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International Arbitration 2022

Germany: Law & Practice

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GERMANY

Law and Practice

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1. GENERAL

1.1 Prevalence of Arbitration

Arbitration is a well and long-established dispute resolution method in Germany. Arbitration, both institutional and ad hoc, is widespread.

German parties mainly resort to arbitration when dealing with international disputes rather than in purely domestic transactions. Due to the strong focus on exports by the German economy, arbitration plays a significant role. While the German court system is known to be quick and efficient, and thus broadly accepted for national disputes, arbitration is preferred where the complexity of the dispute increases, issues of confidentiality arise or knowledge in specific business sectors is favourable.

Arbitration is often used for disputes regarding maritime transport, joint venture, post-M&A, large construction projects, disputes related to gas (price, storage) and such pertaining to complex licence disputes.

1.2 Impact of COVID-19

At first, scholars and practitioners discussed the legal admissibility of remote hearings and their practical implications, including for cybersecurity and data protection. By now, the arbitration community has developed a common understanding of the legal and technical tools available. Some of the remote tools are still used in arbitral proceedings, even when in-person hearings would be possible. In principle, however, in-person hearings continue to be preferred, especially for larger witness and expert hearings.

Despite the global, often mutual economic constraints, there has been no clear increase in the number of COVID-19-related disputes.

1.3 Key Industries

The COVID-19 pandemic seems not to have had a particular impact on international arbitration activity in 2021–22.

The presence of arbitration in the energy and IT sectors is still very high. Energy disputes in particular relate to renewable energies, including offshore wind farms. The disruptions in the oil and gas markets caused by the war in Ukraine are likely to lead to further proceedings. Supply chains strained by the pandemic and sanctions are also increasingly giving rise to contentious disputes.

Cross-border disputes on IP issues are very common, especially in the technology and pharmaceutical sectors. Arbitration also remains the favoured method of dispute resolution in M&A and in shipping disputes. In addition, disputes in (international) plant construction, international trade disputes and disputes among shareholders must also be highlighted.

1.4 Arbitral Institutions

The leading German arbitration institution is the German Arbitration Institute (DIS), which was established on 1 January 1992. The current DIS Arbitration Rules came into effect on 1 March 2018 (DIS Rules) and apply to both national and international arbitrations. In 2021, the number of cases decreased slightly, which is in line with the international trend. In addition, the DIS appointed more female than male arbitrators for the first time in 2020; the quota was just below 40% in 2021. In 2022, the members of DIS elected a new Board, which led to a significant rejuvenation. This is expected to result in comprehensive reforms, more visibility and more efficiency.

Additionally, the International Chamber of Commerce (ICC) is widely favoured by German parties as it is better known in international contexts and, as a non-German institution, is perceived

as neutral. To a lesser extent, this also applies to the Stockholm Chamber of Commerce (SCC) and the Swiss Arbitration Centre (SAC, formerly the Swiss Chambers' Arbitration Institution (SCAI)).

Furthermore, there are several institutions specialised in certain industries that also offer arbitration services, such as the German Maritime Arbitration Association (GMAA). There are also a few arbitration institutions focusing on particular goods, industries or regions – for example, the German Coffee Association at the Hamburg Chamber of Commerce and the Deutsche Börse AG – Frankfurter Wertpapierbörse or the Chinese European Arbitration Centre (CEAC) with a special focus on disputes between Asian and European parties.

In 2020, the Hamburg International Arbitration Center (HIAC) at the Hamburg Chamber of Commerce was founded. HIAC is not an arbitral institution itself, but rather is the home of five independent arbitral institutions. It provides neutral information on all Hamburg arbitral institutions, is a venue for informational and specialised events, rents out meeting rooms for arbitration hearings and assists with further services.

1.5 National Courts

Jurisdiction for most arbitration-specific disputes lays with the different Higher Regional Courts chosen by the parties or at the seat of arbitration (*Oberlandesgericht*) (Section 1062 German Code of Civil Procedure). The internal assignment rules of the courts allocate arbitration-related disputes to special senates, which consequently have the relevant expertise and experience. Due to the higher caseload, the courts with economic centres in their jurisdiction seem to be more experienced than courts in more rural areas. Yet, the local court (*Amtsgericht*) gives judicial assistance in the taking of evidence and other legal actions (Sections 1050, 1060(4) German Code of Civil Procedure).

2. GOVERNING LEGISLATION

2.1 Governing Law

The German arbitration law is consolidated in the Tenth Book of the German Code of Civil Procedure (*Zivilprozessordnung*, or ZPO) encompassing Sections 1025 to 1066 ZPO.

On 1 January 1998, the provisions on arbitration were amended and replaced by an almost verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration (Model Law).

The revision was intended to make the regulation more user-friendly, particularly for foreign parties. This is the reason why the provisions are so close to the actual wording of the Model Law.

The German arbitration law is complemented by a few statutory provisions relating to the non-arbitrability (see **3.2 Arbitrability**) of certain disputes or restrictions due to overriding principles such as consumer protection or public order considerations.

While the German arbitration law is largely based on the Model Law, it allows for certain exemptions to provide greater party autonomy and to reflect the established German arbitration practice. The German arbitration law provides for a unified regime for both national and international arbitrations. Also, the restriction to commercial arbitration contained in the Model Law has not been implemented into German law.

The form requirements for an arbitration agreement are more lenient than those under the Model Law as the so-called "half-written" form

is allowed – that is, arbitration agreements in letters of confirmation where the other party did not respond or contest them are generally accepted.

Other relevant additions to the Model Law regulation include:

- a special procedure for German courts to determine the admissibility of arbitral proceedings up to the constitution of the Arbitral Tribunal (Section 1032(2) ZPO);
- further supportive powers of German courts in the appointment of arbitrators (Section 1025(3) ZPO);
- a provision concerning interim relief measures (Section 1041 ZPO);
- a provision concerning arbitral decisions on costs (Section 1057 ZPO); and
- time limits for the initiation of annulment proceedings (Section 1059(3) ZPO).

