

ARBITRATION IN GERMANY

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1. Historical background and legislative framework

- 1.1.1 Germany's arbitration law in its current form entered into force on 1 January 1998. It largely follows the structure and the wording of the Model Law (1985)¹ and is the result of a reform process that was initiated in the late 1980s and early 1990s.² The main purpose of the reform was to modernise German arbitration law on the basis of the Model Law (1985) and to improve Germany's position internationally as a suitable seat for arbitral proceedings.³
- 1.1.2 German arbitration law is set out in the Tenth Book⁴ of the Code of Civil Procedure (*Zivilprozessordnung (ZPO)*).⁵ A comprehensive English commentary on the German law of arbitration was published in 2007.⁶

2. Scope of application and general provisions of the ZPO

2.1 Structure of the law

- 2.1.1 Sections 1025-1066 of the ZPO apply to ad hoc arbitrations as well as to arbitrations administered by institutions such as the DIS, ICC, LCIA or ICDR.

2.2 General principles

- 2.2.1 The ZPO applies if the seat of arbitration is situated in Germany, regardless of whether the dispute is international or domestic in nature.⁷ Certain provisions even apply if the seat of arbitration is located outside of Germany or is yet to be determined.⁸

¹ See CMS Guide to Arbitration, vol II, appendix 2.1.

² J Münch in *Münchener Kommentar ZPO* (3rd Edition, 2008) before paras 1025 et seq, recital 114.

³ See *ibid*, recital 112.

⁴ ZPO, paras 1025-1066.

⁵ The German (official) text of the Tenth Book of the ZPO is accessible on the internet [<http://www.bundesrecht.juris.de/bundesrecht/zpo/gesamt.pdf>] (accessed 7 December 2011). Private but reliable translations into English, French, Spanish, Russian and Mandarin are provided by the DIS [<http://www.dis-arb.de/en/51/materials/overview-id0>] (accessed 7 December 2011).

⁶ Böckstiegel/Kröll/Nacimiento, *Arbitration in Germany: The Model Law in Practice* (2007).

⁷ ZPO, s 1025(1).

⁸ *Ibid*, s 1025(2).

- 2.2.2 The ZPO supports and promotes party autonomy in arbitration.⁹ The parties can agree on the procedure to be followed by individual agreement or by reference to the arbitration rules of an arbitral institution. The only limitation is that such agreements must not conflict with any of the small number of mandatory provisions as set out below:
- application of the German arbitration law to arbitral proceedings where the seat of arbitration is situated in Germany;¹⁰
 - determination of the validity of the arbitration agreement by state courts;¹¹
 - right of recourse to the state courts if the arbitration agreement disadvantages one party regarding the constitution of the arbitral tribunal;¹²
 - right to request a state court’s decision on a challenge of an arbitrator if the arbitral tribunal has previously rejected the challenge;¹³
 - enforcement of interim protective measures;¹⁴
 - parties have to be treated equally and each party shall be given a full opportunity to present its case;¹⁵ and
 - counsel may not be excluded from acting as an authorised representative.¹⁶ Pursuant to this provision, an agreement by the parties that they may not be represented in arbitral proceedings by counsel admitted to the bar in Germany is invalid. It also applies to counsel admitted in other jurisdictions.¹⁷

3. The arbitration agreement

3.1 Definitions

- 3.1.1 Section 1029 of the ZPO provides a statutory definition of “arbitration agreement” (*Schiedsvereinbarung*), which is defined as: “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.¹⁸ Such an agreement may be in the form of a separate agreement (*Schiedsabrede*) or in the form of a clause in a contract (*Schiedsklausel*).¹⁹

⁹ *Ibid*, s 1042(3).

¹⁰ *Ibid*, s 1025.

¹¹ *Ibid*, s 1032.

¹² *Ibid*, s 1034(2).

¹³ *Ibid*, s 1037(3).

¹⁴ *Ibid*, s 1041(2) and (3).

¹⁵ *Ibid*, s 1042(1).

¹⁶ *Ibid*, s 1042(2).

¹⁷ See K Sachs/T Lörcher in Böckstiegel/Kröll/Nacimiento, *Arbitration in Germany: The Model Law in Practice* (2007), s 1042, recitals 20-23.

¹⁸ ZPO, s 1029(1).

¹⁹ *Ibid*, s 1029(2).

3.2 Formal requirements

- 3.2.1 Arbitration agreements must satisfy relatively few formal requirements.²⁰ Arbitration agreements are valid if they are contained in a document signed by the parties or in an exchange of written communications between the parties such as letters, telefaxes, telegrams, or other means of telecommunication or electronic communication (including emails) which provide a record of the arbitration agreement.²¹
- 3.2.2 In addition, an arbitration agreement can be contained in a document signed by the parties which refers to an arbitration clause contained in another document.²² For example, an agreement or an exchange of correspondence can refer to one of the parties' standard terms and conditions, which provide for arbitration. Depending on the circumstances of the case, this will constitute a valid incorporation of the arbitration agreement into the contract.

