

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2024, 9	Decision date:	12 December 2023	Res judicata: Yes
Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	102 SchH 114/23 e			
Keywords:	Arbitral proceedings, determination of inadmissibility, arbitration clause, expert determination clause, admissibility of arbitral proceedings			
Key legal provisions:	Section 1032(2) German Code of Civil Procedure (ZPO) Section 271(1) German Civil Code (BGB) Section 319(1) sentence 1 German Civil Code (BGB)			

In dubio pro arbitration: Highest Regional Court of Bavaria clarifies that expert determination clauses do not render arbitral proceedings inadmissible

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On 12 December 2023, the Highest Regional Court of Bavaria (BayObLG) addressed the conflict between an expert determination clause and an arbitration clause in a company's articles of association. The court determined that an expert determination clause generally does not preclude the jurisdiction of an arbitral tribunal. At most, the expert determination clause renders the arbitration claim unfounded (at present) until the expert determination is concluded.

Facts

The decision of the BayObLG followed a dispute between the applicant, a German company, and the respondent, a former shareholder.

After the redemption of the respondent's shares, a disagreement arose between the parties over the amount of compensation owed to the respondent under the articles of association (AOA). For disputes on the amount of compensation, Section 8(8) of the AOA provided for final determination by the applicant's auditor. Moreover, Section 28 of the AOA contained an arbitration clause for all disputes between shareholders, or between the company and its (former) shareholders arising out of or in connection with the AOA.

The respondent demanded a higher compensation from the applicant than the amount he had already received and informed the applicant of his intention to commence arbitration proceedings. Thereupon, the applicant filed a request pursuant to Section 1032(2) German Code of Civil Procedure (ZPO) with the BayObLG to determine the inadmissibility of arbitral proceedings on the respondent's compensation claim. The applicant considered the clause in Section 8(8) of the AOA to govern the dispute and therefore to override the general arbitration clause in Section 28 of the AOA.

Key findings

The court dismissed applicant's request as without merit.

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Section 1032(2) ZPO, which has no equivalent in the UNCITRAL Model Law, allows for German courts to determine the (in-)admissibility of arbitral proceedings before the arbitral tribunal has been formed. The standard of the court's review is the jurisdiction of the arbitral tribunal for the respective dispute, rather than the overall admissibility of the proceedings. Applying this standard, the BayObLG held that an arbitral tribunal had jurisdiction to decide the dispute between the applicant and the respondent.

Rejecting the applicant's arguments, the BayObLG held that the arbitral tribunal's jurisdiction was not precluded by the clause in Section 8(8) of the AOA. The court based its findings on its interpretation of the clause. After determining that it constituted an expert determination clause, the BayObLG addressed the implication of the clause on the arbitral tribunal's jurisdiction over the dispute between the parties. The court left open whether the dispute was governed by the expert determination clause in question, as the clause did not affect the arbitral tribunal's jurisdiction either way. The court considered that, under Section 8(8) of the AOA, the auditor was not authorized to act in any judicial capacity in the broader sense and did not have the capacity to create an enforceable decision or order. If the expert determination clause was to preclude not only state court's jurisdiction but the arbitral tribunal's jurisdiction despite the broad arbitration clause, it would deprive former shareholders invoking the expert determination clause of obtaining any enforceable decision on the compensation. Furthermore, such understanding would curtail the option for both, the company and shareholders, to assert any evident inequity ("offensichtliche Unrichtigkeit") of the expert determination as provided for in Section 319(1) sentence 1 German Civil Code (BGB). Following this line of argument, the court considered it to be improbable ("fernliegend") that the expert determination clause was intended to fundamentally preclude any legal recourse.

The court further held that expert determination clauses are generally to be interpreted as deferring the pursuit and enforceability of governed claims until the expert determination has been obtained (Section 271(1) BGB). As is the case with actions before state courts, the court determined that an arbitration claim would have to be considered as filed prematurely ("currently unfounded") and dismissed as without merits at present.

Comment

The decision is of broad practical importance not only in the context of shareholder agreements. Expert determination clauses and arbitration agreements both have long been part of the standard repertoire of contract design in various fields of legal practice such as M&A and construction law, making it common to find both types of clauses within the same contract.

The court's decision therefore provides welcome legal certainty on the scope of expert determination clauses and their effect on arbitration agreements where parties to a dispute have not explicitly defined the interplay of the two clauses. As the court's interpretation of expert determination clauses applies general legal principles, the decision is not confined to shareholder agreements but can be applied in different legal contexts. It also creates a concurrent approach to the treatment of expert determination clauses in the context of state court litigation. This alignment further highlights German courts' arbitration-friendly approach as it reinforces the principle of giving comprehensive effect to arbitration clauses and leaving the arbitral tribunals' role untouched to decide on the admissibility and merits of an arbitration claim submitted to it within its own jurisdiction.