

GERMAN ARBITRATION DIGEST

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| GAD No.: | GAD 2026, 6 | Decision date: | 18 December 2025 | Res judicata: Yes |
| Court: | German Federal Court of Justice (BGH) | | | |
| Case No. : | I ZB 42/25 Case No.(s) other instances: 102 Sch 39/24 e (Highest Regional Court of Bavaria, BayObLG) (see GAD 2025, 21) | | | |
| Keywords: | Setting aside of arbitral award, remittal to the arbitral tribunal, right to be heard, arbitrator challenge, complaint on points of law, procedural economy | | | |
| Key legal provisions: | Section 1059(4) German Code of Civil Procedure (ZPO) Article 103(1) Basic Law for the Federal Republic of Germany (GG) | | | |

BGH confirms admissibility of complaints against remittal orders and sets a "flagrant denial" threshold

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The German Federal Court of Justice (BGH) held that a complaint on points of law is available against a court order remitting a case to the arbitral tribunal under Section 1059(4) German Code of Civil Procedure (ZPO). In doing so, it set out – for the first time – the conditions governing remittal to the arbitral tribunal following the setting aside of an award and found that not every violation of the right to be heard bars remittal.

Facts

The applicant was a pharmaceutical company that in November 2014 acquired all shares in a company developing novel biomarker technology. Alongside a fixed purchase price of USD 150 million, the parties agreed milestone-based earn-out payments of up to three tranches of USD 50 million each, payable upon the occurrence of defined clinical development milestones within a specified earn-out period. The parties agreed on German law and an arbitration clause with Munich as the seat.

The respondents initiated arbitration, claiming payment of all three earn-out tranches. The arbitral tribunal awarded the respondents one tranche (less a deduction), amounting to approximately USD 46.4 million plus interest, holding that the applicant had frustrated the occurrence of the milestone event in breach of good faith under Section 162(1) German Civil Code (BGB), so that the condition was deemed fulfilled.

The applicant applied to the Highest Regional Court of Bavaria (BayObLG) to set the award aside. The respondents sought dismissal of that application, or alternatively remittal to the arbitral tribunal, and separately applied for enforcement. The BayObLG found that the award violated the applicant's right to be heard both in its finding of a breach of obligations and in its finding of causation, and that the tribunal's reasoning on causation failed to meet the minimum requirements for an arbitral award. On that basis, the BayObLG set aside the payment obligation and the costs decision, and remitted the case to the arbitral tribunal.

Both parties brought complaints on points of law before the BGH. The respondents sought reversal of the BayObLG's decision insofar as it had ruled against them; the applicant challenged the remittal order.

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Key findings

The BGH dismissed the respondents' complaint as inadmissible for lack of grounds of fundamental significance. It rejected the applicant's complaint on the merits, confirming that the BayObLG had correctly remitted the case to the arbitral tribunal.

First, the BGH held that a complaint on points of law against a remittal order under Section 1059(4) ZPO is available pursuant to Sections 574(1) sentence 1 No 1, 1065(1) sentence 1, 1062(1) No 4 alternative 1 ZPO.

Second, the BGH clarified that a violation of Article 103(1) Basic Law for the Federal Republic of Germany (GG) does not automatically bar remittal. The wording of Section 1059(4) ZPO refers only to "suitability" and a party's application, giving no indication that particular grounds for setting aside categorically exclude remittal. In addition, the prohibition of full review of the merits by state courts ("révision au fond") limits state court review to serious defects, so that the mere fact that a ground for setting aside is established cannot render a case unsuitable for remittal. On the legislative history, the 1997 arbitration law reform rests on the assumption that the tribunal will not repeat its errors – including public policy violations – mirroring the treatment of state courts under Sections 321a, 544(9) and 563(1) ZPO. Excluding remittal whenever the right to be heard has been violated – the most frequently invoked ground for setting aside – would deprive the provision of its purpose of promoting procedural economy.

Third, as a matter of structured judicial discretion ("typisierte Ermessensausübung") remittal is nonetheless precluded in cases of serious procedural violations, in particular a flagrant and grave denial of a party's right to be heard. Such violations typically raise doubts about the tribunal's impartiality and give rise to concrete grounds to expect that it will no longer conduct the proceedings with the necessary objectivity. In particular, remittal is precluded where the procedural errors would support a successful challenge of an arbitrator under Section 1036(2) ZPO or an application to terminate the arbitrator's mandate under Section 1038(1) sentence 2 ZPO, since in such cases the purpose of procedural economy can no longer be achieved. While multiple violations of Article 103(1) GG may point towards a flagrant denial, they do not automatically constitute one; deliberate disregard of submissions, however, will ordinarily preclude remittal. The BGH found no discretionary error in the BayObLG's assessment that the violations in this case resulted from the complexity of the subject matter rather than from a lack of impartiality.

Fourth, the BGH set the value of the remittal decision at one-fifth of the value of the main proceedings, holding that a remittal order is not a mere consequential ruling.

Comment

The decision resolves three previously open questions: the availability of the complaint on points of law against a remittal order, the threshold for blocking remittal, and the correct valuation of such an order. By refusing to treat every violation of the right to be heard as a categorical bar to remittal, the BGH preserves the procedural economy rationale that underpins Section 1059(4) ZPO and reaffirms the functional equivalence of arbitral and state court proceedings. The "flagrant and grave" threshold provides a concrete standard: remittal is precluded where the severity of procedural error would support a successful challenge of an arbitrator – giving parties clarity on the level of misconduct they must demonstrate to prevent a case from returning to the same tribunal.