3.3 Special tests and requirements of the jurisdiction

- 3.3.1 In principle, any claim concerning an economic interest can be the subject of an arbitration agreement.²³ Private disputes in competition law matters may also be referred to an arbitral tribunal including, for example, disputes arising out of an agreement regarding restrictive trade practices. The German Federal Supreme Court (**BGH**) ruled in 2009 that applications to set aside shareholders' resolutions adopted at a general meeting of a limited liability company, (*Gesellschaft mit beschränkter Haftung*), may be subject to arbitration if certain formal and procedural requirements are observed.²⁴ However, certain matters relating to issues such as family law (e.g. divorce) are not arbitrable.

3.4 Separability

- 3.4.1 German law follows the doctrine of separability. It provides that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.²⁵

3.5 Legal consequences of a binding arbitration agreement

- 3.5.1 A binding arbitration agreement establishes the arbitral tribunal's jurisdiction²⁶ and entitles each party to object pursuant to Section 1032(1) of the ZPO if a state court

²⁰ See the requirements provided by ZPO, s 1031.

²¹ *Ibid*, s 1031(1).

²² *Ibid*, s 1031(3).

²³ *Ibid*, s 1030(1).

²⁴ BGH judgment of 6 April 2009, II ZR 255/08, Neue Juristische Wochenschrift 2009, at p 1962 *et seq*.

²⁵ ZPO, s 1040(1).

²⁶ W Voit in H-J Musielak, ZPO (8th Edition, 2011) s 1029, recital 26.

is seized with the same subject matter.²⁷ It is, however, the parties' responsibility to raise that objection, since the court will not consider an arbitration agreement of its own motion.²⁸

- 3.5.2 Additionally, entering into an arbitration agreement establishes a "duty of loyalty",²⁹ whereby the parties are obliged to support the arbitral proceedings and to abstain from abusive litigation tactics.³⁰

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

- 4.1.1 The parties are free to determine the number of arbitrators that will constitute the arbitral tribunal. In the absence of any agreement, the arbitral tribunal shall be composed of three arbitrators.³¹ The parties are also free to agree on a procedure regarding the appointment of the arbitrator(s).³² In an arbitration with three arbitrators each party typically appoints one arbitrator and the two party-appointed arbitrators then appoint the third arbitrator, who acts as chair of the arbitral tribunal.³³ If a party fails to appoint an arbitrator or if the party-appointed arbitrators cannot agree on the third arbitrator, each party may request the Higher Regional Court (*Oberlandesgericht (OLG)*), with local jurisdiction at the seat of arbitration to make the appointment.³⁴ The same applies where the parties have agreed that the arbitral tribunal shall consist of a sole arbitrator but cannot reach an agreement on the appointment. In the event that the seat of arbitration has not yet been determined, the German courts will have jurisdiction if either party has its place of business or habitual residence in Germany,³⁵ unless the parties have agreed otherwise.

4.2 Procedure for challenging and substituting arbitrators

- 4.2.1 An arbitrator may only be challenged if circumstances exist which give rise to justifiable doubts as to the impartiality or independence of the arbitrator or if the

²⁷ P Schlosser in Stein/Jonas, *ZPO Kommentar zur Zivilprozessordnung*, Vol 9 (22nd Edition, 2002) s 1029, recital 27.

²⁸ See *ibid*, s 1032, recital 1; and W Voit in Musielak, *ZPO* (8th Edition, 2011) s 1032, recital 7.

²⁹ P Schlosser in Stein/Jonas, *ZPO Kommentar zur Zivilprozessordnung*, Vol 9 (22nd Edition, 2002) s 1029, recital 30.

³⁰ J Münch in *Münchener Kommentar ZPO* (3rd Edition, 2008) s 1029, recital 117; and W Voit in Musielak, *ZPO* (8th Edition, 2011) s 1029, recital 26.

³¹ ZPO, s 1034(1).

³² *Ibid*, s 1035(1).

³³ *Ibid*, s 1035(3).

³⁴ *Ibid*, s 1035(3) and 1062(1).

³⁵ *Ibid*, s 1025(3) and 1062(3).

arbitrator does not fulfill the requirements or does not have the qualifications agreed on by the parties.³⁶

- 4.2.2 The parties may agree on their own procedure for challenging an arbitrator.³⁷ Arbitral institutions usually have provisions in their rules dealing with the challenge of arbitrators. In ad hoc arbitrations under German arbitration law, the arbitral tribunal itself or, as the last resort, the state courts, decide on challenges made against an arbitrator.³⁸
- 4.2.3 Pending the outcome of the challenge proceedings, the arbitral tribunal (including the arbitrator subject to the challenge) may continue the arbitral proceedings and may render an award but any such award may subsequently be set aside if the challenge is successful.³⁹ Arbitrators' mandates can be terminated if they fail to act without undue delay.⁴⁰
- 4.2.4 If an arbitrator's mandate is terminated (by challenge, resignation, dismissal or death), a substitute arbitrator shall be appointed.⁴¹ The rules that apply to the appointment of a substitute arbitrator are the same as those applicable to the appointment of the replaced arbitrator, unless the parties have agreed otherwise.

4.3 Responsibilities of an arbitrator

- 4.3.1 A person nominated to act as an arbitrator must disclose all circumstances that could give rise to justifiable doubts as to his or her impartiality or independence.⁴² The arbitrator must also immediately disclose any such circumstances if they arise after appointment and during the arbitral proceedings. The IBA Guidelines on Conflicts of Interest in International Arbitration (2004) provide useful advice on what circumstances may give rise to doubts of an arbitrator's impartiality. In practice, the parties will usually make appropriate enquiries about the arbitrators at the beginning of arbitral proceedings. For a challenge to be successful, it does not matter whether the arbitrator was actually impartial and independent. It must only be shown that a reasonable party could have justifiable doubts regarding the impartiality and/or independence of the arbitrator on the basis of the particular circumstances of the case.

