029 ZPO Rn. 29, 31.

[21]Münch, *supra* note 17, at § 1029 Rn. 29 f.

[22]*Cf.* Münch, *supra* note 17, at § 1029 Rn. 31.

[23]Schmidt-Ahrendts & Höttler, *supra* note 20 at 273; *König*, *supra* note 20, at 129, 132; Voit, *supra* note 20, at § 1029 ZPO Rn. 28.

[24]*See* Münch, *supra* note 17, at § 1029 Rn. 31, 34 (But "kein Anlass für weitausgreifenden Verbraucherschutz [there is no reason for extensive consumer protection]."). *But see* Schmidt-Ahrendts & Höttler, *supra* note 20, at 273.

[25]*See* Schmidt-Ahrendts & Höttler, *supra* note 20, at 273–74; *see also König*, *supra* note 20, at 129, 132 f. (explaining the problem of a lack of determination of the place of arbitration).

[26]Münch, *supra* note 17, at § 1029 Rn. 31.

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there is a choice of law for the underlying contract, this also applies to the applicable law for the arbitration agreement.[27] However, there is a good argument to make against this, stressing that there is a distinction between the two contracts or agreements—procedural and substantive—and each of them have a different scope and pursue different goals.[28]

Even though the arbitration agreement has a procedural subject matter, substantive law governing contractual relationships applies to it.[29] Accordingly, in order to be valid and effective, arbitration agreements have to meet the general contract law prerequisites on the formation of contract, the voidability (§§ 145 sequentes, §§ 116 sequentes BGB), the nullity of contracts or unconscionability clauses such as § 134 BGB and § 138 BGB as well as the preconditions on the enforceability and validity of contracts of adhesion as set out in §§ 305 sequentes BGB.

Up to this point, the focus of this article has been on the substantive law requirements on the validity of arbitration agreements. In order to be effective and enforceable, the so-called arbitrability (Schiedsfähigkeit) has to be determined as well. One distinguishes here between subjective and objective arbitrability. The subjective arbitrability concerns the question of personal legal capacity to enter into an arbitration agreement. According to § 1059 Sec. 2 Nr. 1 a) Var. 1 ZPO this is governed by the personal status of the respective party.[30] The objective arbitrability is regulated in § 1030 ZPO, to which § 1059 Sec. 2 Nr. 2 a) ZPO redirects.[31] The necessary form is set out in § 1031 ZPO, to which § 1059 Sec. 2 Nr. 1 a) ZPO forwards.[32] Both provisions are examined below in more detail.

III. Applicable law for foreign arbitration

Whereas so far the requirements concerned only domestic arbitration, foreign arbitral awards are governed by § 1061 ZPO which declares the New York Convention as applicable.[33] In consequence, the preconditions on the validity and enforceability that are set out in the New York Convention have to be met. These prerequisites do not differ much from the prerequisites for domestic arbitration because the latter have been heavily formed and influenced by the New York Convention. Accordingly, subjective and objective arbitrability are required, as set out in Art. 5 Sec. 1 and 2 New York Convention, while also effectiveness in accordance with substantive law requirements. The required form is set out in Art. 2 of the New York Convention and is a directly applicable norm, basically excluding any other form requirements.[34] Art. II of the New York Convention requires a written agreement.

[27]Michael Stürner & Christoph Wendelstein, *Das Schiedsvereinbarungsstatut bei vertraglichen Streitigkeiten*, IPRax 473, 479 (2014); *cf.* Voit, *supra* note 20, at § 1029 ZPO Rn. 28.

[28]Schmidt-Ahrendts & Höttler, *supra* note 20, at 273 (explaining implied choice of law according to the Schiedsverfahrensstatut); Markus Schulz & Tilman Niedermaier, *Unwirksame Schiedsklausel in. Franchiseverträgen durch Wahl des Tagungsortes im Ausland?*, SchiedsVZ 196, 198 (2009) (providing that it is critical to the court opinion that infers from the choice of law for the main contract also a choice of law for the arbitration agreement).

[29]Münch, *supra* note 17, at § 1029 Rn. 15 f.; *cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 30, 1957, Neue Juristische Wochenschrift [NJW] 589, 590 (1957) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] 28 November, 1964, Neue Juristische Wochenschrift [NJW] 591, 592 (1964) (Ger.).

[30]*See* Münch, *supra* note 17, at § 1029 ZPO Rn. 41 f.; *Schmidt-Ahrendts & Höttler, supra* note 20, at 267, 275; Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 1059 (2)(1)(a), https://www.gesetze-im-internet.de/zpo/__1059.html (Ger.) (discussing how the code forwards to the respective International Private Law so that according to German International Private Law Art. 7 Sec. 1 S. 1 EGBGB applies).

[31]Schmidt-Ahrendts & Höttler, *supra* note 20, at 275 (referencing further, and also to the question of the legal consequences of the choice of law relating to the Schiedsvereinbarungsstatut).