As per the enforcement and recognition of foreign arbitral awards, Section 1061 ZPO explicitly refers to the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958).

2.2 Changes to National Law

There have not been any recent significant amendments to the German arbitration law. However, a working group was established by the German Federal Ministry of Justice to assess whether the German arbitration law needs to be amended in the wake of the 2006 reform of the Model Law. According to the current information, a selective reform rather than a large-scale innovation – as in 1998 – is planned.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

The validity and enforceability of the arbitration agreement are governed by Sections 1029 to 1033 ZPO in Chapter Two of the Tenth Book of the German Code of Civil Procedure.

As per the minimum content, German law sets out very few requirements besides the fact that the arbitration agreement must relate to a defined legal relationship. This concept has been broadly interpreted by German courts.

With regard to form requirements, the arbitration agreement may be concluded in the form of an independent agreement to arbitrate, or in the form of an arbitration clause within the main contract between the parties (Section 1029(2) ZPO).

The arbitration agreement must be either incorporated in a document signed by the parties or referred to in the correspondence between the parties, in which case, the arbitration agreement must be evidenced by supporting documents (Section 1031 ZPO). Thus, the written requirement is much more lenient than in the Model Law. In fact, arbitration agreements concluded orally but later endorsed by one party in a confirmation letter and not contested by the other party are generally accepted (Section 1031(2) ZPO).

The above applies unless one of the parties is a consumer. In that case, the arbitration agreement must be contained in a separate document to the contract and must be personally signed by all the parties involved, unless the agreement is recorded by a notary (Section 1031(5) ZPO).

Any failure to comply with the formal requirements is cured if both parties enter into argu-

ment on the substance of the case in the arbitral proceedings (Section 1031(6) ZPO).

3.2 Arbitrability

Pursuant to German law, any past or future dispute concerning a specific legal relationship, whether contractual or non-contractual in nature, is arbitrable (Section 1029(1) ZPO).

In particular, any claim involving an economic interest may be referred to arbitration (Section 1030(1) ZPO). This also includes, for example, claims based on the violation of antitrust law. Parties may also resort to arbitration regarding non-economic claims as long as the subject matter of the dispute can be settled (Section 1030 ZPO). Based on that restriction or as explicitly stated in the law, the following claims cannot be submitted to arbitration and must be adjudicated by German courts or public authorities:

- legal disputes regarding tenancy relationships for residential accommodation in Germany (Section 1030(2) ZPO);
- certain aspects of family law such as divorce or the custody of minors (Section 1822 No 12 German Civil Code, or *Bürgerliches Gesetzbuch*, or BGB);
- disputes under employment law (Sections 101 to 110 Labour Courts Law, or *Arbeitsgerichtsgesetz*);
- certain disputes concerning defective resolutions in corporations; and
- generally, any criminal law matters.

3.3 National Courts' Approach

Law Governing the Arbitration Agreement

Unless the parties have made an express choice of law for the arbitration clause itself (party agreement is not common in practice), German case law has not yet conclusively clarified how the law applicable to the arbitration clause is to be determined. In some cases, courts assumed that the parties intended an arbitration clause to be effective at the seat of arbitration, irrespective of the choice of law in the main contract, and that therefore the law applicable at the seat of arbitration is decisive.

The predominant assumption seems to be that the choice of law of the main contract is also an implied choice of the law applicable to the arbitration agreement. However, this is in each case an interpretation of the (presumed) intention of the parties. If such an intention cannot be ascertained, the prevailing opinion in the literature assumes that the law of the seat of arbitration shall be applicable.

Arbitration-Friendly Approach

German courts generally lean towards respecting and enforcing the parties' choice to submit their disputes to arbitration. They will deem the arbitration agreement to be invalid where the above-mentioned form requirements are not complied with (see **3.1 Enforceability**). However, Section 1031(6) ZPO specifically provides that any failure to comply with formal requirements shall be cured by both parties entering into argument on the substance of the dispute during the arbitration.

German courts are willing to enforce arbitration agreements as long as the minimum formal requirements are met. The focal point is whether the parties' intention to submit their disputes to arbitration can be deduced sufficiently from the agreement. In doing so, German courts tend to make considerable efforts to give effective meaning to (slightly) pathological arbitration agreements that may refer to non-existing institutions or include conflicting dispute resolution clauses. If German law applies, even where the wording appears ambiguous, the courts will go beyond the wording and interpret the actual intent of the parties to submit their disputes to arbitration.

3.4 Validity

German law explicitly provides that the arbitral tribunal must treat the arbitral clause as independent and separate from all other clauses of the agreement (Section 1040(1) sentence 2 ZPO). Thus, the rule of separability applies in the sense that the termination or invalidity of the main contract will not render invalid the arbitration clause included therein unless the defect affects both, such as the lack of consent by the parties.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

As the German arbitration law is primarily governed by party autonomy, the parties to an arbitration proceeding are free to select the arbitrators they consider suitable for the determination of their dispute. In any event, arbitrators must be impartial and independent.

German law particularly entitles parties to agree on the number of arbitrators (Section 1034(1) ZPO), on their qualifications and on the procedure for their appointment (Section 1035(1) ZPO). The parties may also agree on the procedure for the recusal of an arbitrator (Section 1037(1) ZPO) and on an arbitrator's termination upon his or her inability or failure to perform the tasks assigned to him or her (Section 1038(1) ZPO). There are no limitations as to either the nationality or place of residence of the arbitrators. Thus, non-nationals may be appointed as arbitrators.

A German judge may only act as an arbitrator or give an expert opinion in arbitration proceedings if the parties appoint him or her jointly or if he or she is nominated by an uninvolved body (Section 40 German Judiciary Act, or *Deutsches Richtergesetz*).

