

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 24	Decision date:	10 July 2025	Res judicata: Yes
Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	101 SchH 73/25 e			
Keywords:	Appointment of arbitrators by the state court, independence and impartiality, jurisdiction of the Highest Regional Court of Bavaria			
Key legal provisions:	Section 1035(3) German Code of Civil Procedure (ZPO) Section 1062(1) No 1, (5) German Code of Civil Procedure (ZPO)			

Failure of a Party to Appoint an Arbitrator in Due Time

Dr. Marko Andjic, European Legal Studies Institute, Osnabrück University

In its decision, the Highest Regional Court of Bavaria appointed a co-arbitrator in a contractual dispute stemming from a subcontractor agreement between the applicant and the respondent according to Section 1035(3) ZPO after the respondent failed to appoint a co-arbitrator within the deadline set by the applicant.

Facts

The applicant is a stock company based in France. The respondent is based in Germany. The applicant and the respondent were contractually connected since 2023 through a subcontractor agreement for the construction of passive infrastructures as part of a "fiber to the home"-network in Germany.

This subcontractor agreement contained an arbitration clause for all disputes arising from the agreement, which provides for an arbitral tribunal consisting of three arbitrators and Munich (Germany) as the place of arbitration.

In January 2025, the applicant demanded from the respondent to pay compensation and damages of around EUR 540.000. In March 2025, the applicant initiated arbitration proceedings against the respondent, appointed its arbitrator and requested that the respondent also appoints an arbitrator within one month.

As this deadline expired without result, the applicant requested the Higher Regional Court of Munich to appoint an arbitrator for the respondent. The Higher Regional Court of Munich referred the case to the Highest Regional Court of Bavaria (BayObLG).

In the proceedings, the respondent proposed a lawyer as an arbitrator. This lawyer disclosed that he works for a German member of an international association of law firms that do not share profits among each other and cannot access the IT systems of the other member firms. He also disclosed that a Portuguese member of this association advises Portuguese companies that have the same top-level parent company as the respondent. The applicant agreed to the proposal.

Key findings

The BayObLG considered the application to be admissible and, in a cursory examination, concluded that the arbitration agreement between the parties was valid.

The court therefore appointed an arbitrator for the respondent in accordance with Section 1035(3) ZPO, as the respondent had failed to make this appointment himself within one month. Since the respondent had proposed a candidate in the course of the proceedings, the court took guidance from this and appointed respondent's candidate as arbitrator.

The court considered him suitable to act as an arbitrator due to his training and experience. The candidate had declared his acceptance of the arbitrator role. The court remarked that no doubts as to his independence and impartiality had been raised or identified. The court confirmed that the candidates' law firm forms part of an international association of independent law firms, which in the court's view formed no basis reject the appointment. The court based its decision on the fact that the members of the law firm network did not share profits and had no access to the IT systems of other member firms.

Comment

Regarding jurisdiction, it should be noted that the federal state of Bavaria enjoys a special role in the German court infrastructure: Since 2020, the BayObLG has sole jurisdiction over court proceedings regarding arbitration matters if the seat of arbitration is in the federal state of Bavaria (cf. Section 1062(1) No 1, (5) ZPO in conjunction with Section 7 of the Regulation on Judicial Competences in the Area of the State Ministry of Justice (GZVJu)).

What is particularly interesting regarding the substance of this case is that the court affirmed that there are no doubts regarding the candidate's independence and impartiality despite one law firm in the candidate's law firm network having advised local companies that had the same ultimate parent as respondent. The court focused on the independence of the candidate's law firm in the law firm network, but presumably was also influenced by the fact that the applicant had agreed on the respondent's candidate despite the disclosure.