[32]*Id.* at 274.

[33]*See* Münch, *supra* note 17, at § 1029 Rn. 32.

[34]Münch, *supra* note 17, at App. 1 § 1061 ZPO Commentary to Article V of the New York Convention Rn. 25.; *see also*, for the requirements of Art. II, UNÜ Bundesgerichtshof [BGH] [Federal Court of Justice], 8 June, 2010, SchiedsVZ 46 Rn. 26 ff. (2011) (Ger.). *But see relating to* Art. VII UNÜ Bundesgerichtshof [BGH] [Federal Court of Justice], 8 June, 2010, SchiedsVZ 46 Rn. 29 ff. (2011); Bundesgerichtshof [BGH] [Federal Court of Justice], 25 January, 2011, 157 Rn. 23 ff. (2011) (Ger.).

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Whereas the form is directly regulated by Art. II, again one has to determine which law applies to the other prerequisites. The objective arbitrability depends on the law of the state in which recognition and enforcement is sought after, according to Art. 5 Sec. 2 lit. a) New York Convention.[35] Under German law, the subjective arbitrability is governed by the personal status of the respective party[36], whereas according to Art. 5 Sec. 1 lit. a) New York Convention the substantive law applying to arbitration agreements is governed by the law set out by a choice of law or subsidiarily the law of the place of arbitration.[37] Even though at first glance the latter seems to be clear given that the rules of private international law are essentially replaced by Art. 5 New York Convention[38], many relevant questions remain unanswered: e.g. do the protective norms found in the Rome Regulations[39] still apply? What about the rules found in the EU directive on unfair terms in consumer contracts?[40] Or should German courts limit themselves to the content control of contracts of adhesion as set out in §§ 305 sequentes BGB?[41]

D. Prerequisites for the Effectiveness

I. Existence of arbitration agreement

So far the relevant prerequisites have been determined, particularly the different general criteria for the effectiveness of arbitration agreements for domestic and foreign arbitration as well as the respectively applicable law. The focus of the Article here shifts on the specific requirements for validity of domestic arbitral awards. The first requirement is that there is an arbitration agreement.[42] Such agreement shall provide that disputes arising out of a contractual or non-contractual legal relation are to be submitted to the binding decision of an arbitral tribunal (§ 1029 Sec. 1 ZPO). The latter requirement—binding decision of an arbitral tribunal—excludes mediation; simultaneously, it requires the exclusion of decision by state courts.[43] Additionally, the German law differentiates in § 1029 Sec. 2 ZPO between an independent separate arbitration agreement (*Schiedsabrede*), and an arbitration agreement contained in a contractual clause (*Schiedsklausel*).

[35]*See* MÜNCH, *supra* note 17, at App. 1 § 1061 ZPO COMMENTARY TO ARTICLE V OF THE NEW YORK CONVENTION Rn. 67; *cf.* Schlosser, in Friedrich Stein et al., Commentary on Civil Procedure, Anhang zu § 1061 ZPO Rn. 75 (2025, 23rd ed.).

[36]Schlosser, *supra* note 35, at Rn. 77.

[37]*See* MÜNCH, *supra* note 17, at App. 1 § 1061 ZPO COMMENTARY TO ARTICLE V OF THE NEW YORK CONVENTION Rn. 20 ff.; Schlosser, *supra* note 35, at § 1061 ZPO Rn. 68; Schulz & Niedermaier, *supra* note 28, at 198.

[38]*See* Schlosser, *supra* note 35, at § 1061 ZPO Rn. 68; *see also* Schmidt-Ahrendts & Höttler, *supra* note 20, at 273; Ute König, *Zur Bestimmung des Schiedsvertragsstatuts bei fehlender Gesetzesgrundlage nach Inkrafttreten der Rom I-Verordnung*, SCHIEDSVZ 129, 132 (2012) (Ger.).

[39]MÜNCH, *supra* note 17, at § 1029 ZPO Rn. 34 (explaining that however, Art. 1 Sec. 2 lit. e) Rom I-Regulation excludes arbitration agreements from its scope of application—see above—so that only an analogous application is possible); *see* MÜNCH, *supra* note 17, at § 1029 ZPO Rn. 31, 34. *But see* Schlosser, *supra* note 35, at § 1061 ZPO Rn. 68; *see also* Bundesgerichtschof [BGH] [Federal Court of Justice] Jan. 25, 2011, SCHIEDSVZ 46 Rn. 29, 23 ff. (2011) (Ger). *But see* Gerald Mäsch, *Zur Zwangsversteigerung eines zur Masse eines englischen Insolvenzverfahrens gehörenden und in Deutschland belegenen Grundstücks*, LMK 2011, 318032 (criticizing the BGH opinion).