³⁶ *Ibid.*, s 1036(2).

³⁷ *Ibid.*, s 1037(1).

³⁸ *Ibid.*, s 1037(3).

³⁹ *Ibid.*, s 1037(3) and 1059(2).

⁴⁰ *Ibid.*, s 1038(1).

⁴¹ *Ibid.*, s 1039(1).

⁴² *Ibid.*, s 1036(1).

4.4 Arbitration fees and expenses

- 4.4.1 German arbitration law distinguishes between the arbitration agreement by which the parties submit their dispute to the decision of an arbitral tribunal and the arbitrators' agreement. The arbitrators' agreement deals with the contractual relationship between the parties and the arbitrators. It is therefore concerned, in particular, with issues such as the payment of the arbitrators' fees and the reimbursement of their expenses. The ZPO is silent on this issue. The arbitrators' agreement is simply regarded as a contract for the supply of services under the general rules of the German Civil Code, (*Bürgerliches Gesetzbuch (BGB)*).
- 4.4.2 Under German law, there will be an implied separate arbitrators' agreement if the arbitration is conducted ad hoc or for example pursuant to the DIS Arbitration Rules. Under the DIS Arbitration Rules, the DIS will appoint the arbitrators and conclude the implied arbitrators' agreement with the arbitrators on behalf of the parties. The arbitrators' fees in such cases are determined in accordance with the fee scales of the DIS Arbitration Rules. By contrast, if the arbitrators are appointed by the ICC, the implied arbitrators' agreement is concluded between the ICC and the arbitrator(s).

4.5 Arbitrator immunity

- 4.5.1 In Germany, arbitrators are liable to the parties in the same way as court judges. The law does not contain any explicit provision to this effect, but it is an implied term of the arbitrators' agreement unless there is an agreed term to the contrary. In particular, arbitrators are liable for the erroneous application of the law under the same conditions that apply to court judges (i.e. if the erroneous application constitutes a deliberate criminal offence).⁴³ An arbitrator may also be liable for negligence under the general rules of the law of obligations (e.g. where he or she, in violation of Section 1036 of the ZPO, fails to disclose circumstances giving rise to doubts as to his or her impartiality or independence and if this causes additional cost or delay). In practice such claims are rare.

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

- 5.1.1 The arbitral tribunal may rule on its own jurisdiction (*competence-competence*) and on the existence and validity of the arbitration agreement.⁴⁴ Objections to the jurisdiction of the arbitral tribunal must be made no later than upon submission of

⁴³ Section 839(2) of the BGB; P Reinert in Bamberger/Roth, *BeckOK BGB* (20th Edition, 2011) s 839, recital 95.

⁴⁴ ZPO, s 1040(1).

the statement of defence.⁴⁵ Otherwise the right to object to the arbitral tribunal's jurisdiction may be precluded.⁴⁶

- 5.1.2 If the arbitral tribunal rules that it has no jurisdiction, this decision is final. If, on the other hand, the arbitral tribunal considers that it has jurisdiction, each party can apply for a decision from the OLG with local jurisdiction where the seat of arbitration is located.⁴⁷ If the arbitral tribunal has confirmed its jurisdiction, it can continue the arbitral proceedings regardless of whether or not a party has requested the OLG to decide on the arbitral tribunal's jurisdiction. It can also make an award while the request is pending.⁴⁸ This rule is intended to prevent a party from delaying arbitral proceedings by applying to the court and corresponds to the rules applicable to the challenge of arbitrators. If the court subsequently finds that the arbitral tribunal did not have jurisdiction, any award made in the meantime may be set aside following an application by one of the parties.⁴⁹

5.2 Power to order interim measures

- 5.2.1 The arbitral tribunal may order protective interim measures.⁵⁰ At the request of a party, it may repeal or amend such measures.⁵¹ If an interim measure proves to have been unjustified from the outset, the party who obtained that order is obliged to compensate the other party for any losses it suffered as a result of the order.⁵² A claim for damages may be included in the pending arbitral proceedings.⁵³
- 5.2.2 An interim measure ordered by the arbitral tribunal will not be automatically enforceable but requires enforcement to be granted by the courts.⁵⁴ Jurisdiction for enforcement applications lies with the OLG.⁵⁵ Upon application by a party, the court can also set aside or modify an interim measure ordered by the arbitral tribunal.

⁴⁵ *Ibid.*, s 1040(2).

⁴⁶ *Ibid.*, s 1040(2) and 1027.

⁴⁷ *Ibid.*, s 1040(3).

⁴⁸ *Ibid.*

⁴⁹ ZPO, s 1059(2).

⁵⁰ *Ibid.*, s 1041(1).

⁵¹ *Ibid.*, s 1041(3).

⁵² *Ibid.*, s 1041(4).

⁵³ *Ibid.*

⁵⁴ ZPO, s 1041(2).

⁵⁵ *Ibid.*, s 1062(1).