4.2 Default Procedures

Where the procedure agreed by the parties for the appointment of the arbitrator(s) fails, each party may file an application to a German court to order the required measures to ensure the appointment, unless otherwise agreed by the parties (Section 1035(4) ZPO).

The German court must consider all the prerequisites of the parties' agreement and ensure the appointment of an independent and impartial arbitrator. When appointing a third or sole arbitrator, the court may select an arbitrator of a different nationality than that of the parties if it considers this to be appropriate (Section 1035(5) ZPO).

German law does not provide for a specific default procedure governing multi-party arbitrations. However, Section 1034(2) ZPO – eventually applied mutatis mutandis – might provide a solution as it states that if the arbitration grants one party overriding rights with regard to the composition of the arbitral tribunal, which discriminates against the other party, that other party may request the court to appoint the arbitrator(s) in deviation from the nomination made or the agreed procedure.

4.3 Court Intervention

Under German law, courts may not intervene in arbitral proceedings except where they are expressly permitted to do so (Section 1026 ZPO).

With regard to the selection of arbitrators, courts may intervene only where either the parties failed to reach an agreement on the appointment of the arbitrators or the procedure agreed has failed. In this case, and upon application by a party, the competent German court will act as appointing authority (Section 1035 (3) and (4) ZPO).

However, as a deviation from the Model Law, Section 1034(2) ZPO provides that if the arbitration agreement grants one party overriding rights with regard to the composition of the arbitral tribunal, which discriminates against the other party, that other party may request the court to appoint the arbitrator(s) in deviation from the nomination made or the agreed procedure.

4.4 Challenge and Removal of Arbitrators

The appointment of an arbitrator may be refused only where there are circumstances that raise justified doubts as to his or her impartiality or independence, or if he or she does not meet the prerequisites previously agreed by the parties (Section 1036(2) ZPO). The party that appointed the arbitrator may challenge that arbitrator only for reasons learnt after his or her appointment.

The parties are free to agree on a procedure for the challenge of an arbitrator (Section 1037(1) ZPO). In the absence of such agreement, a party must submit to the arbitral tribunal within two weeks after becoming aware of the composition of the tribunal or the circumstance prompting doubts as to his or her impartiality or independence. The grounds for the challenge must be submitted in writing (Section 1037(2) ZPO). If the arbitrator refuses to resign from office or the other party does not consent to the recusal, the arbitral tribunal shall rule on the challenge.

In contrast, the DIS Rules provide for a decision by a special council of the DIS for arbitrator challenges (Article 15 DIS Rules).

Should the challenge be dismissed, within one month the party may file an application to the competent German court to decide on the challenge (Section 1037(3) ZPO). While the application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration proceedings and may render an award.

Furthermore, where an arbitrator is unable to perform the tasks assigned to him or her, either legally or factually, or if he or she failed to perform within a reasonable period for other reasons, then he or she may resign from office or the parties may agree on the termination of his or her appointment. Failing that, each party may file an application to the court to terminate the arbitrator's appointment (Section 1038 ZPO).

4.5 Arbitrator Requirements

Arbitrators must disclose to the parties all circumstances that might give rise to doubts as to their impartiality or independence without undue delay. This obligation spans from their appointment up to the closing of the arbitration proceedings and the rendering of the arbitral award (Section 1036(1) ZPO).

Pursuant to Article 9 DIS Rules, each arbitrator has the obligation to remain impartial and independent throughout the entire arbitration proceedings. Arbitrators also have the duty to disclose any and all circumstances that could give rise to doubts in a reasonable person as to their impartiality and independence. Moreover, at the time of accepting the nomination, the appointed arbitrators must sign a declaration stating their impartiality and independence from the parties.

5. JURISDICTION

5.1 Matters Excluded From Arbitration

Generally, any claim relating to economic interests (*vermögensrechtlicher Anspruch*) may be referred to arbitration under German law. Other claims may be subject to an arbitration agreement to the extent that the parties would be entitled to conclude a settlement on the issue in dispute (Section 1030(1) ZPO). By way of exception, German law declares some disputes to be non-arbitrable or only to be arbitrable under certain conditions (see **3.2 Arbitrability**).

5.2 Challenges to Jurisdiction

An arbitral tribunal will decide on its own jurisdiction and on the existence and validity of the arbitration agreement (Section 1040(1) ZPO). However, the tribunal's decision confirming its jurisdiction can subsequently be challenged before national courts (see **5.3 Circumstances for Court Intervention**). Therefore, arbitral tribunals are only granted with a provisional competence-competence as German courts are not bound by the arbitral tribunal's determination as to its own jurisdiction.

5.3 Circumstances for Court Intervention

Before the arbitral tribunal is constituted, a party may file a request to the competent national court for it to determine the admissibility or inadmissibility of arbitration proceedings (Section 1032(2) ZPO).

After the tribunal's constitution, a party must raise any jurisdictional objection before the arbitral tribunal itself (Section 1040(2) ZPO). If the tribunal considers that it has jurisdiction, it generally must decide on the objection by way of preliminary ruling (*Zwischenentscheid*). In this case, any party may challenge the tribunal's decision before the Higher Regional Court (*Oberlandesgericht*) at the arbitral seat within one month after receipt of the written preliminary ruling. While the challenge is pending, the tribunal may continue the proceedings and even render an award on the merits (Section 1040(3) ZPO).

Lastly, German courts may address jurisdictional issues in the context of set-aside proceedings (see **11. Review of an Award**). An application to set aside an award can be based on, inter alia, the invalidity of the arbitration agreement since the determination by the tribunal on its jurisdiction is not binding on German courts. Even if the applicant does not assert invalidity of the arbitration agreement, German courts may still review the arbitrability (see **3.2 Arbitrability**) of the dispute ex officio (Section 1059(2) ZPO).

As far as the arbitral tribunal denies its jurisdiction in an award, parties may initiate the general setting-aside procedure.

5.4 Timing of Challenge

Prior to the constitution of the arbitral tribunal, a request may be filed with the competent national court to determine the admissibility or inadmissibility of arbitral proceedings (Section 1032(2) ZPO).