[40]*See also* Schulz & Niedermaier, *supra* note 28, at 198 (describing the question of a content control according to the control of contracts of adhesion in case of a stipulation of a foreign place of arbitration, explaining the invalidity of choice of a place of arbitration in the U.S., and differentiating that it was presupposed that German law applied to the arbitration agreement).

[41]*See* Schlosser, *supra* note 35, at § 1061 ZPO Rn. 73, 16; Council Directive 93/13, 1993 O.J. (L 95) (EC) (finding that part of the applicable law governing the arbitration agreement is also the control of unfair terms and implying that relating to arbitration agreements for which the law of third states applies, the AGB-control would not apply); *cf.* Europäischer Gerichtshof [EuGH] [European Court of Justice], SCHIEDSVZ 2010, 110 Rn. 52 ff. (commentary on *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira*); European Court of Justice [ECJ], Oct. 26, 2007, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 135 Rn. 22 ff. (Ger.) (*Mostaza Claro*); *see also* Katharina Hilbig, *Absoluter Verbraucherschutz bei unzulässigen AGB-Schiedsvereinbarungen?*, SCHIEDSVZ 2010, 74, 78 ff.

[42]*Cf.* MÜNCH, *supra* note 17, at § 1029 Rn. 93 ff.

[43]MÜNCH, *supra* note 17, at § 1029 Rn. 93.

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II. Subjective and Objective Arbitrability

As mentioned above, the subjective arbitrability concerns the question of legal capacity to validly enter into arbitration agreements. Because there are no special procedural provisions governing this issue, the general requirements of substantive law apply. According to § 1059 Sec. 2 Nr. 2 a) Var. 1, the law applying to the respective party is governed by the so-called personal status of the respective party, as set out in Art. 7 EGBGB.[44] The objective arbitrability is governed by § 1030 ZPO, where it is provided that all monetary claims may become the subject matter of an arbitration agreement; however, legal disputes relating to the existence of a tenancy relationship for residential spaces in Germany are excluded.

III. Required Form of the Arbitration Agreement

Notwithstanding general form requirements provided under substantive law, § 1031 ZPO provides for the form of the arbitration agreement. As will be explained, this rule is basically and practically the most important and only real requirement needed to be met in order to enter into a binding arbitration agreement. § 1031 Sec. 1 ZPO provides that for an arbitration agreement to be binding, it needs to be contained either "in a document signed by the parties" or in other forms of writing being exchanged between the parties and ensuring that the existence of the agreement is proven.[45] Therefore, also if the arbitration agreement is contained in contracts of adhesion, the requirements as set out in § 1031 ZPO are basically met.[46] However, this only applies to contracts in B2B-relations; in business-to-consumer agreements, § 1031 Sec. 5 ZPO provides for a special form requirement. According to this rule, a special document being separate from the rest of the contract is required; this document has to be signed by the consumer. Accordingly, when consumers are parties to arbitration agreements, only so-called Schiedsabreden and not so-called Schiedsklauseln, which would be clauses for example in a contract of adhesion, are admissible.[47]

The 2024 Draft Bill for the Modernization of Arbitration Law—not yet enacted—was about to bring a number of changes to the existing framework surrounding the effectiveness of arbitration agreements. One of the elements of the reform concerns the required form for arbitration. The draft provides that if the arbitration agreement is entered into without participation of a consumer, then no form is required;[48] thus, even the very basic form requirement of § 1031 Sec. 1 ZPO would be eventually eliminated provided the draft bill is adopted into law.

IV. Effectiveness and Control of Content of Standard Business Terms

1. Measure and Object of the Control

A control of content follows the requirements as set out in §§ 134, 138 BGB and §§ 307 sequentes BGB. The measure of control differentiates as to whether consumers are party to the agreement or solely businesses. When it comes to what is subject to the control, one has to distinguish between, on the one hand, the arbitration agreement on its own, and, on the other hand, the provisions governing the arbitration proceeding—so called Verfahrensvereinbarungen.[49]

Whereas the arbitration agreement concerns the question whether an arbitration is admissible in the first place, Verfahrensvereinbarungen regulate the arbitration proceeding and thereby

[44]MÜNCH, *supra* note 17, at § 1029 ZPO Rn. 42.

[45]Inka Hanefeld & Mathias Wittinghofer, *Schiedsklauseln in Allgemeinen Geschäftsbedingungen* [*Arbitration Clauses in General Terms and Conditions*], SCHIEDSVZ 217, 218 (2005) (Ger).

[46]*See id.*

[47]MÜNCH, *supra* note 17, at § 1031 ZPO Rn. 53 ff., 59.

[48]Entwurf der Bundesregierung eines Gesetzes zur Modernisierung des Schiedsverfahrensrechts [Federal Draft Bill to Modernize Arbitration Law], Deutscher Bundestag: Bundestagsdrucksache [BT] 20/13257, 26, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj / https://dserver.bundestag.de/btd/20/132/2013257.pdf (Ger.).

