

# GERMAN ARBITRATION DIGEST

<b>GAD No.:</b>	GAD 2025, 2	<b>Decision date:</b>	1 October 2024	<b>Res judicata:</b> Yes
<b>Court:</b>	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
<b>Case No. :</b>	101 Sch 45/24 e			
<b>Keywords:</b>	Foreign arbitral award, declaration of enforceability, public policy, right to be heard, postponement of hearing, poverty of a party, adequate participation in the arbitration proceedings, serious illness of a party, right to a public defender			
<b>Key legal provisions:</b>	Section 1061 German Code of Civil Procedure (ZPO) Article V New York Convention			

## **The Highest Regional Court of Bavaria confirms restrictive approach of German courts to violations of the right to be heard applying standards for parties' ability to participate adequately in arbitration proceedings irrespective of illness/alleged poverty**

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On 1 October 2024, the Highest Regional Court of Bavaria (BayObLG) declared two arbitral awards of the Danish Institute of Arbitration (DIA) enforceable. The BayObLG thereby confirmed German courts' restrictive approach to violations of the right to be heard: It rejected the objection of a violation of the right to be heard in a case where the party did not substantiate its inability to participate in the arbitration hearing in consequence of prolonged illness. In addition, the court held that the arbitration rules' lack of regulations on parties' right to be assigned a lawyer in case of poverty does not violate the right to be heard.

### **Facts**

The applicant asserted claims for damages against the respondent in consequence of breaches of warranties under a sale and purchase agreement ("SPA") for the sale of shares in a GmbH.

The applicant initiated an arbitration against the respondent before the Danish Institute of Arbitration. The seat of the arbitration was Copenhagen, Denmark.

The applicant's request for arbitration was sent to the respondent via email. The applicant paid its share of the arbitration proceedings' deposit. The respondent claimed that he was unable to pay his share. The applicant subsequently paid respondent's share and applied for a separate arbitration award to be rendered for the latter's reimbursement.

In November 2021, the respondent stated that due to a serious illness and corresponding treatment he did not consider himself physically and mentally capable of adequately exercising his rights in the arbitration proceedings. In September 2022, he submitted a statement of defence. In October 2022, he submitted that he was not familiar with Danish law. In his opinion, he should be given the opportunity to defend himself; alternatively, it should be examined whether he is entitled to a "public defender" ("Pflichtverteidiger"). The arbitral tribunal issued a separate award on 31 October 2022 regarding the refund of the deposit.

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Furthermore, it held that the respondent had not shown sufficiently that he was not properly informed about the proceedings and was not able to take part in them. The respondent submitted a statement in German in response to the applicant's reply and announced that he would not be able to make a timely statement in the further course of the proceedings.

In March 2023, the arbitral tribunal decided to hold a hearing on 30 May 2023 by remote communication via Microsoft Teams. Before this, it had instructed the respondent that he could attend this hearing in person or via a representative. On 5 May 2023, it confirmed the hearing date and announced that it would proceed in accordance with Article 31 DIA Arbitration Rules if a party failed to appear at the hearing or to submit evidence without giving reasons. By letter dated 30 May 2023 – written in German –, the respondent submitted arguments against the applicant's claims. On 30 May 2023, an oral hearing was held via Microsoft Teams, at which the arbitral tribunal and the applicant were present. The respondent was not present.

The arbitral tribunal decided in favour of the applicant. It did not regard respondent's letter dated 30 May 2023, as it was submitted in the German language.

The BayObLG declared both awards enforceable.

## **Key findings**

The BayObLG rejected respondent's objections regarding a violation of his right to be heard.

First, the respondent had been duly informed of the arbitration proceedings. He received the request for arbitration and the further procedural correspondence in accordance with the DIA Arbitration Rules (informally) via email. In view of the BayObLG this cannot be seen as a violation of public policy.

Second, there was no violation of the right to be heard due to the fact that the arbitral tribunal's decision was a default judgment in accordance with Article 21 DIA Arbitration Rules based on the facts known to it. The BayObLG held that the respondent was duly informed of the date of the hearing and did not raise any objections to it. In particular, the respondent had not filed a proper request for postponement. Furthermore, the respondent had not substantiated that he did not attend the hearing for valid reasons. The certificates of incapacity for work previously submitted in the arbitration proceedings did not extend to the hearing and were not sufficient to prove that he was not able to take part in the hearing properly. Furthermore, the respondent had been expressly informed by the arbitral tribunal beforehand that he could also send a representative. He had not substantiated that this was not reasonable for him.

Third, there was no breach of public policy, because the DIA Arbitration Rules do not provide for a party to be provided with a lawyer in the event of a dispute.

The BayObLG held that respondent did not substantiate his inability to attend the oral hearing in consequence of his illness and/or poverty.

## **Comment**

The decision upholds the restrictive approach of German courts when reviewing foreign arbitral awards regarding a potential violation of the right to be heard. It is particularly encouraging that the hurdles for proving a violation of the right to be heard have been kept high, even in a special constellation.