Once the arbitral tribunal has been constituted, its jurisdiction must be objected to the tribunal. General objections to the tribunal's jurisdiction must be raised at the latest at the time of submission of the statement of defence, and any objection that the tribunal exceeds its jurisdiction must be raised as soon as the issue in dispute is addressed in the arbitral proceedings (Section 1042(2) ZPO). Failing a timely objection, the party is barred from relying on the tribunal's lack of jurisdiction in subsequent proceedings. The tribunal may, however, allow a later objection if the party sufficiently excuses the delay.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

German courts will undertake a full review of the arbitration agreement to determine its existence and validity based on both fact and law. They are not bound by the arbitral tribunal's determination as to its own jurisdiction.

Against a German court's decision on the tribunal's jurisdiction, complaints on points of law (*Rechtsbeschwerde*) may be made to the German Federal Court of Justice (*Bundesgerichtshof*) (Section 1065 ZPO). This remedy is, however, only available under limited circum-

stances. Therefore, court proceedings are often restricted to one instance only.

5.6 Breach of Arbitration Agreement

If a party brings a claim before German courts, the respondent may object to the court's jurisdiction by invoking an arbitration agreement between the parties that covers the issue in dispute. If that respondent wants to rely on such an arbitration agreement, this objection must be made prior to the hearing on the merits of the dispute (Section 1032(1) ZPO). If no objection is raised, the arbitration clause will not be taken into account ex officio. If the objection is raised, the court must reject the action as inadmissible unless the arbitration agreement is invalid or does not cover the matter in dispute before the national court.

German courts generally lean towards respecting and enforcing the parties' choice to submit their disputes to arbitration (see **3.3 National Courts' Approach**).

5.7 Jurisdiction Over Third Parties

Under German law, a tribunal may not assume jurisdiction over individuals or entities that are not party to the arbitration agreement. Thus, third parties may only be bound to the arbitration clause in exceptional circumstances such as legal succession by means of inheritance, by law or by accession to the contract.

Insolvency administrators and the executors of a will are also considered to be bound by the arbitration clause concluded by the insolvent company or the testator.

The rules providing for joinder of parties or consolidation of actions in court proceedings do not apply to arbitration. In the absence of specific rules, any joinder of parties or consolidation of arbitral proceedings will require an agreement between all participating parties, unless the institutional rules provide for another standard.

For example, the DIS Rules 2018 contain special provisions for multi-contract and multi-party arbitrations as well as for joinders (Articles 17 to 19 DIS Rules).

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

Unless otherwise agreed, a party may seek preliminary/interim relief from the arbitral tribunal (Section 1041(1) ZPO). Similarly, the DIS Rules confer on the arbitral tribunal the power to grant preliminary/interim relief in the absence of differing procedural agreements, even allowing the award of ex parte interim relief (Article 25 DIS Rules).

Arbitral tribunals are not limited by the types of preliminary/interim relief that may be awarded by German national courts (see **6.2 Role of Courts**). In principle, a tribunal may grant any type of relief that it deems necessary regarding the matter in dispute (eg, orders to give securities in the form of a bank guarantee, freezing orders/Mareva injunctions). Such orders are binding upon the parties to the arbitration. Yet, to be enforceable, a national court must permit the enforcement of the preliminary/interim relief granted by the arbitral tribunal (Section 1041(2) ZPO); see also **6.2 Role of Courts**.

6.2 Role of Courts

Even when a valid arbitration agreement exists and even after the tribunal has already been constituted, any party may seek preliminary/interim relief from national courts (Section 1033 ZPO). However, German courts are restricted to the requirements and types of preliminary/interim relief available under the general provi-

sions of the German Code of Civil Procedure. Particularly, German courts may grant pre-award attachment orders (Arrest) or preliminary injunctions (*einstweilige Verfügung*). In essence, this generally requires a plausible demonstration of a corresponding claim as well as of a specific ground for attachment or for relief in the form of a preliminary injunction (Sections 916 to 945b ZPO). It should be noted that German courts do not grant anti-suit injunctions.

Importantly, the enforcement of any preliminary/interim measure ordered by a tribunal requires a leave of enforcement by national courts. To obtain this, a party may apply to the competent court, which may also recast any tribunal-ordered measure for the purpose of enforcement (Section 1041(2) ZPO). In contrast, preliminary/interim relief ordered by national courts is directly enforceable.

In principle, German courts may also grant interim relief in assistance of a foreign-seated arbitration, as the provisions permitting national courts to grant preliminary/interim relief apply (Sections 1025(2), 1033 ZPO). However, it is yet to be determined by German courts whether parties can exclude preliminary/interim relief of the German national courts by agreement and, if this is the case, whether selecting a foreign arbitral seat constitutes such an (implied) agreement.

6.3 Security for Costs

Based on the tribunal's wide discretion to grant preliminary/interim relief (Section 1041(1) ZPO), it may also order security for costs with regard to the matter in dispute depending on the circumstances of the case.

When granting preliminary/interim relief in aid of arbitral proceedings, German courts are bound by the general rules for court-ordered preliminary/interim measures. Under these provisions, an order of security for costs may be permissible as a pre-award attachment (see **6.2 Role of Courts**).

7. PROCEDURE

7.1 Governing Rules

With regard to arbitration procedure, the German Code of Civil Procedure defines mandatory and fundamental principles: the parties' right to equal treatment and the parties' right to be heard, as well as the parties' right to be represented by legal counsel (Section 1042(1) and (2) ZPO).

Apart from these fundamental principles, the German arbitration law only provides for a basic framework of procedural rules (Sections 1043 to 1050 ZPO). This framework addresses, inter alia, the commencement of the proceedings, the language, the statements of claim and defence, the oral hearings and the written proceedings, as well as the consequences of a party's default. Notably, in the absence of specific procedural rules, the tribunal may conduct the arbitration in such a manner as it considers appropriate (Section 1042(4) ZPO).

