

GERMAN ARBITRATION DIGEST

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Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	101 Sch 171/25 e			
Keywords:	Arbitration agreement, interpretation, bilingual contract, conciliation clause, jurisdiction of arbitral tribunal, Section 1040(3) ZPO, burden of proof, competence-competence			
Key legal provisions:	Section 1029(1) German Code of Civil Procedure (ZPO) Section 1040(3) sentence 2 German Code of Civil Procedure (ZPO)			

Highest Regional Court of Bavaria holds bilingual clause insufficient to establish agreement to arbitrate where German version only refers to conciliation

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On 16 June 2026, the Highest Regional Court of Bavaria (BayObLG) held that a contract clause in a bilingual subcontractor agreement between two German companies referring to "arbitraje" (arbitration) in its Spanish version but only to "Schlichtungsverfahren" (conciliation) in its German version did not constitute a valid arbitration agreement.

Facts

The applicant, a German subsidiary of a Spanish parent company, and the respondent entered into a subcontractor agreement for fibre-optic drilling works on 11 September 2024. The parties corresponded in English, the contract was concluded bilingually in German and Spanish, with no provision specifying which language version should prevail. Section 21 of the contract was headed "Schlichtungs- und/oder Schiedsklausel" (conciliation and/or arbitration clause) in German and "Cláusula de Mediación y/o Arbitraje" in Spanish. The German language version provided that the parties undertake to conduct conciliation proceedings before the Chamber of Commerce and Industry Munich ("IHK München"). The Spanish text referred to "arbitraje" (arbitration) before the Munich Chamber of Commerce.

On 25 July 2025, the respondent filed a statement of claim with the Arbitration Institute of the German Chamber of Commerce and Industry in Munich. The applicant timely challenged the arbitral tribunal's jurisdiction. In an interim decision of 3 November 2025, the sole arbitrator held that Section 21 contained a valid arbitration agreement. The sole arbitrator reasoned that the Spanish version, which was at least equivalent to the German version and referred only to arbitration, accurately reflected the parties' true intent. The sole arbitrator also found that both parties had confirmed during a case management conference on 16 October 2025 that the Spanish version was the original one that had been (incorrectly) translated into German.

On 3 December 2025, the applicant filed an application with the Higher Regional Court of Munich (Oberlandesgericht München) (OLG Munich) under Section 1040(3) sentence 2 ZPO seeking a declaration that the arbitral tribunal lacked jurisdiction. The applicant stated that the parties had not agreed to arbitrate

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but to have conciliation proceedings precede state court proceedings. The applicant also refuted the sole arbitrator's statement that it had confirmed a translation error. On 5 December 2025, the OLG Munich referred the matter to the BayObLG. The respondent was given the opportunity to comment in the proceedings but did not do so. The BayObLG declared that state courts, not the arbitral tribunal administered by the Arbitration Institute of the German Chamber of Commerce and Industry, have jurisdiction over the dispute between the parties.

Key findings

The BayObLG held the application admissible and well-founded. The court confirmed its jurisdiction under Section 1062(1) No 2, (5) sentence 1 ZPO. It further held that the one-month time limit under Section 1040(3) sentence 2 ZPO had been complied with by the applicant. The applicant's filing with the (incompetent) OLG Munich within the time limit was sufficient since procedural time limits (Ausschlussfristen) may be preserved by filing with an incompetent court that subsequently refers the matter to the competent court.

On the merits, the court found that Section 21 did not constitute a valid arbitration clause. The court emphasised that the party invoking the arbitration agreement bears the burden of proving its valid conclusion. This burden of proof allocation, well established for proceedings under Section 1032 ZPO, applies equally to proceedings under Section 1040(3) sentence 2 ZPO. The court noted that the right of access to state courts under Article 19(4) of the German Basic Law requires that the parties' free will to submit to arbitration must be clearly ascertainable. Any doubts go to the detriment of the party alleging a valid arbitration clause.

Applying the standard principles of contractual interpretation under Sections 133 and 157 of the German Civil Code (BGB), the BayObLG held that the German version of Section 21 did not reflect an intent to arbitrate. The German text only obligated the parties to conduct conciliation proceedings before the IHK Munich. The court left open whether the Spanish term "arbitraje" exclusively denotes arbitration. It held that even if the two language versions were contradictory, no priority of the Spanish version could be established. The surrounding circumstances did not support giving precedence to the Spanish text. The fact that the parent company of the applicant is a Spanish company was not seen as sufficient by the court.

The BayObLG further held that the respondent had failed to demonstrate that the parties had a common intent to conclude an arbitration agreement. The applicant had asserted in its application that no such common intent existed, and the respondent had not contested this assertion.

Comment

The decision offers guidance on the interpretation of bilingual dispute resolution clauses and the limits of an arbitral tribunal's competence-competence under German law. It underscores that where two language versions diverge on whether disputes are to be submitted to arbitration or conciliation, a valid arbitration agreement cannot simply be inferred from the version more favourable to arbitration. Practitioners drafting bilingual dispute resolution clauses should ensure consistency across all language versions and include an express provision designating one language as authoritative.

From a procedural perspective, it is noteworthy that the BayObLG's extended the burden of proof borne by the party relying on the arbitration agreement explicitly to proceedings pursuant to Section 1040(3) sentence 2 ZPO. The respondent's failure to respond in the court proceedings also played an important role, as it left the applicant's submission uncontested that no common intent to conclude an arbitration agreement existed.