5.2.3 Instead of requesting an interim measure from the arbitral tribunal, a party may also apply to the courts in accordance with the general provisions on protective interim measures⁵⁶ and ask for an attachment order⁵⁷ or an interim injunction.⁵⁸ In deciding whether to apply for an interim measure to the courts or to the arbitral tribunal, it is important to note that, as mentioned above, the arbitral tribunal's order can only be enforced after enforcement has been granted by the court.

6. Conduct of proceedings

6.1 Commencing an arbitration

6.1.1 Unless otherwise agreed by the parties, the arbitral proceedings commence on the date on which a request for arbitration is received by the respondent.⁵⁹ The ZPO only requires the request to contain the names of the parties, the subject matter of the dispute and a reference to the arbitration agreement.⁶⁰ However, the request may, and usually does, contain details of the facts, legal arguments and evidence in support of the claim. Service of the request for arbitration suspends the limitation period. The parties may deviate from this procedure by agreement. In particular, the rules of the various arbitral institutions regularly contain provisions on the commencement of arbitral proceedings that deviate from this position.

6.1.2 Within the period agreed by the parties or determined by the arbitral tribunal, the claimant must complete its statement of claim and the respondent must serve its statement of defence.⁶¹ Each party may change or amend its written submissions in the course of the proceedings.⁶² The same provisions also apply to counterclaims.⁶³ If a counterclaim relates to subject matters which exceed the scope of the arbitration agreement, the other party may object to the arbitral tribunal's jurisdiction. In addition, a party may claim a right to set-off against the other party's right if such claim falls within the scope of the arbitration agreement.

⁵⁶ *Ibid*, s 1033.

⁵⁷ *Ibid*, s 916-934.

⁵⁸ *Ibid*, s 935-945.

⁵⁹ *Ibid*, s 1044.

⁶⁰ *Ibid*, s 1044(1).

⁶¹ *Ibid*, s 1046(1).

⁶² *Ibid*, s 1046(2).

⁶³ *Ibid*, s 1046(3).

6.2 General procedural principles

- 6.2.1 The ZPO contains a number of provisions governing the conduct of the arbitral proceedings, namely:
- general rules of procedure;⁶⁴
 - seat and place of arbitration;⁶⁵
 - commencement of arbitral proceedings;⁶⁶
 - language of proceedings;⁶⁷
 - statements of claim and defence;⁶⁸
 - oral hearings and written submissions;⁶⁹
 - default of a party;⁷⁰
 - experts appointed by the arbitral tribunal;⁷¹ and
 - court assistance in the taking of evidence and other judicial acts.⁷²
- 6.2.2 The parties may derogate from these provisions with the exception of the mandatory provisions in Sections 1042(1) and (2) of the ZPO.
- 6.2.3 The German arbitration law stipulates that the parties must raise any objection to procedural irregularities without undue delay or within the relevant period provided for by the ZPO.⁷³ If they fail to do so, they may not raise that objection later. However, this rule does not apply if a party was not aware of the irregularity at that time.
- 6.2.4 Subject to the mandatory provisions of the law, the arbitral tribunal shall conduct the proceedings according to the rules determined by the parties.⁷⁴ Failing such an agreement, the arbitral tribunal shall conduct the proceedings in such manner as it considers appropriate.⁷⁵

⁶⁴ *Ibid.*, s 1042.

⁶⁵ *Ibid.*, s 1043.

⁶⁶ *Ibid.*, s 1044.

⁶⁷ *Ibid.*, s 1045.

⁶⁸ *Ibid.*, s 1046.

⁶⁹ *Ibid.*, s 1047.

⁷⁰ *Ibid.*, s 1048.

⁷¹ *Ibid.*, s 1049.

⁷² *Ibid.*, s 1050.

⁷³ *Ibid.*, s 1027.

⁷⁴ *Ibid.*, s 1042(3).

⁷⁵ *Ibid.*, s 1042(4).

- 6.2.5 German arbitration law does not indicate a preference as to whether arbitral proceedings should be conducted pursuant to Continental European or Anglo-American procedural traditions. Instead, the law gives the parties significant autonomy to agree on the procedure best suited to resolve their dispute. In the absence of an agreement between the parties, and subject to the mandatory and optional provisions of German arbitration law, the arbitral tribunal may decide on the procedure to be followed. In practice, the way the proceedings will be conducted often depends on the background of the parties, counsel and the arbitrators involved.
- 6.2.6 The comprehensive disclosure requirements typical of common law discovery procedures are unlikely to feature in arbitral proceedings conducted by arbitrators with a German legal background in a dispute that only involves Continental European parties, unless specifically agreed upon by the parties. In proceedings following the German tradition, each party will normally submit only those documents on which it seeks to rely in support of its case. Disclosure proceedings, although rare, are not forbidden, even in proceedings before German state courts. Section 142 of the ZPO⁷⁶ provides for limited disclosure in State court proceedings, stipulating that the court may order the production of documents that are in the possession of a party or a third-party, to which one of the parties has made reference.⁷⁷ In addition, pursuant to the jurisprudence of the German Federal Court of Justice, a claim for information exists, if three prerequisites are met: there must be a specific connection between the parties; the entitled party must have a justifiable uncertainty about the existence or the scope of its right; and the obliged party must be able to provide the requested information without undue hardship.⁷⁸ Finally, German substantive civil, commercial and intellectual property laws contain a number of specific provisions pursuant to which a party may be obliged to provide certain information to the other party.
- 6.2.7 While disclosure is limited in German state court proceedings, arbitral tribunals, particularly in international arbitral proceedings, will take into account the backgrounds and the expectations of the parties involved with respect to disclosure.
- 6.2.8 In arbitral proceedings that involve international parties and, in particular, parties with a common law background, it has become standard practice for arbitral

⁷⁶ As amended in 2001.