The parties may amend or deviate from most statutory procedural rules by agreement. The German arbitration law expressly allows a set of arbitration rules to be referred to (Section 1042(3) ZPO). The DIS Rules, for example, contain rules that provide a more detailed regulation of arbitral procedure.

7.2 Procedural Steps

Party autonomy is the governing principle of the German arbitration law. The few mandatory principles (see **7.1 Governing Rules**) and the provisions of the German arbitration law are aimed at safeguarding due process.

In the absence of specific agreements by the parties, the default procedure established by

the German Code of Civil Procedure governs the basic steps of an arbitration.

Arbitral proceedings are commenced on the date the respondent receives a request for arbitration that states the name of the parties and the matter in dispute, and refers to the arbitration agreement (Section 1044 ZPO). Afterwards, within a time period to be set by the tribunal, the statement of claim and the statement of defence must be submitted (Section 1046(1) ZPO). The tribunal then has discretion to conduct the arbitral proceedings without an oral hearing, unless requested by a party (Section 1047(1) ZPO). Failing an agreement between the parties, any further issue concerning the procedure is left to the discretion of the tribunal (Section 1042(4) ZPO).

7.3 Powers and Duties of Arbitrators

Under the German arbitration law, there are only a few procedural rules, and the organisation of the proceedings is mostly left to the discretion of the tribunal (see also **7.1 Governing Rules**). Thus, German law confers substantial powers on arbitrators.

German law does not explicitly set out the duties of an arbitrator. However, the grounds for the challenge of an arbitrator (Section 1036 ZPO) do indirectly impose certain restrictions. In particular, an arbitrator must be impartial and independent, and must disclose any circumstances likely to give rise to doubts as to the arbitrator's impartiality or independence.

The obligation of the arbitrator to remain impartial and independent of the parties throughout the entire proceedings is also stated in Article 9 DIS Rules. In addition, the DIS Rules prohibit the arbitrators from disclosing to anyone any information concerning the arbitration, including, in particular, the existence of the arbitration, the names of the parties, the nature of the claims, the names of any witnesses or experts, any procedural orders or awards and any evidence that is not publicly available (Article 44 DIS Rules).

7.4 Legal Representatives

Under the German arbitration law, there are neither particular qualifications nor requirements necessary to act as a legal representative in arbitration proceedings. However, it expressly provides that lawyers cannot be excluded from acting as authorised representatives during arbitral proceedings (Section 1042(2) ZPO).

8. EVIDENCE

8.1 Collection and Submission of Evidence

First, the parties determine the procedure of the arbitration (Section 1042(3) ZPO). This includes the collection and submission of evidence.

The parties are free to decide whether the facts of the case should be established in a civil law-style procedure of a tribunal actively managing and conducting the evidentiary proceedings or in the adversarial Anglo-American style. Also, any restrictions as to the admissible evidence, how it should be weighed and what standard of proof the tribunal should apply are subject to the party autonomy.

Should the parties not agree on procedural rules, the arbitral tribunal has a wide discretion to determine the procedure. Section 1042(4) ZPO stipulates that the arbitral tribunal shall conduct the arbitration in such a manner, as it considers appropriate. However, it must ensure the parties' right to a fair hearing and the opportunity to present their case as part of the ordre public. As long as these principles are respected, arbitral tribunals are authorised to decide on the admissibility of the taking of evidence, to take evidence and to assess the results at their sole discretion. In particular, general provisions of the

German civil court procedure as laid down in the ZPO do not bind arbitral tribunals, as these are not applicable in arbitral proceedings.

As Germany is a civil law jurisdiction, arbitral tribunals influenced by German legal tradition usually take a more prominent role in deciding which evidence is relevant.

Arbitral tribunals are also often guided by the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules), especially in international proceedings. The discovery/disclosure stage resulting from the application is a foreign element in the German legal system. The Redfern Schedule is customary for the implementation, although due to the German background, the granting of applications is rather restrained. Given the more civil-law-influenced approach of the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), German arbitrators more and more take them into account.

Both witness statements and cross-examinations are alien to the German ZPO. In this respect, it is up to the parties or the arbitral tribunal to decide how to conduct the proceedings. However, in international proceedings, it is customary and generally accepted in Germany to submit witness statements and conduct cross-examination.

As German law does not provide for a general disclosure obligation, there is no specific doctrine regarding privilege of documents. However, a few substantive law provisions exist. In the event that a tribunal orders a discovery or disclosure – eg, relying on the IBA Rules – it should at the same time address the issue of privilege and should make sure that a level playing field for the parties exists; frequently this will lead to applicability of the higher standard of protection to both parties.

In general, tribunals are also allowed to rely on their own knowledge in determining the relevant facts, as arbitrators are chosen for their expertise. Unless the parties agreed otherwise, the arbitral tribunal may appoint experts to draft reports regarding specific factual questions of the case. The tribunal may also ask the parties to provide the experts with the information – ie, documents or objects – they might need to evaluate such questions. If one party does not meet this request, the arbitral tribunal may draw negative inferences.

8.2 Rules of Evidence

The ZPO does not provide any specific rules of evidence for arbitration proceedings nor is the arbitral tribunal bound by the rules of evidence that apply to state courts. Nevertheless, the arbitral tribunal has to comply with the rules of evidence according to the ordre public, especially the parties' right to be heard and the opportunity for each to present its case. If the latter standard is not met, the arbitral award can be set aside by a state court (see **11.1 Grounds for Appeal**).

In the absence of an agreement between the parties, "soft law", such as the IBA Rules and/or the Prague Rules, will regularly guide arbitral tribunals.

It should be noted that under the DIS Rules, the arbitral tribunal is not limited to the evidence offered by the parties. Rather, it has the right to appoint experts, to examine fact witnesses other than those called by the parties on its own initiative and to order any party to produce or make available any documents or electronically stored data (Article 28.2 DIS Rules).

