

GERMAN ARBITRATION DIGEST

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Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	101 Sch 139/24 e			
Keywords:	Shareholder agreement, shareholder resolution dispute, DIS Supplemental Rules for Corporate Disputes, third parties, subjective scope of an award, joinder, intervention, set-aside proceedings			
Key legal provisions:	Sections 62, 66, 67, 69, 1059 German Code of Civil Procedure (ZPO) Sections 248, 249 German Stock Corporation Act (AktG)			

Highest Regional Court of Bavaria on joinder and effects of set-aside proceedings in shareholder resolution disputes

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On 7 May 2025, the Highest Regional Court of Bavaria (BayObLG), in a court order providing judicial guidance, addressed the question of who participates in and who is bound by set-aside proceedings following a shareholder resolution arbitration. The decision closes a gap in the German jurisprudence on shareholder resolution disputes.

Facts

The applicants and participants in the court proceedings were the shareholders of a company and the company itself.

The four shareholders of the company had concluded a shareholder agreement which, among other things, bound the shareholders in the exercise of their voting rights in respect of certain resolutions. In a general meeting in September 2021, in breach of the shareholder agreement, a majority of the shareholders voted against the appointment of the agreed candidate as managing director.

The succumbed shareholder commenced arbitral proceedings against the company seeking a declaration that, in light of the shareholders' commitments under the shareholder agreement, the resolution must be taken to have passed. In accordance with the applicable DIS Supplemental Rules for Corporate Disputes, the other shareholders were informed about the initiation of the arbitral proceedings and provided an opportunity to join. Indeed, two of the shareholders subsequently joined the arbitration as respondents alongside the company. The fourth shareholder, however, decided not to participate in the arbitration.

The arbitral tribunal ultimately decided in favour of the claimant. The company and one of the other shareholders decided not to challenge the award. However, after the time limit to challenge the award had lapsed for the company and the other shareholder, the remaining shareholder filed an application to set aside the award.

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Key findings

In its decision, the Highest Regional Court of Bavaria (BayObLG) addressed two questions.

The first question revolved around the issue of whether a company that does not want to challenge and is, in fact, time-barred from challenging an award in a shareholder resolution dispute may nevertheless be joined to the set-aside proceedings.

At the outset, the court noted that this is precisely what would happen upon appeal in German court proceedings over a shareholder resolution. Indeed, upon appeal, the company would be joined although it did not, and could no longer, appeal the judgment. The company would be joined to the proceedings as a compulsory joined party (“notwendiger Streitgenosse”) who may participate in the proceedings and, crucially, would also be bound by the outcome of the appeal.

The court argued that the same should apply analogously in set-aside proceedings. The court reasoned that this finding was crucial to ensure the uniform *erga omnes* effects of the award towards all participants in the arbitration. In the eyes of the court, it followed that, in shareholder resolution disputes, all parties to the prior arbitration must be joined to the set-aside proceedings as compulsory joined parties.

The second question then revolved around the further issue whether the same should apply to the fourth shareholder who had not participated in the arbitration.

The court noted that, under the DIS Supplementary Rules for Corporate Disputes, a shareholder is bound by an award in a shareholder resolution dispute even if it decides not to participate in the arbitration. The court, however, observed that the right to challenge an award is inextricably linked to the participation in the underlying arbitration. As a consequence, a shareholder that did not participate in the arbitration is bound by the resulting award but can neither challenge the same nor be ordered to join the set-aside proceedings by the court.

The court held that these shareholders must nevertheless be bound by the court’s decision in set-aside proceedings. It follows that, while the court did not have the power to order their joinder, these shareholders must have a right to intervene in the set-aside proceedings as an intervening third party. The company is therefore also under a duty to inform all shareholders, including those who did not participate in the arbitration, about the set-aside proceedings.

Comment

The decision of the BayObLG fills a gap in the German jurisprudence on shareholder resolution disputes. It is, indeed, the first one to assess the question of who participates in and is bound by set-aside proceedings after a shareholder resolution arbitration. It convincingly builds on the principles established by the German Federal Court of Justice (BGH) in its jurisprudence on the arbitrability of shareholder disputes. The ruling of the BayObLG ultimately ensures uniform *erga omnes* effect of the arbitral award in a shareholder resolution dispute by preventing parties to escape the binding effect of a set-aside or remission merely by not participating in the post-award proceedings.