[49]MÜNCH, *supra* note 17, at § 1029 Rn. 11, 23; § 1042 Rn. 79.

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contain procedural provisions on which rules the arbitration proceeding has to follow.[50] This distinction is of special importance for the respective legal ramifications of invalidity: it is only the invalidity of the arbitration agreement that gives the parties the objection according to § 1032 Sec. 1 ZPO or that enables parties to seek the setting aside of an arbitral award according to § 1059 Sec. 2 Nr. 1 a) Var. 2 ZPO.

2. B2B

As mentioned above, the requirements and the measure of scrutiny differ depending on whether the arbitration agreement is entered into by businesses or consumers. When it comes to B2B-relations, a nullity of the arbitration agreement according to the rules of unconscionability in § 134 BGB and § 138 BGB is only possible in exceptional circumstances. Such could be if the arbitration agreement essentially does not provide for any effective legal remedy.[51] Consequently, relevant obstacles to the validity usually only stem from the content control of standard business terms[52] according to the principles of the directive on unfair terms as set out in the §§ 307 sequentes BGB.[53] First, one can say that in B2B-relations an arbitration agreement does not constitute a surprising clause as set out in § 305c Sec. 1 BGB; only in extraordinary circumstances, this could be assessed differently.[54]

Therefore, one can proceed to the control of content as set out in the §§ 307 sequentes BGB. Such a content control has to be conducted only when there is a deviation from the statutory law. One could argue that § 1029 Sec. 1 ZPO explicitly provides for arbitration agreements so that there is no deviation from statutory law. However, the content control is generally viewed to be applicable because there is a deviation from the statutory law that provides for access to justice to the state courts.[55] When it now comes to the question of whether the provision of an arbitration agreement is unfair in the sense of § 307 Sec. 1 BGB, the vast majority of opinions says that an arbitration agreement as such is not an unfair treatment of one of the parties.[56] The reason is that according to § 307 Sec. 2 Nr. 1 BGB an unfair treatment does exist in cases where the private stipulation differs from basic rules and principles of the statutory law. Because the statutory law explicitly provides for arbitration proceedings in the §§ 1025 sequentes ZPO, there is no conflict with the principles of the statutory law; rather it is a principle of statutory law that arbitration proceedings are deemed to be equivalent with state court litigation.[57]

Therefore, the fact of an arbitration agreement as such does not constitute an unfair treatment. The invalidity of an arbitration agreement can only be founded on the concrete outline of the proceeding that is provided for in the arbitration agreement, i.e. the general rules of procedure that

[50]MÜNCH, *supra* note 17, at § 1029 Rn. 11; § 1042 Rn. 79.

[51]MÜNCH, *supra* note 17, at § 1029 Rn. 21; Kilian Bälz & Philipp Stompfe, *Asymmetrische Streitbeilegungsklauseln in internationalen Wirtschaftsverträgen: Zulässigkeit, Grenzen, Gestaltungsmöglichkeiten* [*Asymmetric Dispute Resolution Clauses in International Commercial Contracts: Admissibility, Limits, Design Options*], SCHIEDSVZ 157, 160 (2017) (Ger.).

[52]For the terminology see Peter McColgan, *A Farewell to the Information Model in the Law of General Terms and Conditions?*, in this Issue.

[53]*See* Inka Hanefeld & Mathias A. Wittinghofer, *Schiedsklauseln in Allgemienen Geschäftsbedingungen [Arbitration Clauses in General Terms and Conditions]*, SCHIEDSVZ 217 (2005) (Ger.) (emphasizing the proposition).

[54]*Id.* at 222 (2005); MÜNCH, *supra* note 17, at § 1029 Rn. 22, 24.

[55]Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 3, 1992, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 575, 576 (1992) (Ger.); MÜNCH, *supra* note 17, at § 1029 Rn. 23.

[56]Bundesgerichtshof [BGH] [Federal Court of Justice] 10 Oct., 1991, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 575, 576 (1992) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 13, 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1125, 1126 (2005) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 1, 2007, NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNGSREPORT [NJW-RR] 1466 (2007) (Ger.); Hanefeld & Wittinghofer, *supra* note 53, at 222; Bälz & Stompfe, *supra* note 51, 162; MÜNCH, *supra* note 17, at § 1029 ZPO Rn. 40; Schlosser, *supra* note 35, at § 1029 ZPO Rn. 45.

[57]MÜNCH, *supra* note 17, at § 1029 Rn. 24; Bälz & Stompfe, *supra* note 51, at 162 (questioning whether this would also apply to collective forms of arbitration).