8.3 Powers of Compulsion

Arbitral tribunals may order the appearance of witnesses or the production of documents. However, they do not have any sovereignty or powers to compel this and cannot administer

oaths on their own. Tribunals rather attempt to reach agreements with the parties in order to ensure the availability of the persons involved. In the event of a refusal to produce documents or the non-appearance of witnesses, the arbitral tribunal may draw negative inferences therefrom.

However, Section 1050 ZPO allows tribunals or one party with the consent of the tribunal to refer to the state courts with a request for assistance. State courts can assist in the taking of evidence or with actions reserved for judges. The court shall assist the arbitral tribunal if it considers the application admissible. However, the court is bound to the general German procedural law when providing judicial assistance, which means that only the procedures for taking evidence provided for in the ZPO are available. A discovery is therefore impossible for lack of a legal basis. However, it is possible to require the attendance of witnesses or experts, to have a witness testify under oath or to serve public notice. The arbitrators are entitled to take part in a judicial taking of evidence and to ask questions.

The local court (*Amtsgericht*) is competent for such measures (Section 1062(4) ZPO). All decisions are taken in the form of an order (Section 1063(1) ZPO). Generally, no oral hearing is required.

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

There are no explicit regulations in German law regarding privacy and confidentiality in arbitral proceedings.

In contrast to ordinary court proceedings, arbitral proceedings are generally conducted in private, unless agreed otherwise by the parties. As this is generally accepted in principle, the limits are unclear. This may concern, for example, advisers to the parties (not party representatives) or assistants to the arbitral tribunal.

The confidentiality of proceedings is more ambiguous. On the one hand, a general consensus exists that arbitrators are bound by a duty of confidentiality towards the parties. Arbitrators also have the duty to keep the deliberations of the arbitral tribunal confidential. In fact, the Higher Regional Court of Frankfurt recently suggested in an obiter dictum that an award entailing a dissenting opinion violated the confidentiality of the deliberations of the tribunal, being part of procedural public policy, and most likely would be set aside.

On the other hand, there is no specific statutory provision imposing an obligation of confidentiality upon the parties. The parties are free to decide on a confidentiality clause or refer to their chosen institutional rules. In the absence of a party agreement, it is highly controversial whether a far-reaching confidentiality agreement can be implied. The majority of German commentators deny this, although the number of supporters is increasing.

Article 44.1 DIS Rules provides that, unless the parties agree otherwise, persons involved in the arbitration shall not disclose to anyone any information concerning the arbitration, including, in particular, the existence of the arbitration, the names of the parties, the nature of the claims, the names of any witnesses or experts, any procedural orders or awards and any evidence that is not publicly available.

10. THE AWARD

10.1 Legal Requirements

Arbitral awards rendered in proceedings having the seat of arbitration in Germany must meet the

following requirements concerning the form and the content (Section 1054 ZPO):

- the arbitration award has to be in writing and be signed by the arbitrator(s);
- signing by the majority of arbitrators is sufficient if the grounds for the missing signature are provided;
- the award must be reasoned, unless otherwise agreed on by the parties or it is an award by consent;
- it is not mandatory to give an account of the facts of the dispute, although this, of course, is regularly appropriate and therefore common;
- the award shall also state the date of the decision and the place of arbitration; and
- recitals are not required, but as identification of the parties is a prerequisite for the enforcement, parties must be clearly identified.

A signed arbitration award is to be transmitted to each of the parties, but the ZPO does not stipulate any time limits on delivery of the award. The delivery of a copy of the original is sufficient, as long as such copy bears the necessary original signatures.

Without the mandatory formalities (written form, including reasons and signature), no award is rendered, which forecloses a declaration of enforceability. Where the date or the place of arbitration is not stated and cannot be deduced by interpretation, the award is not null and void, but rather it is up to the courts to determine it.

10.2 Types of Remedies

German law does not provide any exhaustive list of legal remedies that can be awarded in arbitral proceedings. In practice, these will be very much the same as in state court proceedings, but arbitral tribunals have more liberty. However, it is not possible to award punitive damages in Germany. According to the German Federal Court of Justice (*Bundesgerichtshof*), punitive damages lead to an infringement of the German ordre public.

The arbitral tribunal can also grant measures of temporary relief, unless the parties have agreed otherwise (see **6.1 Types of Relief**).

German courts, however, will not issue any anti-suit injunctions.

10.3 Recovering Interest and Legal Costs

The parties may agree whether and to what extent the tribunal may award the reimbursement of costs. This is usually done by reference to institutional arbitration rules; individual agreements are rare.

Unless the parties to the dispute have agreed otherwise, the arbitral tribunal decides in its award on the allocation of costs. This includes legal fees that were necessary to conduct the proceedings. The arbitral tribunal shall decide after having duly taken into account the circumstances of the individual case, in particular the outcome of the proceedings (Section 1057(1) ZPO). Accordingly, arbitral tribunals regularly decide according to the principle “costs follow the event”, which also applies in German state court litigation, but are expressly not limited to it.

Whether a party is entitled to interest is not regulated in German procedural law (apart from restitution claims for costs in state court proceedings), but under German law it is a matter of the substantial law applicable to the main claim. As far as German law is applicable, the following principles apply.

A debtor has to pay interest during his or her default to settle a payment claim (Section 288 BGB). This amounts to either five or nine percentage points above the base interest rate; the higher rate applies solely to remuneration claims

(*Entgeltforderung*) if no consumer is involved in the transaction. By contrast, it is controversial whether interest also accrues from the day the request for arbitration became pending, as provided for in the BGB for state court litigation (Section 291 BGB).

It is also uncertain whether the costs for in-house counsel are eligible for reimbursement. On the one hand, it is argued that this work could also be outsourced to external lawyers, leading to the possibility of compensation. Others argue that these costs are missing a causal link (costs incurring anyway).

