

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2026, 9	Decision date:	19 November 2025	Res judicata: - Yes
Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	102 SchH 121/25 e			
Keywords:	Application to declare arbitration inadmissible, constitution, jurisdiction, temporal limitation of judicial review, competence-competence, jurisdiction of arbitral tribunal			
Key legal provisions:	Sections 1032(2) and 1040(2) and (3) German Code of Civil Procedure (ZPO)			

Timing of Section 1032(2) ZPO Applications: German Court Applies Strict Approach – No Court Review After Tribunal Constitution

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On 19 November 2025, the Highest Regional Court of Bavaria (BayObLG) held that an application under Section 1032(2) German Code of Civil Procedure (ZPO) is inadmissible if filed after the arbitral tribunal has been constituted, irrespective of whether the tribunal has already ruled on its jurisdiction. The court clarified that the statutory time limit ("prior to the constitution of the tribunal") is absolute and does not depend on the applicant's knowledge or on a prior decision pursuant Section 1040(3) ZPO. An alleged lack of an arbitration agreement does not alter this procedural bar.

Facts

The applicant sought a declaration under Section 1032(2) ZPO that an arbitration initiated at the German Arbitration Institute (DIS) was inadmissible, arguing that no arbitration agreement existed between the parties and that it was not bound by any contractual relationship underlying the dispute. The statement of claim had initially named the applicant as a respondent, allegedly on the basis that it was personally liable as a general partner; however, the claimant later asserted that this designation resulted from a clerical error and that another entity had in fact been intended. By the time the application was filed, the arbitral tribunal had already been fully constituted.

Therefore, the opponent (the claimant in the arbitration) requested dismissal, contending that the application was inadmissible due to its timing and, in addition, that the applicant lacked a legitimate interest in obtaining declaratory relief. The applicant argued that the application remained admissible despite the constitution of the arbitral tribunal, as no decision on jurisdiction under Section 1040(3) ZPO had yet been rendered by the arbitral tribunal and the state courts therefore retained competence to decide the issue.

Key findings

The court dismissed the application as inadmissible. It emphasised that Section 1032(2) ZPO expressly limits such applications to the period "prior to the constitution of the arbitral tribunal". A tribunal is deemed constituted once all arbitrators are appointed, regardless of whether the applicant was aware of this fact.

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The court rejected the argument that admissibility depends on whether the arbitral tribunal has issued a jurisdictional decision under Section 1040(3) ZPO. Instead, it adopted a strict reading of the statutory wording and the prevailing case law of the German Federal Court of Justice (BGH): once the tribunal is constituted, state courts are excluded from intervening under Section 1032(2) ZPO. The court also declined to follow views in the literature that advocate allowing Section 1032(2) ZPO applications even after constitution of the tribunal where the arbitral tribunal fails to issue a jurisdictional decision under Section 1040(3) ZPO, in order to avoid gaps in legal protection. Any jurisdictional objections must be raised before the arbitral tribunal under Section 1040 ZPO, with subsequent judicial review only available through set-aside or enforcement proceedings under Sections 1059 and 1060 ZPO.

Comment

The decision aligns with and reinforces the strict line taken by the BGH that applications under Section 1032(2) ZPO are categorically barred after constitution of the arbitral tribunal. The court explicitly rejects contrary views in the literature advocating a residual state court jurisdiction to prevent gaps in legal protection where no Section 1040(3) ZPO decision is issued.

What makes the decision notably arbitration-friendly is not merely its general deference to arbitration, but its concrete doctrinal consequences. The court adopts a formal and rigid cut-off point at the moment of constitution of the arbitral tribunal, thereby preventing parallel jurisdictional review by state courts. It channels all jurisdictional challenges arising after that point into the arbitral process and thus reinforces the competence-competence principle as set out in Section 1040(1) ZPO. At the same time, the court shows restraint in engaging with the merits of the jurisdictional objection, even though the absence of an arbitration agreement was not in dispute. It also denies any corrective flexibility, for instance based on a lack of knowledge of the tribunal's constitution or the absence of an interim decision and thereby prioritises procedural efficiency and arbitral autonomy over early access to judicial review. Thereby, the court closes potential avenues for tactical recourse to state courts and underscores that the German arbitration framework deliberately limits judicial intervention once arbitral proceedings are underway.