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apply to the arbitration.[58] So if the outline and the chosen rules of the arbitration proceeding are deemed unfair, the whole arbitration agreement can be rendered invalid.[59] However, one has to keep in mind the above-mentioned distinction between arbitration agreement and Verfahrensvereinbarung, which refers to the procedural rule of the arbitration agreement. Different outcomes are possible: either only the Verfahrensvereinbarung is invalid, or because of the unfair outline of the whole proceeding the arbitration agreement itself is invalid. The latter can also be the case if the Verfahrensvereinbarung and the arbitration agreement cannot be separated from each other, which means that they are so closely intertwined that one cannot exist without the other. It is in these circumstances that the whole arbitration agreement is invalid as well.[60]

When it comes to the outline or the design of the arbitration agreement, §§ 1042 sequentes ZPO establish a statutory framework which assists in the determination about whether the procedural outline of the arbitration proceeding is unfair.[61] Under certain circumstances, a violation of the §§ 1042 sequentes ZPO also constitutes a reason to repeal an arbitral award according to § 1059 Sec. 2 Nr. 1 d) ZPO. Relevant criteria to determine whether the procedural rules are unfair are the costs and place of proceeding, as well as other constituents of the proceeding.[62] Regarding the place of arbitration, one can consider the rules on territorial jurisdiction as set out in §§ 12 sequentes ZPO, whereas particularly for consumers it might be relevant whether they can initiate an arbitration at their own place of residence as provided for by § 29c ZPO.[63] An example of the very few instances where an arbitration agreement may be rendered invalid due to unfairness includes so-called asymmetrical arbitration agreements where one party has the possibility of opting either for litigation or arbitration.[64] Apart from this example, it is generally accepted that arbitration agreements in the B2B scenario are presumably valid except for special circumstances.

3. B2C

The situation is different, though, when it comes to consumer contracts, where more reasons for invalidity might be inferred from the content control of standard business terms. In the past it was even argued that arbitration agreements in consumer contracts are generally void. This argument was derived from the EU-Alternative Dispute Resolution Directive of 2013; this directive contains mainly organizational provisions for alternative dispute resolution proceedings.[65] However, in Art. 10 of the ADR-Directive it is provided that any agreements made before a dispute arises that exclude the access to state courts are deemed unenforceable. From this, it is inferred that also arbitration agreements are within the scope of this directive and thus are under the described circumstances unenforceable in consumer contracts.[66] However, the majority opinion rejects this point of view, arguing that the Alternative Dispute Resolution Directive only refers to mediation

[58]*Cf.* Hanefeld & Wittinghofer, *supra* note 53, at 223.

[59]*Cf.* MÜNCH, *supra* note 17, at § 1029 ZPO Rn. 24; Schlosser, *supra* note 35, at § 1029 ZPO Rn. 45; *see* RECHTSPRECHUNG DER OBERLANDESGERICHTE IN ZIVILSACHEN [OLGZ] [Higher Regional Court of Bremen] Oct. 30, 2008, 465 (2009) (Ger.) (finding that in this direction also the courts tend to adjudicate and invalidating an arbitration clause determining New York as the place of arbitration).

[60]*Cf.* Schlosser, *supra* note 35, at § 1029 ZPO Rn. 45

[61]*See also* MÜNCH, *supra* note 17, at § 1029 Rn. 24, 26.

[62]Gerhard Wagner & David Quinke, *Ein Rechtsrahmen für die Verbraucherschiedsgerichtsbarkeit* [*A Legal Framework for Consumer Arbitration*], JURISTENZEITUNG 932, 936 (2005) (Ger.); Hanefeld &. Wittinghofer, *supra* note 53, at 223.

[63]Wagner & Quinke, *supra* note 62, at 937; Hilbig, *supra* note 41, at 76; Schulz & Niedermaier, *supra* note 28, at 198 (invalidating a place of arbitration in the USA).

[64]Bundesgerichtshof [BGH] [Federal Court of Justice] 10 Oct., 1992, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 575, 576 (1992) (Ger.); Bälz & Stompfe, *supra* note 51, at 162; MÜNCH, *supra* note 17, at § 1029 ZPO Rn. 96.

[65]*See* MÜNCH, *supra* note 17, at § 1025 ZPO Rn. 53 ff.

[66]Caroline Meller-Hannich, Elisabeth Krausbeck & Armin Höland, *ADR und ODR: Kreationen Der Europäischen Rechspolitik Eine Kritische Würdigung,* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRETCHT 8, 26 (2014); *see also* Gerhard Wagner, *Die Richtlinie über die Alternative Streitbeilegung und die Schiedsgerichtsbarkeit*, *in* FESTSCHRIFT FÜR ROLF A. SCHÜTZE 679, 683 (2014).