The DIS also adjusted the rules on costs. The tribunal may make decisions, including interim decisions, concerning the costs of the arbitration at any time during the course of the arbitration (Article 33.1 DIS Rules). It shall also decide on the allocation of the costs between the parties (Article 33.2 DIS Rules). The arbitral tribunal has discretion and shall take into account all relevant circumstances. Such circumstances may include the outcome of the arbitration and the extent to which the parties have conducted the arbitration efficiently (Article 33.3 DIS Rules). This potential cost sanction shall encourage parties to conduct arbitration proceedings efficiently.

The costs of the arbitration shall include the arbitrators' fees and expenses as well as the fees of any expert appointed by the arbitral tribunal; the reasonable costs of the parties incurred in connection with the arbitration, including legal fees, fees of experts and expenses of any witnesses; and the administrative fees (Article 32 DIS Rules).

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

German law does not provide for an appeal against awards. Awards are final. However, parties are free to provide for an appeal in their arbitration agreement. Both the scope (pure legal review or complete factual reassessment) and the requirements, such as a time limit and form, can be determined. Such agreements are very rare, but have been recognised by German courts.

The setting aside of an arbitral award pursuant to Section 1059 ZPO is not an appeal, as the merits of the decision are not reviewed (no *révision au fond*).

An award rendered by a tribunal seated in Germany may only be challenged by an application to set aside the award (Section 1059(1) ZPO). The request generally must be submitted within three months of receipt. The Higher Regional Court (*Oberlandesgericht*) chosen by the parties or at the seat of arbitration is competent (Section 1062(1) No 4 ZPO). There is no concentration of setting-aside proceedings in just one court.

The setting aside of an arbitral award can only be based on an exhaustive list of grounds for setting aside (see Section 1059(2) ZPO). These are based on the UNCITRAL Model Law, distinguishing two categories: grounds to be invoked by the applicant and grounds to be observed ex officio.

Irrespective of a complaint by the applicant, the court must always take into account:

- whether the subject matter in dispute is arbitrable under German law; and
- whether the recognition or enforcement of the award leads to a result contrary to public policy (ordre public).

The applicant may further assert that:

- one of the parties to the arbitration agreement did not have the capacity to enter into the agreement or that the arbitration agreement is invalid; or
- it was not properly notified of the appointment of an arbitrator, or of the arbitration proceedings, or that it was unable to present its case; or
- the award concerns a dispute not mentioned in the arbitration agreement, or not subject to the provisions of that clause, or that it contains decisions that are beyond the scope of the arbitration agreement; or
- the formation of the tribunal or the arbitration proceedings did not correspond to a provision of the German arbitration law or to an admissible agreement between the parties and that this presumably had an effect on the award.

If an award is set aside – in case of doubt – the arbitration agreement once again will enter into force concerning the subject matter of the dispute (Section 1059(5) ZPO). Upon request and if considered appropriate by the court, the dispute is referred back to the initial tribunal, unless otherwise agreed by the parties.

Parties may file a legal complaint on points of law (*Rechtsbeschwerde*) against the decision of the Higher Regional Court with the Federal Court of Justice (Section 1065(1), 1062(1) No 4 ZPO).

Parties are not obliged to initiate a setting-aside procedure. They can wait for the procedure for a declaration of enforceability (see **12.2 Enforcement Procedure**) to be carried out and obtain the rejection of the declaration of enforceability and the setting aside of the arbitral award.

Furthermore, tribunals can correct, interpret or change arbitral awards within the scope of Section 1058 ZPO. The arbitral tribunal may correct spelling errors or grammatical mistakes, interpret specific parts of the award and amend the award regarding claims that requested but not decided in the award. This requires a request by a party.

11.2 Excluding/Expanding the Scope of Appeal

Parties cannot agree on further grounds for a setting aside. The list is exhaustive and intended to ensure limited judicial review.

Similarly, a general waiver prior to the application for annulment is not effective. A review of the arbitral award by state courts to secure the parties against arbitrariness and unjustifiable infringements remains mandatory.

Whether individual reasons can be effectively excluded is controversial. The prevailing opinion is that a waiver of the grounds to be taken into account by the court is only admissible after the award has been rendered and the waiving party has knowledge of the ground for setting aside. The reasons to be taken into consideration ex officio are not subject to the party's disposition.

11.3 Standard of Judicial Review

German courts do not review the merits of a case (no *révision au fond*). When reviewing an award, the state court is limited to those grounds for setting aside that are enumerated in Section 1059(2) ZPO.

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

Germany signed the New York Convention in 1958 and ratified it in 1961.

In August 1998, the government of Germany withdrew its initial reservation made upon ratification of the Convention under Article I(3). German courts now enforce foreign arbitral awards even in the absence of reciprocity.

Other International Treaties

In addition, Germany is a member of the Geneva Convention (European Convention on International Commercial Arbitration 1961) and the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States). Germany is also a party to more than 130 bilateral investment protection agreements as well as multilateral conventions such as the Energy Charter Treaty.

Germany, being an EU member state, in 2020 signed the treaty for the termination of intra-EU bilateral investment treaties (BITs) (not applying to the ECT) as a consequence of the judgment of the Court of Justice in Achmea. For Germany, it entered into force on 9 June 2021. Germany formerly was party to ten intra-EU BITs. It remains to be seen how this unilateral termination, especially of the sunset clauses, will affect pending and future arbitrations under intra-EU BITs. At the end of 2021, the Federal Court of Justice (*Bundesgerichtshof*) confirmed that intra-EU investor-state arbitration is incompatible with EU law.

12.2 Enforcement Procedure

The New York Convention governs the recognition and enforcement of foreign arbitral awards (Section 1061(1) ZPO). The foreign arbitral award must have become binding in accordance with the provisions of the state of origin.

The recognition requires an application by a party to the competent Higher Regional Court. From a formal point of view, the application has to comply with the German requirements, which are not as strict as those set out in Article IV(1) (a) and (b) New York Convention.

