

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2025, 30	Decision date:	22 July 2025	Res judicata: Yes
Court:	Higher Regional Court of Frankfurt am Main (OLG Frankfurt am Main)			
Case No. :	32 SchH 3/25			
Keywords:	Termination of arbitrator's mandate, failure to act within a reasonable time, procedural discretion, interim decision on jurisdiction			
Key legal provisions:	Section 1038 German Code of Civil Procedure (ZPO)			

Higher Regional Court of Frankfurt am Main rejects application to terminate arbitrators' mandate for alleged failure to perform functions within a reasonable time; Section 1038 ZPO applies only in exceptional cases

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The Higher Regional Court of Frankfurt am Main (OLG Frankfurt am Main) rejected an application under Section 1038(1) German Code of Civil Procedure (ZPO) to terminate the mandate of three arbitrators in a Frankfurt Bar Association arbitration. The applicant alleged the arbitrators failed to perform their functions within a reasonable time. The court emphasized that Section 1038(1) ZPO is reserved for exceptional circumstances and found that the arbitrators (i) were not required to issue a formal interim ruling on jurisdiction, (ii) exercised appropriate discretion in managing the counterclaim, and (iii) had, by the time the application was filed, advanced the proceedings.

Facts

The dispute arose from a partnership agreement among lawyers containing an arbitration clause referring disputes to the Permanent Arbitral Tribunal at the Frankfurt Bar. The applicant, a former partner, resigned in 2022. In June 2023, the respondent initiated arbitral proceedings seeking repayment of excess withdrawals and costs.

At the outset, the applicant challenged the arbitral tribunal's jurisdiction and requested an interim ruling, arguing the arbitration clause was invalid. The arbitral tribunal did not issue a formal interim ruling but stated at the first hearing on 7 November 2023 that it considered the arbitration clause valid.

On 23 February 2024, the applicant filed a counterclaim for EUR 120,960.69, extending it to include the respondent's partners. The arbitral tribunal did not transmit the counterclaim to the respondent and, about a year later, on 10 February 2025, decided to separate it from the main proceedings and transmit it to the respondent only after payment of a deposit. Notably, at that time, the arbitral tribunal had not yet explicitly requested such a deposit. However, the applicant had previously refused to pay a deposit when filing an earlier counterclaim (which he later withdrew), and when filing the current counterclaim, requested that any deposit be sought from the respondent, arguing his claims had good prospects of success.

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On 18 February 2025, the applicant challenged the impartiality of the arbitrators, and on 7 April 2025, filed the application with the OLG Frankfurt am Main under Section 1038(1)(2) ZPO, seeking termination of their mandate. The applicant argued that the arbitrators had not performed their functions within a reasonable time, citing a 1.5-year delay in issuing an interim ruling on jurisdiction, the counterclaim not being transmitted, and a lack of progress between May 2024 and January 2025.

Key findings

The OLG Frankfurt am Main rejected the application on its merits. The court clarified that Section 1038(1) ZPO applies only to objective impediments and exceptional cases of delay where continued waiting would be unreasonable. What is unreasonable depends on the circumstances; there are no fixed time limits. Unless the arbitral tribunal's actions are clearly arbitrary or intentionally delaying, courts should presume that there is no unreasonable delay.

Applying this standard, the court found no failure of the arbitrators to perform their functions within a reasonable time:

- First, the court stated that the arbitral tribunal was not obliged to issue a formal interim ruling on jurisdiction, even if it may be common practice. As there was no such obligation, the court found no specific "function" under Section 1038(1) ZPO that would justify terminating the arbitrators' mandate. In any event, the arbitral tribunal had already clarified its view on the validity of the arbitration agreement at an early stage.
- Second, the court held that the tribunal's handling of the counterclaim was within its discretion. Under the applicable institutional rules, the arbitral tribunal could decide to transmit the counterclaim and proceed after payment of a deposit, even without an explicit request for payment. The court noted that such an explicit request was unnecessary in these circumstances: The applicant had previously refused to pay an advance and asked that advances be sought from the opposing party, allowing the arbitral tribunal to conclude that the applicant was unwilling to pay any deposit.
- Third, the court found that the applicant could not justify terminating the arbitrators' mandate due to a lack of progress in the arbitral proceedings between May 2024 and January 2025, even after repeated requests to expedite the proceedings. The court stated that by the time the application under Section 1038(1) ZPO was filed in April 2025, the arbitral tribunal had already held another hearing in February 2025 and scheduled the next. The court found that the tribunal was fulfilling its functions within a reasonable time and noted that even if there are serious delays at a certain stage, subsequent measures to expedite the proceedings can offset previous delays.

Comment

The decision aligns with prevailing strict German case law on Section 1038(1) ZPO, confirming that removal of arbitrators for failure to perform their functions within a reasonable time is confined to exceptional "outlier" cases and that state courts must refrain from dictating the arbitral timetable. The threshold remains willful or obvious abuse, not mere inefficiency.

The decision further refines the strict approach by upholding the arbitral tribunal's procedural discretion, including the decision not to issue a separate interim ruling on jurisdiction, accepting case management

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choices such as not transmitting the counterclaim until payment of a deposit, and emphasizing that even if there are serious delays, subsequent measures to expedite the proceedings can offset previous delays.