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proceedings and thus does not encompass arbitration agreements.[67] Consequently, Art. 10 ADR-Directive is interpreted restrictively, claiming it only refers to agreements to go to an Alternative Dispute Resolution Forum in the sense of the directive, which is particularly a mediation forum.[68]

Consequently, the validity of arbitration agreements in consumer contracts is to be measured according to the provisions governing the content control as provided under §§ 305 sequentes BGB. The first objection concerns the question whether an arbitration agreement is a surprising clause according to § 305c Sec. 1 BGB, causing the clause not be validly incorporated into the contract.[69] The question whether a clause is surprising in the meaning of § 305c Sec. 1 BGB is not only content-based, but also takes into account the specific form. As explained above, the specific form required according to § 1031 Sec. 5 ZPO for arbitration agreements with consumers requires a separate document that needs to be signed by the consumer. Considering this special form also fulfills a warning function, it will be difficult to infer that the respective clause is surprising within the meaning of § 305c Sec. 1 BGB.[70]

§ 309 BGB which provides for prohibitions on specific clauses is also applicable in B2C-relations. § 309 Nr. 14 BGB stipulates that a clause is invalid if it requires the other party to first seek an out-of-court alternative dispute resolution mechanism before accessing state courts. Even though at first glance this prohibition could encompass also arbitration agreements, the majority opinion argues that the clause only refers to requirements to seek alternative dispute resolution mechanisms before court remedies and does not prohibit alternatives to court remedies such as arbitration; therefore, arbitration agreements are not invalid based on § 309 Nr. 14 BGB.[71]

Because no specific clause prohibition in § 308 or § 309 BGB is applicable to arbitration agreements, the measure for the validity or invalidity is again § 307 BGB that declares clauses invalid if they contain unfair terms that act to the detriment of one party. Even though some propose a stricter scrutiny relating to consumer arbitration agreements, the standard opinion is that arbitration agreements as such do not pose unfair terms neither in the B2C context. Therefore, in general, arbitration agreements included in contracts of adhesion are deemed to be valid notwithstanding special circumstances in some cases.[72] Similar to B2B arbitration agreements, invalidity can only ensue out of the procedural outline or design that is provided for in the arbitration agreement.[73] As mentioned above, certain criteria such as the costs of the proceeding or the place of arbitration are applied in order to determine whether the outline of the proceeding is unfair and therefore render the arbitration agreement void.[74]

E. Consequences of the Invalidity

If one wants to sum up the results so far, one can conclude that arbitration agreements are generally valid, not only in B2B, but also in B2C-relations. However, the principal obstacle for arbitration agreements in consumer contracts is the specific form requirement as set out in § 1031 Sec. 5 BGB.

[67]MÜNCH, *supra* note 17, at § 1029 Rn. 26a; Jens Kleinschmidt, Das Verhältnis der ADR-Richtlinie zu Mediation und Schiedsgerichtsbarkeit, ZZP 128 215, 241 (2015); Wagner *supra* note 66, at 679, 683.

[68]Kleinschmidt, *supra* note 67, at 215, 241 ff.; Wagner *supra* note 66, at 679, 683.

[69]*See, e.g.*, Schlosser, *supra* note 35, at § 1029 Rn. 49.

[70]Bundesgerichtshof [BGH] [Federal Court of Justice] 10 Febr., 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1125, 1126 (2005) (Ger.); *see also* Schlosser, *supra* note 35, at § 1029 ZPO Rn. 49.

[71]*See also* Schlosser, *supra* note 35, at § 1029 Rn. 50.

[72]Bundesgerichtshof [BGH] [Federal Court of Justice] 10 Feb., 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1125, 1126 (2005) (Ger.); MÜNCH, *supra* note 17, at § 1029 ZPO Rn. 25 ff.; Schlosser, *supra* note 35, at § 1029 ZPO Rn. 45 ("Eine Schiedsklausel als solche ist niemals eine unangemessene Benachteiligung der anderen Seite, auch nicht des Verbrauchers [Such an arbitration clause is never an unreasonable disadvantage to the other party, including the consumer].").

[73]MÜNCH, *supra* note 17, at, § 1029 ZPO Rn. 26.

[74]*Id.*

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When it comes to the legal consequences of invalidity, one needs to distinguish between the invalidity of the arbitration agreement as such, and the invalidity of procedural clauses or stipulations, the so called Verfahrensvereinbarungen. If the arbitration agreement as such is invalid, according to § 306 Sec. 2 BGB the statutory law applies, which does not provide for arbitration without agreement. Consequently, if an arbitral award has been rendered in the case of an invalid arbitration agreement, it can be repealed according to § 1059 Sec. 1 ZPO; enforceability cannot be granted according to § 1059 Sec. 2 ZPO. The validity of the main contract is not impacted by the invalidity of the arbitration agreement.[75]

More difficult is the question on the repercussions of an invalid Verfahrensvereinbarung.[76] In this scenario, the statutory law applies according to § 306 Sec. 2 BGB as well, which means the applicability of the procedural rules for arbitration as set out in §§ 1031 sequentes ZPO. However, one has to discuss whether the invalidity of a Verfahrensvereinbarung can also affect the arbitration agreement, i.e. invalidate it.[77] According to § 306 Sec. 1 BGB, a contract generally remains valid even if one clause is invalid, as far as separability is provided, i.e. to the extent that the remainder of the contract can remain in effect on its own without the ineffective clause.[78] As long as only a Verfahrensvereinbarung is invalid, the arbitration agreement can remain valid, if separability is given.[79]

