

<b>GAD No.</b>	GAD 2024, 2	<b>Decision date</b>	26 June 2024	<b>Res judicata:</b> No (complaint pending – BGH, I ZB 45/24)
<b>Court</b>	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
<b>Case No.</b>	101 Sch 116/23 Case No. other instances: I ZB 45/24 (German Federal Court of Justice, BGH)			
<b>Keywords</b>	Foreign arbitral award, declaration of enforceability, public policy, révision au fond, wrong decision, contractual penalty, right to be heard, possibility of objection, postponement of hearing, video conference			
<b>Key legal provisions</b>	Section 1061 German Code of Civil Procedure (ZPO) Article V New York Convention			

## Highest Regional Court of Bavaria confirms restrictive approach of German courts to public policy violations deciding on virtual hearings and contractual penalties

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On 26 June 2024, the Highest Regional Court of Bavaria (BayObLG) declared two CIETAC arbitral awards enforceable and thereby confirmed the German courts' restrictive approach to violations of public policy. The BayObLG found that an oral hearing which one party is only able to attend by video conference does not violate that party's right to be heard. In addition, it held that enforcing a contractual penalty in the amount of 10 % of the total contract price does not violate public policy either.

### Facts

The respective applicants were two Chinese manufacturing companies and the respondent was, in both cases, a German plant engineering company. In both cases, the parties entered into contracts for the supply and installation of machinery for the production of concrete slabs. The contracts provided for penalties in the event of late performance, amongst others five percent of the total contract price for late delivery of the equipment and another five percent for late performance of test runs.

The applicants initiated two separate arbitrations against the respondent before the China International Economic and Trade Commission (CIETAC). The seat of the arbitrations was Shanghai.

In both cases, the respondent informed the arbitral tribunals that it would be unable to attend the hearing scheduled in Shanghai due to Covid and requested its postponement. The arbitral tribunals did not postpone the hearings and invited the respondent to participate by video conference. The respondent did not make use of such opportunity.

In both cases, the arbitral tribunals decided in favour of the respective applicants. In one of the cases, the Tribunal ordered the respondent to pay contractual penalties in a total amount of 10 % of the total contract price.

The BayObLG declared both awards enforceable. The respondent's complaints on points of law are pending before the German Federal Court of Justice (Bundesgerichtshof, BGH).

### **Key Findings**

The BayObLG held that the enforcement of both awards does not violate public policy.

First, the BayObLG held the Tribunals neither violated the respondent's right to be heard nor the principle of procedural equality of arms ("Grundsatz der prozessualen Waffengleichheit") by holding hearings which one of the parties could have only attended by video conference and eventually did not attend at all. The BayObLG argued that in principle the use of videoconferencing technology is an effective means to combine the right to effectively pursue a claim and the right to be heard, particularly during a pandemic. In this respect, it referred to the well-known (similar) decision of the Austrian Supreme Court (OGH) in 2020 (OGH, 23 July 2020, 18 ONc 2/20s-2). Moreover, it noted that the respondent had failed to identify how such technology would have been disadvantageous in the present case.

Second, the BayObLG held that the enforcement of the arbitral award also does not violate public policy by virtue of the fact that it ordered the respondent to pay contractual penalties in the total amount of 10 % of the respective contract price. The BayObLG noted that even a contractual penalty in the amount of 40 % of the total contract price would, in the absence of additional aggravating circumstances, not violate public policy. In this context, the BayObLG also reaffirmed the prohibition of a *révision au fond* under German law and stressed that erroneous decisions on the merits must be accepted and, per se, do not justify their non-recognition or non-enforcement.

### **Comment**

The decision upholds the restrictive approach of German courts when reviewing arbitral awards with regard to a potential violation of public policy. It constitutes a welcome contribution to the development of arbitration jurisprudence in Germany.