⁷⁷ H Wöstmann in Saenger, ZPO (4th Edition, 2011) s 142, recital 2.

⁷⁸ BGH judgment of 17 May 2001, I ZR 291/98, BGHZ 148, 26, at p 30; and BGH judgment of 5 November 2002, XI ZR 381/01, BGHZ 152, 307, at p 316.

tribunals to apply the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration (2010), which attempt to bridge the gap between civil law and common law approaches to evidentiary issues.

6.3 Seat, place of hearings and language of arbitration

- 6.3.1 The parties are free to agree on the seat of arbitration⁷⁹ and on the language of the proceedings.⁸⁰ Failing such agreement, the arbitral tribunal shall determine the seat of arbitration and the language of the proceedings.⁸¹
- 6.3.2 The seat of arbitration is significant for the applicability of German arbitration law and to the question of whether an award will be regarded as a domestic or foreign award. Unless otherwise agreed upon by the parties, the seat of arbitration does not determine where the hearing will take place. Moreover, the arbitral tribunal may hold hearings and take evidence or other procedural steps at any place which it considers appropriate.⁸²

6.4 Multi-party issues

- 6.4.1 Difficulties arise regarding the appointment of arbitrators where multiple parties are involved in the arbitral proceedings as claimants or respondents. German law does not contain explicit provisions for multi-party arbitrations and it is therefore up to the parties to incorporate fair procedures for the appointment of a joint arbitrator for several participating parties to an arbitration agreement. The ICC Rules as well as the DIS Arbitration Rules contain provisions on the appointment of arbitrators in multi-party arbitrations, which are accepted by German courts.

6.5 Oral hearings and written proceedings

- 6.5.1 It is common practice to exchange comprehensive written submissions at the first stage of the proceedings. The parties will usually submit the evidence on which they intend to rely in the proceedings together with these submissions. Unless otherwise agreed by the parties, the arbitral tribunal decides whether such written submissions are to be followed by an oral hearing or whether the proceedings are to be conducted on the basis of written submissions only.⁸³ At the request of one of the parties, the arbitral tribunal is obliged to hold an oral hearing, unless the parties have excluded oral hearings in the arbitration agreement.

⁷⁹ ZPO, s 1043(1).

⁸⁰ *Ibid.*, s 1045(1).

⁸¹ *Ibid.*, s 1043(1) and 1045(1).

⁸² *Ibid.*, s 1043(2).

⁸³ *Ibid.*, s 1047(1).

6.6 Default by one of the parties

- 6.6.1 If a party does not appear at an oral hearing, the arbitral tribunal may continue the proceedings in the absence of that party.⁸⁴ However, unlike in court proceedings, absence will not be deemed to be an admission of the factual submissions made by the other party.⁸⁵ Rather, the arbitral tribunal must base its award on the evidence available at that time.⁸⁶
- 6.6.2 If a party has not made its submissions within the time period determined by the arbitral tribunal, the arbitral tribunal may disregard submissions after the expiration of such time period if the delay is deemed unjustified. The parties can determine other or supplementary rules in regard to default by one of the parties. These may be found in institutional arbitration rules incorporated into the arbitration agreement by reference or in the terms of reference agreed by the parties.

6.7 Taking of evidence

- 6.7.1 Unless otherwise agreed, and particularly in domestic proceedings, the arbitral tribunal will usually decide whether the taking of evidence is required to support a statement of fact. In domestic proceedings, the arbitral tribunal will play an active role in the taking of evidence, namely with respect to the questioning of witnesses and experts. The arbitral tribunal has discretion to assess such evidence freely.⁸⁷ In international cases, the taking of evidence in arbitral proceedings may differ considerably as it will be conducted in a way that takes into account the backgrounds of the parties involved.

6.8 Appointment of experts

- 6.8.1 In addition to party-appointed experts, the arbitral tribunal can appoint experts to report on certain issues identified by the arbitral tribunal. The arbitral tribunal will usually formulate these questions after consultation with the parties. The arbitral tribunal can instruct a party to provide the tribunal-appointed expert with information or give access to documents and other relevant items for inspection.⁸⁸

6.9 Confidentiality

- 6.9.1 Generally, arbitral proceedings tend to be more private than state court litigation, as there are usually no oral hearings open to the public. Furthermore, awards are

⁸⁴ *Ibid*, s 1048(3).

⁸⁵ *Ibid*, s 1048(2).

⁸⁶ *Ibid*, s 1048(3).

⁸⁷ *Ibid*, s 1042(4).

⁸⁸ *Ibid*, s 1049(1).

not usually published and the public is not informed of the conduct and content of the proceedings. The private nature of arbitration is usually considered as one of the key advantages of arbitral proceedings compared to proceedings in state courts. However, the confidentiality of such proceedings is less extensive than parties usually assume as German arbitration law does not expressly stipulate a confidentiality obligation on the parties.