However, this result can collide with the so-called Verbot der geltungserhaltenden Reduktion, translated as the prohibition of a reduction of a clause to that extent that remains effective.[80] This term refers to the prohibition to declare parts of a clause invalid, however maintaining the rest of the clause. The prohibition is meant to prevent parties from using potentially invalid clauses, thereby relying on the expectation that only the invalid part is taken out and the rest of the clause is upheld. Thus, the Verbot der geltungserhaltenden Reduktion aims to avoid party incentives for including unfair terms without negative consequences. In the context of this article, it is argued that if one declares only a procedural stipulation invalid, but upholds the arbitration agreement as such, then this could collide with the Verbot der geltungserhaltenden Reduktion.[81] If this were allowed, parties could be inclined to use invalid procedural terms without having to fear that the arbitration agreement as such is affected by the invalidity. Further, one could argue that maintaining the agreement collides with the principles of transparency and separability.[82] However, the majority opinion rejects this claim and maintains the view that Verfahrensbestimmung and arbitration agreement are separable and therefore the invalidity of a Verfahrensbestimmung does not directly affect the validity of the arbitration agreement as such.[83]

Nevertheless, one can conclude that the majority opinion upholds that arbitration agreements in contracts of adhesion even in B2C contracts are generally valid and effective; that invalidity can only stem from the procedural outline and design of the arbitration proceeding and that the invalidity of Verfahrensvereinbarungen that only concern the outline of the arbitration procedure usually does not cause the arbitration agreement to become invalid.

[75]*Id.* at Rn. 26b.

[76]*See* Hanefeld & Wittinghofer, *supra* note 45, at 228; MÜNCH, *supra* note 17, at § 1029 ZPO Rn. 26b.

[77]*See also* MÜNCH, *supra* note 17, at § 1029 Rn. 26b.

[78]Hanefeld & Wittinghofer, *supra* note 45, at 228.

[79]OLG Frankfurt am Main (Higher Regional Court of Frankfurt am Main) SCHIEDSVZ 294 (2013) (Ger.) (providing examples from court cases in which Verfahrensvereinbarungen [stipulations on the arbitration proceeding] were deemed invalid, without causing also the arbitration agreement to be invalid); Bundesgerichtshof [BGH] [Federal Court of Justice] March 1, 2007, NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNGSREPORT [NJW-RR] 1466 (2007) (Ger.).

[80]Hanefeld & Wittinghofer, *supra* note 45, at 228

[81]Schlosser, *supra* note 35, at § 1029 ZPO Rn. 45.

[82]Hanefeld & Wittinghofer, *supra* note 45, at 228; *see also* Schlosser, *supra* note 35, at § 1029 Rn. 45 ("Eine Häufung von unfairen Verfahrensbestimmungen und Ernennungsmodalitäten macht die Schiedsvereinbarung unwirksam, wenn man zwischen wirksamen und unwirksamen Bestandteilen der Gesamtvereinbarung nicht mehr differenzieren kann [An accumulation of unfair procedural provisions and appointment modalities renders the arbitration agreement ineffective if it is no longer possible to differentiate between effective and ineffective components of the overall agreement].").

[83]Hanefeld & Wittinghofer, *supra* note 45, at 228.

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F. Effectiveness and Impact on Collective Redress

A current discussion concerns the effectiveness of arbitration clauses in relation to collective redress. This discussion is a relatively new one, resulting from the introduction of collective redress measures in the past years in Germany and Europe, and somehow mirrors the American discussion on class actions that has been ongoing for the last two decades.[84]

First, this question concerns the scope of arbitration agreements. In general, arbitration agreements bar the individual access to litigation. Therefore, if an individual suit is filed before state courts, the defendant can raise the objection of existence of an arbitration agreement according to § 1032 Sec. 1 ZPO.[85] Because the introduction of remedies of collective redress such as the Musterfeststellungsklage (collective redress for declaratory judgment) the question has been posed whether individual arbitration agreements are also effective relating to the remedies of collective redress, in other words, whether the existence of such arbitration agreements also bars parties from entering collective suits before state courts.[86] The answer to the question can be twofold: if the arbitration agreement is silent on that, as one would expect at least with respect to older arbitration agreements, one could argue along with the general interpretation rule of § 305c Sec. 2 that respective clauses have to be interpreted against the party using them; that means that in case of silence they do not encompass collective redress remedies and thus do not exclude individuals from joining them.[87]