The court merely examines whether there is a ground for refusal according to Article V New York Convention. Neither the substantive correctness nor the enforceability is subject to examination. The court is not bound by any findings of fact nor, a fortiori, by any legal opinions of the foreign arbitral tribunal.

If there is a ground for refusal under Article V of the New York Convention, the court shall refuse recognition. There is no discretion, and the court states that the arbitral award is not to be recognised in Germany.

By an order granting recognition and enforceability, the award becomes enforceable if the provisional enforceability had been ordered or no legal remedy has been filed against the order.

Parties have the right to file a legal complaint on points of law (*Rechtsbeschwerde*) against the decision of the Higher Regional Court with the Federal Court of Justice (Section 1065(1) ZPO).

No Enforcement of Award Set Aside at the Seat of Arbitration

German courts will generally refuse to enforce a foreign award set aside at the seat of arbitration.

The declaration of enforceability of domestic awards is regulated separately (Section 1060 ZPO). The declaration of enforceability must only be refused if there is a ground for setting aside according to Section 1059(2) ZPO (Section 1060(2) ZPO).

Effect of Pending Setting-Aside Procedures at the Seat of Arbitration

Pending setting-aside procedures are not a ground to deny recognition and enforcement. The German Federal Court of Justice clarified

that an award is also binding on the parties when a setting-aside procedure is still available. Also, at least two Higher Regional Courts have ruled that even pending setting-aside procedures are no ground to deny the declaration of enforceability, which is also backed by German scholars.

However, Article VI New York Convention allows the recognition proceeding to be adjourned as there is the risk of contradictory decisions. Based on the plain language, the court can consider an adjournment not only upon a party's request but also of its own accord. The court has a very wide discretion, which refers on the one hand to whether the proceedings are adjourned at all and on the other hand to whether the suspension is only granted against the provision of security by the opposing party. The provision does not specify criteria for the exercise of discretion. According to the German understanding of an autonomous interpretation, the intention of the New York Convention to facilitate the recognition of arbitral awards must be preserved. For that reason, the opposing party must show that the grounds for setting aside asserted by it are actually expected to succeed. Besides the prospects of success of the foreign proceedings, the duration of the proceedings in the foreign court and the consequences of enforcement or prevented enforcement, as well as mitigation through the provision of security, must be balanced.

If the award is set aside in another country after the award has been declared enforceable in Germany, it is admissible to apply for the setting aside of the declaration of enforceability (Section 1061(3) ZPO). At least one German court argued that the legislative evaluation of said provision shows that the legislator explicitly allowed courts to issue a declaration of enforceability in spite of pending annulment proceedings.

State Immunity

In principle, according to German understanding, by entering into an arbitration agreement a state waives its state immunity for the purposes of the proceedings. German courts have also accepted this waiver of enforceability proceedings before a German court. Of course, this presupposes that the dispute is subject to the arbitration clause, which is examined by German courts. Immunity in enforcement proceedings is assessed independently. The Federal Constitutional Court (*Bundesverfassungsgericht*) distinguished between sovereign and non-sovereign assets. The immunity only covers objects that have a sovereign function; economically used goods are subject to enforcement.

12.3 Approach of the Courts

Current practice shows that denial of the recognition and enforcement of a foreign award is limited to exceptional cases. Also, the violation of public policy is only very cautiously assumed. The Federal Court of Justice rather applies a more generous international public policy. Public policy (ordre public) precludes the recognition and enforcement of an arbitral award in Germany if its recognition or enforcement leads to a result that is "manifestly" incompatible with fundamental principles of German law. This is the case if the arbitral award violates fundamental rights or is in an intolerable contradiction to German ideas of justice. This may be the case both in procedural terms (insufficient representation, violation of the right to be heard) or in substantive terms (violation of accepted principles of morality). This, for example, has been assumed for punitive damages.

13. MISCELLANEOUS

13.1 Class Action or Group Arbitration

German law does not provide for any class-action arbitration or group arbitration, as also in

state court proceedings there is no such tradition. Since arbitration agreements with consumers must be contained in a separate document signed by the parties themselves, business-to-customer arbitration proceedings are de facto non-existent.

The DIS Rules 2018 include Supplementary Rules for Corporate Law Disputes as Annex 5, regulating procedures used in arbitrations involving shareholder disputes. However, this kind of collective arbitral proceeding has a limited scope and will only come into place if the parties made reference to this set of rules in the arbitration agreement in or outside the statutes of the company.

13.2 Ethical Codes

German law does not provide for any specific ethical code applicable in arbitration proceedings. Rather, the arbitrators and counsel are subject to the regulations applicable in their respective home jurisdictions and any ethical code agreed by the parties (and eventually issued by the arbitration institution administering the proceedings).

German attorneys admitted to the Bar, whether acting as arbitrators or as counsel, must comply with the professional standards and provisions of the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung*). These provisions, however, do not apply to foreign lawyers who are involved in arbitration proceedings in Germany.

13.3 Third-Party Funding

The German arbitration law does not regulate third-party funding. Third-party funding, which has a long tradition in state court proceedings, is generally permissible. There is also no statutory disclosure obligation. In individual cases, disclosure may be indicated if this circumstance becomes relevant for the decision – eg, in the case of cost guarantees or the assessment of an arbitrator's independence.

13.4 Consolidation

The German arbitration law does not regulate the consolidation of separate arbitral proceedings, neither by tribunals, nor by courts. A consolidation would only be possible if the parties explicitly consent to it or if it is provided by the applicable institutional rules; also, the arbitrators would need to consent.

Parties are free to provide for consolidation in their arbitration agreement or to refer to rules allowing for consolidation. For example, the DIS Rules contain a rule on consolidation (Article 8.1 DIS Rules). It is required that the proceedings to be consolidated have been carried out under the DIS Rules and that all parties to all arbitrations agree on the consolidation. Considerations of appropriateness are not relevant.

13.5 Binding of Third Parties

See **5.7 Jurisdiction Over Third Parties**.

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