- 6.9.2 Regarding any consultation during the decision-making process, the arbitrators are bound by the confidentiality of judicial deliberations.⁸⁹

6.10 Court assistance in taking evidence

- 6.10.1 The arbitral tribunal cannot compel witnesses to give evidence but it can request the assistance of the state courts.⁹⁰ The court can compel witnesses that fall under the jurisdiction of that court to appear and provide testimony.⁹¹ In practice the parties and the arbitral tribunal will be present at such a hearing before the state court and will usually be granted the opportunity to ask questions.

7. Making of the award and termination of proceedings

7.1 Choice of law

- 7.1.1 The arbitral tribunal must render its award on the basis of the law chosen by the parties. In the absence of an express or implied choice of law, the arbitral tribunal has to apply the law of the jurisdiction with which the subject matter of the proceedings is most closely connected.⁹² This rule corresponds to the conflict of law rules applicable in many countries and, in particular, to the Regulation on the Law Applicable to Contractual Obligations adopted by the European Community on 17 June 2008.
- 7.1.2 The parties can also agree that the arbitral tribunal shall apply the rules of *lex mercatoria*, which are primarily based on customary law but also on international conventions and international uniform model laws. The rules of *lex mercatoria*, however, lack a precise definition, which makes it difficult for the parties to predict the outcome of a dispute on this basis.
- 7.1.3 Finally, the parties can grant the arbitral tribunal the authority to decide *ex aequo et bono* or as *amiable compositeur*, where an arbitral tribunal will decide a dispute

⁸⁹ BGH, 23. 1. 1957, V ZR 132/55, Neue Juristische Wochenschrift 1957, at p 592.

⁹⁰ ZPO, s 1050.

⁹¹ *Ibid*, s 380(2).

⁹² *Ibid*, s 1051(2).

on what it considers to be fair and equitable rather than applying a particular law.⁹³ Such authority has to be granted explicitly and in practice it is rare that arbitral tribunals are authorised to decide *ex aequo et bono*.

7.2 Form, content and notification of award

7.2.1 In arbitral proceedings with more than one arbitrator, all decisions must be made by a majority of the members of the arbitral tribunal.⁹⁴ This applies not only to all awards but also to procedural decisions. The parties may agree otherwise, for example, by providing that the chair has a casting vote. It is also not uncommon for the parties or the other arbitrators to authorise the chair to decide on routine issues of procedure. Section 1052(2) of the ZPO contains provisions dealing with the situation where an arbitrator refuses to take part in the vote on a decision. In that case and in the absence of a contrary agreement between the parties, the remaining arbitrators can decide without the arbitrator in question.

7.2.2 The award shall be made in writing and signed by the members of the arbitral tribunal.⁹⁵ If an arbitrator is prevented from signing or refuses to sign the award, the signature of the majority of the members of the arbitral tribunal shall be sufficient provided that the reason why a signature is missing is stated in the award.⁹⁶

7.2.3 The award must state the reasons upon which it is based unless the parties have agreed that no reasons are to be given.⁹⁷ No reasons are required for an award on agreed terms.

7.2.4 Within the scope of its jurisdiction, an arbitral tribunal can grant the same relief in its award as can be granted in a court judgment. In particular, the arbitral tribunal can order a party to make payment, deliver goods or make a declaration of will and can determine the existence or non-existence of a legal relationship.

7.2.5 The award is final and binding unless the parties have agreed to an arbitral process of appeal (which usually only arises in relation to commodity arbitration). The award shall be delivered to the parties.⁹⁸ No particular form of service (e.g. service by a bailiff or by registered mail) is required under German law.

⁹³ *Ibid.*, s 1051(3).

⁹⁴ *Ibid.*, s 1052(1).

⁹⁵ *Ibid.*, s 1054(1).

⁹⁶ *Ibid.*

⁹⁷ ZPO, s 1054(2).

⁹⁸ *Ibid.*, s 1054(4).

7.3 Settlement

- 7.3.1 If the parties reach settlement during the course of the arbitration, the arbitral tribunal shall terminate the proceedings.⁹⁹ At the request of the parties, the arbitral tribunal shall record the settlement in the form of an award on agreed terms.¹⁰⁰ Such an award can be enforced as soon as it is declared enforceable by a state court. Awards on agreed terms can be declared enforceable not only by the courts but also, with the consent of the parties, by a notary public.
- 7.3.2 It should be noted that, independent of any arbitral proceedings, a settlement agreement is enforceable under German law if it was concluded by duly authorised lawyers¹⁰¹ and was declared enforceable by a court or (with the consent of the parties) by a notary public.¹⁰²

7.4 Power to award interest and costs

- 7.4.1 The arbitral tribunal can award interest if and to the extent that the applicable substantive law allows a claim for interest. The arbitral tribunal can only award discretionary interest if the parties have granted the arbitral tribunal the right to decide *ex aequo et bono*.¹⁰³ The filing of an arbitration claim, as opposed to a court action, does not in itself give the claimant a right to statutory interest. However, the debtor will often be in default of a contractual obligation to make payment and may therefore be obliged to pay interest under the contract.
- 7.4.2 The costs of the arbitration are dealt with in accordance with the arbitration agreement or other agreements reached by the parties. Failing an agreement on costs, the arbitral tribunal has discretion to allocate the costs between the parties. In exercising its discretion, the arbitral tribunal has to take into consideration the circumstances of the individual case, in particular the outcome of the proceedings.¹⁰⁴ This is in line with the general concept under German civil procedure rules that the parties generally bear the costs in proportion to their degree of success or failure (i.e. the costs follow the event).¹⁰⁵ The costs of the arbitration include the necessary costs incurred by the parties for the proper pursuit of their claim or defence, including: legal fees; the costs of expert reports; and travel expenses.

