GAD No.:	GAD 2026, 18	**Decision date:**	30 July 2026	**Res judicata:** Yes
Court:	German Federal Court of Justice (Bundesgerichtshof, BGH)			
Case No. :	I ZB 6/26 Case No.(s) other instances: 102 Sch 61/25 e (Highest Regional Court of Bavaria) (BayObLG)			
Keywords:	Third-party notice, arbitrator liability, setting-aside proceedings, duty of disclosure, remittal to the arbitral tribunal			
Key legal provisions:	Section 72 German Code of Civil Procedure			

Securing liability claims: German Federal Court of Justice allows third-party notices to arbitrators in setting-aside and enforcement proceedings

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On 30 July 2026, the German Federal Court of Justice (BGH) held that a party to setting-aside or enforcement proceedings may serve a third-party notice on a member of the arbitral tribunal that rendered the award if that party believes, it would have a claim for damages against the arbitrator should the award be set aside. It also decided that Section 72(2) German Code of Civil Procedure (ZPO), which excludes third-party notices to state judges and court-appointed experts, does not apply to arbitrators by analogy. Once served with such a notice, the arbitrator is bound by the findings of a setting-aside decision in any subsequent damages proceeding.

Facts

In the underlying proceedings, the applicant had asked the Highest Regional Court of Bavaria (BayObLG) to set aside an arbitral award under Section 1059(2) No 1 lit. d ZPO, while the respondent sought a declaration of enforceability. The applicant argued, inter alia, that its party-appointed arbitrator had failed to disclose a cooperation with a law firm that had previously advised the respondent in a matter related to the arbitration, thereby breaching Article 9(4) DIS Arbitration Rules. Anticipating raising potential claims for damages against the arbitrator should the award be set aside, the respondent sought to serve a third-party notice on the arbitrator. The BayObLG, however, rejected service of the notice, applying Section 72(2) ZPO by analogy.

Under German civil procedure, a party to pending litigation may formally notify a third party against whom it may have a claim should it lose the case by serving a third-party notice ("Streitverkündung"). The third party may then join the proceedings as an intervener. Whether or not it does so, the findings of the court bind the third party in any subsequent proceedings with the notifying party ("Interventionswirkung"). Serving the notice also suspends the limitation period for those claims. Under Section 72(2) ZPO, a third-party notice may not be served on judges or court-appointed experts. The rationale is that, with respect to these persons, a third-party notice cannot fulfil its intended (informative, intervention and participatory) functions. First, judges and experts are already aware of the proceedings, so there is no need to inform them. Second, a binding effect would (usually) be meaningless, as they would have to defend the very correctness of the

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judgment that the notice already establishes. Third, joining the proceedings as an intervener is not a genuine option: an expert could be regarded as biased and a judge would be disqualified, which would in turn delay the proceedings, contrary to the principle of procedural economy ("Prozessökonomie").

As regards arbitrators, the BayObLG held that the informative and intervention functions could well be fulfilled. However, the concerns relating to the participatory function applied equally: A party could challenge an arbitrator who joins the proceedings as an intervener for lack of impartiality. This would preclude remitting the case to the original arbitral tribunal under Section 1059(4) ZPO. In the BayObLG's view, this alone justified applying Section 72(2) ZPO by analogy: Remittal under Section 1059(4) ZPO likewise serves procedural economy. A party could undermine that purpose simply by serving a third-party notice on the arbitrator, who then joins the proceedings.

The respondent challenged this decision by way of a complaint on points of law with the BGH.

Key findings

The BGH deviated from the decision of the BayObLG and held that Section 72(2) ZPO does not apply to arbitrators by analogy. An analogy requires both an unintended regulatory gap and a comparable conflict of interests. In the BGH's view, at least the latter requirement was not met: the legislative objectives underlying Section 72(2) ZPO do not apply to arbitrators in the same way as to judges and court-appointed experts.

The BGH agreed with the BayObLG that a third-party notice to an arbitrator can fulfil its informative function and give rise to an intervention effect. However, it departed from the lower court on the aspect of procedural economy: While joining an arbitrator to the proceedings does raise procedural economy concerns, these concerns carry less weight than in the case of judges or experts: First, the arbitrator is not directly involved in the setting-aside proceedings. Therefore, no immediate delay arises. Second, any complications under Section 1059(4) ZPO are not serious enough to preclude a third-party notice. Remittal to the original arbitral tribunal requires an application by a party. The party seeking to set aside the award for lack of impartiality will not apply for remittal in any event. The party serving the notice can therefore decide for itself whether to accept the risk that the arbitrator joins and remittal will no longer be available.

Finding no abuse of rights in the third-party notice either, the BGH set aside the BayObLG's decision and instructed it to serve it on the arbitrator.

Comment

The decision clarifies that arbitrators may be subject to third-party notices in setting-aside and enforcement proceedings. A party defending an award which is challenged based on an (alleged) wrongdoing on the part of an arbitrator should therefore consider serving a third-party notice on that arbitrator to secure the binding intervention effect for any subsequent damage claims. At the same time, it should weigh that benefit against the risk of losing the option of remittal to the original arbitral tribunal if the arbitrator joins the proceedings. By making it easier to preserve damages claims against arbitrators who breach their (disclosure) obligations, the decision also strengthens the integrity of arbitral proceedings and confidence in Germany as a seat of arbitration. Arbitrators, however, need not fear a substantial increase in their liability risk. The decision is purely procedural and leaves the substantive requirements for arbitrator liability untouched. These remain difficult to meet, not least given the limitations commonly provided for in institutional rules (e.g. Article 45 DIS Arbitration Rules).