

GERMAN ARBITRATION DIGEST

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Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	102 SchH 135/24e			
Keywords:	Arbitrator challenge, qualified procedural errors, judicial review of challenge proceedings, deadline extension, bias, impartiality			
Key legal provisions:	Section 1036 German Code of Civil Procedure (ZPO) Section 1037 German Code of Civil Procedure (ZPO)			

Challenging an arbitrator is not a means for judicially reviewing potential procedural errors or preliminary assessments made by the arbitrator during the proceedings

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On 7 November 2024, the Highest Regional Court of Bavaria (BayObLG) dismissed a challenge against a presiding arbitrator based on alleged bias. The court clarified that mere alleged procedural errors, such as the disparate treatment of deadline extension requests, and differing preliminary legal assessments do not inherently indicate bias. Only significant procedural errors, such as arbitrary legal interpretations that are detrimental to one side, can raise valid concerns about bias.

Facts

The case concerns a challenge against the presiding arbitrator by four respondents in a construction arbitration. Prior to the arbitration, the respondents had hired the claimant to provide planning services for technical equipment. In the *ad hoc* arbitration, the claimant sought payment of fees based on a final invoice and the return of several guarantees. In a prior arbitration between the same parties, in which the claimant sued for declaratory relief, the presiding arbitrator served in the same capacity.

During a preliminary hearing, the presiding arbitrator provided an initial legal assessment regarding the final invoice, which he later revised. In the course of the proceedings, the presiding arbitrator granted both parties extensions for substantive submissions. He granted the claimant a deadline as requested, while the respondents were only granted a deadline from 2 July to 31 July 2024 instead of until 30 August 2024 as requested. This prompted the respondents to challenge the presiding arbitrator pursuant to Section 1037(2) German Code of Civil Procedure (ZPO). They contended that while the presiding arbitrator's preliminary legal assessments may not individually raise concerns, their cumulative effect and the disparate treatment in handling the extension requests justified the challenge.

The arbitral tribunal rejected the challenge, determining that there were no circumstances that warranted justified doubts about the impartiality of the challenged arbitrator. Further, the arbitral tribunal held that the respondents failed to meet the two-week deadline pursuant to Section 1037(2) sentence 1 ZPO.

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Subsequently, the respondents filed a complaint with the BayObLG under Section 1037(3) sentence 1 ZPO, seeking a declaration that their challenge against the presiding arbitrator is well-founded ("begründet").

Key findings

The BayObLG upheld the arbitral tribunal's decision and held that there were no justifiable doubts regarding the impartiality of the presiding arbitrator. Before assessing the alleged grounds for challenging the presiding arbitrator, the BayObLG clarified that the standard of bias established for state court judges applies to arbitrators in much the same way.

First, the BayObLG did not view a statement by the presiding arbitrator in the previous arbitration regarding declaratory relief as indicative of bias. In that prior arbitration, the presiding arbitrator had noted that the arbitral tribunal's prior engagement with the matter could be a pragmatic reason supporting the admissibility of the request. The BayObLG held that this statement did not suggest the presiding arbitrator would favour pragmatism over the correct application of the law to the detriment of the respondents.

Second, the BayObLG did not view the presiding arbitrator's preliminary statement regarding the final invoice as an indication of bias. Specifically, the court found that an arbitrator is not obliged to provide reasons for preliminary legal assessments in the same manner required for a final award.

Third, the BayObLG did not consider the presiding arbitrator's statement, that hearing a witness on a specific aspect was unnecessary, indicative of bias. The court asserted that determining which facts require proof in arbitration is within the purview of the arbitral tribunal and cannot be construed as bias unless the assessment appears arbitrary. The court did not find the presiding arbitrator's assessment to be arbitrary.

Fourth, the BayObLG held that the presiding arbitrator's differing treatment of the respondents' extension request compared to the claimant's previous request could, at most, be considered a simple procedural error. Such errors do not justify a challenge based on bias, as challenges are not intended to serve as a means for reviewing and controlling the arbitrator's conduct for errors. The BayObLG stated that only qualified procedural errors adversely affecting one party can raise concerns about bias. The court did not consider the presiding arbitrator's conduct to be a qualified procedural error, noting that the differing treatment of extension requests appeared to have legitimate grounds and was thus not arbitrary.

The BayObLG also held that even if all circumstances presented by the respondents are considered as a whole, there are no objective reasons that warrant the presiding arbitrator's challenge on the grounds of bias. As the BayObLG did not find any grounds for bias, it did not need to decide on the question whether the complaint was filed in time. The court noted in obiter that a challenge could be based on past circumstances outside the two-week period stipulated by Section 1037(2) sentence 1 ZPO, provided that these circumstances are closely related to the still-valid grounds for challenge. The BayObLG also did not address the claimant's argument that the procedural decisions which the respondents had challenged were not solely decisions of the presiding arbitrator but rather decisions made collectively by the arbitral tribunal.

Comment

The decision of the BayObLG provides valuable clarifications regarding the requirements for challenging arbitrators in Germany. It aligns the standards for assessing arbitrator bias with those established for German state court judges. Notably, the court specifies that only qualified procedural errors and arbitrary conduct that adversely affect one party can indicate bias, rather than simple procedural errors. This distinction

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prevents parties from (mis)using challenge proceedings as a means to review or control an arbitrator's procedural conduct for errors in German courts.