⁹⁹ *Ibid*, s 1053(1).

¹⁰⁰ *Ibid*, s 1053.

¹⁰¹ *Ibid*, s 796(a).

¹⁰² *Ibid*, s 796(b) and s 796(c).

¹⁰³ *Ibid*, s 1051(3).

¹⁰⁴ *Ibid*, s 1057(1).

¹⁰⁵ *Ibid*, s 91-98.

7.5 Termination of the proceedings

7.5.1 The claimant can withdraw its claim and thereby terminate the arbitral proceedings. In this event the arbitral tribunal has to make a decision declaring the arbitral proceedings terminated.¹⁰⁶ Withdrawal does not result in loss of the legal right to the claim and the claimant is therefore free to institute new proceedings regarding the same subject matter. However, if the respondent objects to the withdrawal of the claim and the arbitral tribunal recognises a legitimate interest on the part of the respondent in obtaining a final determination of the dispute, the arbitral tribunal may make an award on the merits of the claim instead of making a decision which merely declares the termination of the arbitration.¹⁰⁷

7.6 Effect of an award

7.6.1 The award has the same effect as a final judgment by a state court.¹⁰⁸ This means that an award is final and can only be set aside at the request of one of the parties on one of the grounds stipulated in Section 1059 of the ZPO.

7.7 Correction, clarification and issuance of a supplemental award

7.7.1 If the award contains errors in computation, typographical errors or similar obvious errors, the arbitral tribunal can correct these on its own initiative or at the request of one of the parties.¹⁰⁹ At the request of one of the parties, the arbitral tribunal may also provide an interpretation of parts of its award and/or make an additional award in respect of any claim which was presented to the arbitral tribunal but omitted from the award.¹¹⁰

8. Role of the courts

8.1 Jurisdiction of the courts

8.1.1 State courts may only intervene to the extent permitted by the ZPO.¹¹¹ In keeping with the scheme of the Model Law (1985),¹¹² Section 1062(1) of the ZPO enumerates those limited circumstances where state courts are authorised or obliged to intervene to:¹¹³

¹⁰⁶ *Ibid*, s 1056(2).

¹⁰⁷ *Ibid*, s 1056(2).

¹⁰⁸ *Ibid*, s 1055.

¹⁰⁹ *Ibid*, s 1058(1) and (4).

¹¹⁰ *Ibid*, s 1058(1).

¹¹¹ *Ibid*, s 1026.

¹¹² See CMS Guide to Arbitration, vol II, appendix 2.1.

¹¹³ ZPO, s 1026 and 1062.

- determine the admissibility of arbitration;¹¹⁴
- appoint an arbitrator;¹¹⁵
- decide on a challenge of an arbitrator;¹¹⁶
- decide on the termination of an arbitrator’s mandate;¹¹⁷
- decide on an arbitral tribunal’s decision confirming its competence in a preliminary ruling;¹¹⁸
- enforce, set aside or amend orders for protective interim measures issued by the arbitral tribunal;¹¹⁹
- assist in the taking of evidence and in any other judicial act;¹²⁰ and
- set aside an award, declare an award enforceable or set aside a declaration of enforceability.¹²¹

8.2 Competent courts

- 8.2.1 With the exception of situations governed by Section 1050 of the ZPO, the competent court is usually the OLG designated in the arbitration agreement, or failing such agreement, the OLG in whose district the seat of arbitration is situated.¹²²
- 8.2.2 As far as the assistance in the taking of evidence and other judicial acts pursuant to Section 1050 of the ZPO are concerned, the Local Court, in whose district the judicial act is to be carried out, has jurisdiction.¹²³

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts

- 9.1.1 As already stated, unless otherwise agreed by the parties, an award is final and can only be set aside at the request of one of the parties and on one of the grounds

¹¹⁴ *Ibid*, s 1032.

¹¹⁵ *Ibid*, s 1034-1035.

¹¹⁶ *Ibid*, s 1037(3).

¹¹⁷ *Ibid*, s 1038.

¹¹⁸ *Ibid*, s 1040.

¹¹⁹ *Ibid*, s 1041.

¹²⁰ *Ibid*, s 1050.

¹²¹ *Ibid*, s 1059-1061.

¹²² For details see ZPO, s 1062.

