

GERMAN ARBITRATION DIGEST

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Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	101 Sch 3/24 e			
Keywords:	Enforcement proceedings, set aside proceedings, arbitration agreement, formal validity, commercial confirmation letter, tacit agreement, standard business terms, due process, right to be heard, procedural public policy			
Key legal provisions:	Section 1031(1), (2), (3) German Code of Civil Procedure (ZPO) Sections 1054, 1059(2) German Code of Civil Procedure (ZPO) Section 305 German Civil Code (BGB)			

Highest Regional Court of Bavaria invalidates tacit arbitration agreement in the case of a farmer, while dismissing due process challenge

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The Highest Regional Court of Bavaria (BayObLG) has ruled on the validity of two separate arbitration agreements contained in delivery contracts for agricultural products. In its detailed reasoning, which deals with a host of substantial and procedural issues, the BayObLG has clarified the formal requirements for a valid arbitration agreement pursuant to Section 1031 German Code of Civil Procedure (ZPO). The ruling also contains helpful considerations regarding the inclusion of arbitration agreements as standard business terms and a due process challenge based on a party alleging not to have been notified of a hearing.

Facts

The case before the BayObLG concerned a dispute in the agricultural sector, arising from two contracts for the supply of grass silage and chicken manure. These contracts were entered into in 2022, following an offer (labelled as "contract confirmation") made by the respondent via fax, which referred to the standard business terms commonly used in the wheat trading sector and included an arbitration clause. When the applicant failed to meet its delivery obligations under the contracts, the respondent commenced arbitration proceedings before the Arbitration Court of the Bavarian Commodity Exchange, seeking compensation. The applicant did not participate in the oral hearing, and the arbitral tribunal issued an award on 22 September 2023, granting the respondent's claims.

The applicant subsequently applied to the state courts to have the arbitral award set aside, arguing that the arbitration agreements for each of the contracts were invalid. Specifically, he maintained that there was no agreement on the standard business terms – neither through a confirmation email he had sent in relation to the grass silage contract, nor by any implied agreement in the case of the chicken manure contract. Additionally, he asserted that he had not been properly served with either the hearing notice or the arbitral award, raising a procedural public policy objection. The respondent, in turn, sought a declaration of enforceability of the arbitral award.

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The court declared the arbitral award enforceable insofar as it related to the contract for grass silage, but set it aside regarding the chicken manure contract, as it found that there was no valid arbitration agreement for that contract.

Key findings

Ruling on the formal validity of the arbitration agreement for each of the two contracts according to Section 1031(1), (3) ZPO, the BayObLG came to different conclusions:

In the case of the grass silage contract, the BayObLG found that the arbitration agreement was valid. It interpreted the applicant's email as acceptance of the contract and its terms, including the standard business terms and the arbitration clause contained therein. The BayObLG emphasised that, although the applicant was a farmer, he was also to be deemed as an entrepreneur ("Unternehmer") within the meaning of Section 14 German Civil Code (BGB), and therefore the stricter requirements for the incorporation of standard terms under Section 305(2) BGB did not apply. The court found the reference to the standard business terms in the contract to be clear and unambiguous.

As for the chicken manure contract, the applicant's silence after having received the contract confirmation in the BayObLG's view did not amount to tacit agreement and was thus not sufficient to establish an arbitration agreement. The court explained that the trade custom, whereby silence on a commercial confirmation letter constitutes acceptance of its terms, applies only to merchants ("Kaufleute") or those acting as such. The applicant, who operated a biogas plant as a farmer, was not considered a merchant under the German Commercial Code. Furthermore, he claimed to not usually trade the goods in question, and the respondent could not in turn prove that the applicant was participating in the market to a significant extent.

As for the procedural public policy challenge, the BayObLG found that the notices for the oral hearing and the constitution of the arbitral tribunal had been sent by registered mail, and that the applicant had either refused acceptance or failed to collect them. Under the applicable arbitration rules, such conduct is deemed effective service. The court further noted that the applicant, after having received the request for arbitration, had been aware of the arbitration, and had previously corresponded with the arbitral tribunal, concluding that he should have expected further communications. Consequently, the court found no violation of the right to be heard for the purpose of Section 1059(2) No 2 lit b ZPO.

Comment

The ruling is a textbook-like case study of the form requirements set out in Section 1031 ZPO. At the time of writing, these provisions are potentially subject to reform by the German legislator, which may abolish formal requirements for arbitration agreements entirely, except in cases involving consumers. Particularly noteworthy – still under the current law – is the possibility to enter into an arbitration agreement tacitly pursuant to Section 1031(2) ZPO, provided both parties are merchants (or acting in merchant capacity). Determining whether a party acts in merchant capacity requires a case-by-case analysis, introducing a degree of legal uncertainty. The approach taken by the BayObLG in this case arguably strikes the right balance.

As for the procedural public policy challenge, the decision's clear rejection is commendable. The applicant had previously both received and responded to correspondence from the arbitral tribunal. Granting the application would, in effect, have allowed the applicant to create a ground for challenge merely by ignoring further communications.