The legal situation is different if the arbitration agreement explicitly also includes an exclusion from the participation in remedies of collective redress. There is no specific rule prohibiting this.[88] Therefore, the measure in order to evaluate the validity has to be taken again from the content control of standard form contracts. One could argue in the following way: because the exclusion of individual access to litigation can be validly entered by clauses in contracts of adhesion, a maiore ad minus this must even be more the case when the exclusion refers to mechanisms of collective litigation.[89] However, a counterargument could be that individual arbitration is only able to adequately replace individual access to courts, but not collective redress. If one in general argues that arbitration is an equivalent alternative to litigation in state courts and is able to replace the most basic form of access to state court—the individual one—then it is difficult to argue why the access to collective redress mechanisms cannot be equally excluded. This is a fresh debate and one will have to wait and see in which direction the majority opinion or the courts will tend to go. The relevance of this question is mitigated if one looks at the potential party to a collective redress procedure: it is only consumers as well as small businesses that are allowed to join the measures of collective redress (§ 1 Verbraucherrechtedurchsetzungsgesetz). Contrarily, arbitration agreements are usually used between businesses as shown above.

G. Effectiveness and Informed Consent

Before coming to summary and conclusion, one now has to put the above in context with the general topic of this project. What do the requirements for effectiveness of arbitration agreements as set out by German law have to do with consent or how do they foster informed consent? At first sight, very little. As mentioned above, the only real and practically relevant obstacle for effectiveness of arbitration agreements in German law is the form requirement in § 1031 Sec. 5 ZPO applying only to consumer contracts and thereby requiring a separate signed

[84]For the USA, see above at Section B of this Article.

[85]*See also* MÜNCH, *supra* note 17, at § 1029 Rn. 116.

[86]*Cf.* Astrid Stadler, *Kollektiver Rechtsschutz – Chancen und Risiken*, ZHR 182, 623, 645–46 (2018).

[87]Stefan Thönissen, *Prozessverträge und Verbandsabhilfeklage*, ZZP 137, 43, 54–55 (2024).

[88]Council Directive 93/13, 1993 O.J. (L 95) Annex 1(q) (EC) (explaining that even though Annex 1(q) of the Directive 93/13/EWG seems to suggest otherwise, it has to be considered that there is no specific reference relating to collective redress).

[89]However, Stadler, *supra* note 86, at 646 argues for invalidity as far as collective redress is concerned, thereby referring to § 309 No. 14 BGB and Council Directive 93/13, 1993 O.J. (L 95) (EC) (Directive on Unfair Terms) No. 1 lit. (q) of the Appendix to Art. 3 Abs. 3.

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document. Apart from that provision, there is hardly any obstacle that prevents a party from imposing or introducing an arbitration agreement. The reform that is currently undertaken will, if enacted, change little towards the solution of this problem. Thus, it remains to be seen whether other developments such as the introduction and higher relevance of collective redress remedies will have ramifications on the law in relation to the effectiveness of arbitration agreements.

H. Summary and Conclusion

Determining the question of effectiveness of arbitration agreements according to German law is not an easy enterprise, but requires to answer lots of different legal questions. Already at the outset, the question does not stand on its own, but depends on the procedural situation and context. The basic differentiation is on whether it involves a domestic or a foreign arbitration proceeding and arbitral award. Depending on these circumstances, the validity and effectiveness mainly depends on two aspects: on the one hand, a control of the content according to the law of standard business terms; on the other hand, the form. The content control could provide a plurality of tools to control the adequacy and fairness of arbitration clauses. However, the courts basically do not make use of it. The guiding principle is the presupposed equality and equivalence of arbitration proceedings with state court litigation. Accordingly, it is inferred that the arbitration agreement as such does not constitute an unfair treatment of the other party and is, thus, generally valid. This is the case even in contracts with consumer participation. The only ground that can potentially lead to invalidity of arbitration clauses is the design and outline of the arbitration proceeding. Here, different aspects can constitute an unfair treatment and thus a ground for invalidity. However, even if this is the case, this does not necessarily mean that the arbitration agreement becomes invalid. Rather, the courts tend to declare only the specific stipulation relating to the arbitration proceeding invalid, but not the arbitration agreement as such. Taking this into account, the content control does not constitute any strict scrutiny relating to arbitration agreements. Essentially, the only real obstacle towards arbitration agreements is the form required in § 1031 Sec. 5 ZPO for contracts with consumer participation. Consequently, a comparison with the US law relating to the validity of arbitration agreements shows that apart from the form requirement in consumer disputes, there is no real distinction with regard to substantive law: U.S. as well as German law hold in general that arbitration agreements in contracts of adhesion—even in B2C-contracts—are valid and enforceable.

Taking these observations into account, one can hardly say that the German model essentially provides for an informed consent towards arbitration, which somehow surprises if one considers the high stakes that are in play. Nonetheless, the form requirement in § 1031 Sec. 5 ZPO at least fulfills in consumer contexts a certain warning and information function that can essentially promote an informed consent.

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