¹²³ ZPO, s 1062(4).

listed in Section 1059 of the ZPO. These grounds are based on the grounds for refusing recognition and enforcement of a foreign award under the New York Convention.¹²⁴

- 9.1.2 The jurisdiction to decide challenges to awards lies with the OLG designated in the arbitration agreement, or failing such agreement, the OLG in whose district the seat of arbitration is situated.¹²⁵
- 9.1.3 The court can set aside the award or can, in appropriate circumstances, set aside the award and refer the case back to the arbitral tribunal.¹²⁶ If the award is set aside and the matter is referred back to the arbitral tribunal, the proceedings will continue before the original arbitral tribunal. If the award is set aside without the matter being referred back to the arbitral tribunal, the arbitral proceedings must be repeated from the beginning. In such cases, a new arbitral tribunal must be constituted since the arbitration agreement remains in force (unless it was deemed invalid by the court or the parties have agreed otherwise).¹²⁷

9.2 Appeals

- 9.2.1 Appeals against the decision of the OLG can be made to the Federal Supreme Court.¹²⁸ Such an appeal is, however, limited to points of law regarding the admissibility of the arbitral proceedings, the jurisdiction of the arbitral tribunal as well as the setting aside or the recognition and enforcement of an award.¹²⁹ Other decisions by the OLG are final and without appeal.¹³⁰

9.3 Applications to set aside an award

- 9.3.1 An application for the award to be set aside can generally only be made within three months from the date on which the party making the application received notification of the award.
- 9.3.2 In line with the standards applicable under the New York Convention¹³¹ such an application can only be based on a limited number of reasons, namely:
- a party to the arbitration agreement was under some incapacity;

¹²⁴ See paragraph 9.3.2 below.

¹²⁵ ZPO, s 1062(1).

¹²⁶ *Ibid*, s 1059(4).

¹²⁷ *Ibid*, s 1059(5).

¹²⁸ With respect to the question whether an appeal against an award is possible, see paragraph 7.2.5 above.

¹²⁹ ZPO, s 1065(1) and 1062(1).

¹³⁰ *Ibid*, s 1065(1).

¹³¹ See CMS Guide to Arbitration, vol II, appendix 1.1.

- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Tenth Book of the ZPO or with an admissible agreement of the parties and this presumably affected the award;
- the subject-matter of the dispute is not capable of settlement by arbitration under German law;
- recognition or enforcement of the award leads to a result which is in conflict with public policy (*ordre public*); and
- the invalidity of the arbitration agreement.¹³²

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 An award can be enforced in Germany if it has been declared enforceable by the German courts.¹³³ Jurisdiction lies with the OLG designated by the parties in the arbitration agreement or, should there be no such designation, with the court in whose district the seat of arbitration is situated.¹³⁴ The court may only refuse to declare the award enforceable if there are grounds for setting aside the award under Section 1059(2) of the ZPO.¹³⁵ In particular, the declaration of enforceability cannot be refused on the grounds that the arbitral tribunal has made an erroneous decision.

10.1.2 An award on agreed terms can, with the consent of the parties, also be declared enforceable by a German notary public, unless the award violates public policy.¹³⁶

10.2 Foreign awards

10.2.1 The enforcement of foreign awards in Germany is governed by the New York Convention.¹³⁷ If an application for an order declaring a foreign award enforceable is refused, the court must also make a declaration that the award is not to be recognised in Germany.

¹³² ZPO, s 1059(2).

¹³³ *Ibid*, s 1060(1).

¹³⁴ *Ibid*, s 1062(1).

¹³⁵ *Ibid*, s 1060(2). See also paragraph 9.3.2 above.

¹³⁶ *Ibid*, s 1053(4).

¹³⁷ *Ibid*, s 1061(1).

11. Special provisions and considerations

11.1 Consumers

- 11.1.1 Arbitration agreements to which a consumer is a party must, unless the document is notarised before a German notary public, be contained in a document that has been personally signed by the parties and only contains provisions concerning the arbitration agreement.¹³⁸

11.2 Employment law

- 11.2.1 German employment law distinguishes between the relationships of the employer and trade unions on the one hand and between the single employee and his or her employer on the other. Arbitration agreements contained in labour agreements between employers and trade unions are valid. Arbitration in such cases is governed by Sections 101–110 of the German Labour Court Law (*Arbeitsgerichtsgesetz (ArbGG)*). These provisions supersede the aforementioned rules of the Tenth Book of the ZPO. While a number of provisions are similar to the provisions of the ZPO (e.g. pursuant to Section 102 of the ArbGG the arbitration agreement will not be considered by the court of its own motion, the respondent, therefore, has to raise an objection),¹³⁹ the applicable provisions of the ArbGG take into consideration the specific characteristics of labour law related disputes. By way of example, Section 103 of the ArbGG provides that an arbitral tribunal must consist of an equal number of employees and employers, which excludes the possibility of appointing a sole arbitrator. Furthermore, issues dealing with the recognition and enforcement¹⁴⁰ or with the setting aside¹⁴¹ of awards are to be brought before the competent labour court.
- 11.2.2 In contrast, an arbitration agreement between an employer and individual employees regarding the employment contract is invalid under German law.

12. Concluding thoughts

- 12.1.1 Germany has a long-standing tradition as an arbitration-friendly jurisdiction. The Tenth Book of the ZPO provides a modern and up-to-date framework for domestic and international arbitration. Further, German courts take a positive and pro-

¹³⁸ *Ibid*, s 1031(5).

¹³⁹ See paragraph 3.5.1 above.

¹⁴⁰ ArbGG, s 109.

¹⁴¹ *Ibid*, s 110.

arbitration attitude. This makes arbitration in Germany an attractive option not only for domestic but also international parties who look for a reliable and neutral jurisdiction for their arbitral proceedings.

13. Contacts

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