

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 21	Decision date:	2 April 2025	Res judicata: - No, appeal pending before the BGH (I ZB 42/25)
Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	102 Sch 39/24 e			
Keywords:	Right to be heard, minimum reasoning requirements, remanding to the arbitral tribunal			
Key legal provisions:	Sections 1054(2), 1059(2) No 1(d), 1059(2) No 2(b), Section 1059(4) German Code of Civil Procedure (ZPO)			

BayObLG set aside domestic award for violation of right to be heard and insufficient reasoning, remanding the case to the arbitral tribunal

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The BayObLG set aside an arbitral award for violation of the right to be heard and insufficient reasoning. The court also addressed the requirements for remanding the case to the arbitral tribunal.

Facts

The dispute arose out of a share purchase agreement between a biotechnology and a pharmaceutical company. The agreement included an earn-out clause providing for additional purchase price payments conditional upon the initiation of clinical trials. The claimant initiated an arbitration seeking the earn-out payment, asserting the conditions had been deliberately frustrated by the respondent. The respondent argued that the trials had not been implemented for reasons beyond its control and that the conditions for the earn-out were not satisfied. The arbitral tribunal upheld the claim. The respondent applied to set aside the award, alleging that the arbitral tribunal had disregarded key submissions, applied an inconsistent standard of proof, and failed to provide sufficient reasoning.

Key findings

The BayObLG set aside the award pursuant to Section 1059(2) No 1(d) and No 2(b) German Code of Civil Procedure (ZPO), finding that the award violated the respondent's right to be heard and lacked the reasoning required under Section 1054(2) ZPO.

The court held that the arbitral tribunal had failed to address two essential submissions. First, it did not consider the respondent's argument that the clinical trial could not be implemented due to insufficient tissue samples. Second, it did not duly assess the respondent's argument regarding the causal link required for a finding of deliberate frustration under Section 162 German Civil Code (BGB). Both arguments were, in the court's view, recognisably intended to influence the outcome and potentially dispositive. Their omission thus amounted to a violation of the right to be heard and, consequently, of public policy as per Section 1059(2) No 2(b) ZPO.

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In addition, the reasoning of the award was found to fall short of the minimum standard under Section 1054(2) ZPO. In the court's view, the arbitral tribunal's application of the legal test under Section 162 BGB was internally inconsistent: it initially stated that the claimant had to prove causality but later appeared to assume a reversed burden of proof or a lower standard of persuasion. The court considered the arbitral award's reasoning unclear as to whether the articulated standard had been maintained or departed from. According to the BayObLG, this internal inconsistency amounted to a reasoning defect justifying set-aside under Section 1059(2) No 1(d) ZPO.

The BayObLG also clarified that a violation of the right to be heard does not per se exclude the possibility of remand under Section 1059(4) ZPO. While the Federal Court of Justice (BGH) had not previously resolved this issue, the BayObLG held that remanding remains possible unless three cumulative conditions are met: (i) the violation is manifest, (ii) it is grave, and (iii) the arbitral tribunal appears so firmly committed to its position that a meaningful reconsideration cannot reasonably be expected. In the present case, these conditions were not fulfilled. The court therefore remanded the case to the arbitral tribunal.

Comment

The decision sheds light on the procedural standards applicable in set-aside proceedings under Section 1059(2) ZPO, particularly regarding the right to be heard and the arbitral tribunal's duty to give reasons. The BayObLG reaffirmed that the right to be heard under Section 1059(2) No 1(d) ZPO is infringed if an arbitral tribunal fails to consider arguments that are recognisably intended to influence the outcome of the dispute. According to the BayObLG, an arbitral tribunal is not required to address every single argument, but it must engage with essential and potentially dispositive submissions. In this context, the BayObLG confirmed that arbitral tribunals must comply with the same constitutional minimum standards as state courts.

Regarding the reasoning requirement under Section 1054(2) ZPO, the BayObLG emphasised that an arbitral award must disclose—at least in outline—the factual and legal considerations underlying the arbitral tribunal's decision. It also stated that a reasoning deficit may amount to a violation of public policy under Section 1059(2) No 2(b) ZPO if the award fails to reflect the arbitral tribunal's line of thought or contains unresolved internal contradictions. Here, the BayObLG held that the arbitral tribunal appeared to apply a legal standard different from the one it had set out, without offering a coherent explanation.

Notably, the BayObLG addressed an open question in German case law: whether a violation of the right to be heard necessarily precludes the court from remanding the case to the arbitral tribunal under Section 1059(4) ZPO. The court answered in the negative, holding that remanding is excluded only where three cumulative conditions are met: (i) the violation is manifest, (ii) it is grave, and (iii) it must be assumed that the arbitral tribunal has already committed itself in a way that a reconsideration of the matter cannot realistically be expected.