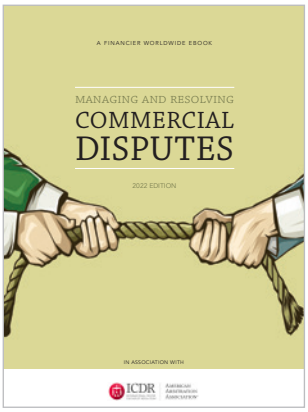

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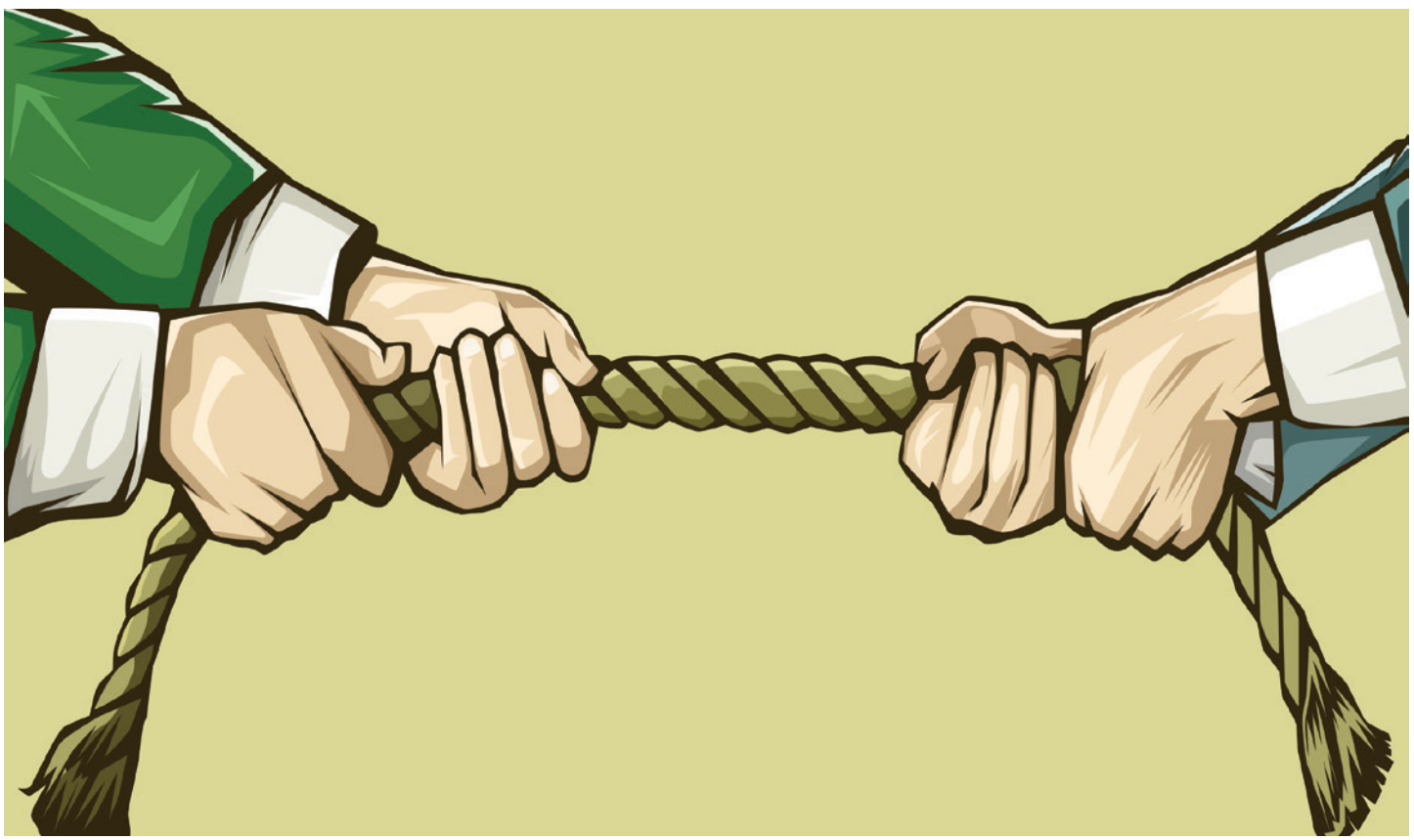
Chasing arbitration – german judicial organisation for international proceedings makes another attempt

BY CHRISTIAN STRASSER AND YANNICK GREIMANN



CHASING ARBITRATION – GERMAN JUDICIAL ORGANISATION FOR INTERNATIONAL PROCEEDINGS MAKES ANOTHER ATTEMPT

BY CHRISTIAN STRASSER AND YANNICK GREIMANN

GERMANY IS THE SELF-PROCLAIMED 'export world champion'. It is a major member of the G7 and G20 and is one of the largest economies in the world. It enjoys an excellent reputation as an investment location, hosts the headquarters of a multitude of international companies and is home to one of the largest stock

exchanges in the world. The high level of business and service sector development, provision of excellent education and much more, make Germany an attractive place to do business.

While Germany can consistently persuade multinational companies of its advantages, from a commercial and development perspective, it has not been a sought-after judicial location in the past, despite excellent training and the lofty reputation of its judiciary. In the past, when parties had a choice of where to go in international state proceedings, they regularly opted for the High Court in London as their preferred jurisdiction venue. Germany was not, and is not, famous as an international commercial court location.

This is reflected by the fact that companies operating in Germany tend to resort to dispute resolution by means of arbitration in cross-border disputes instead of turning to the state courts. International disputes are regularly handled by the internationally renowned arbitration institutions of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), with the German Institution of Arbitration (DIS) gaining prominence as a high-level institution for administered arbitration proceedings in recent years.

Arbitration proceedings administered by the DIS are of international standard, as a result of a continuously revised set of rules tailored to the latest developments in arbitration, and can be conducted entirely in English.

German policymakers have recognised that, regardless of Germany's economic strength and international integration, the enhancement and modernisation of Germany as a judicial location is required. While Germany has bolstered its position as a location for international arbitration proceedings by implementing the UNCITRAL Model Law, German policymakers are concerned by the migration of high-volume and complex disputes to arbitration, consequently depriving the state courts of jurisdiction over such disputes. For this reason, policymakers are attempting to adapt German procedural law and the German state judicial system to the requirements of an internationalised economy and to counteract the trend toward arbitration through various state initiatives.

In 2008, Germany launched the 'Law Made in Germany' initiative, which, while focusing on substantive law, also aimed to strengthen and highlight Germany as a forum for jurisdiction. However, this initiative did not have the desired effect, as

ultimately no decisive innovations were achieved; rather, the status quo was reinforced, and its limited advantages promoted. As such, the initiative did not result in an increase in Germany's attractiveness as a judicial location.

To keep pace with the internationalisation of businesses and the globalisation of supply chains, individual courts, such as the Regional Court of Bonn, established international chambers in 2010. For these special chambers, only judges who had studied in English-speaking countries and also acquired qualifications there, were assigned. In addition to the legal expertise of the judges, these chambers provide the advantage that oral proceedings may be held in English, allowing purely English-speaking parties the opportunity to easily follow them. Furthermore, in such chambers, in contrast to the jurisdiction of a 'normal chamber', attachments to the submissions no longer have to be translated into German.

While these amendments constitute a significant improvement, particularly compared to the previous status quo, and are a step in the right direction, they stopped short compared to arbitration. Whereas even in those special international chambers all submissions are required to be filed in German and the

general language of the proceedings remains German, an entire arbitral proceeding can be conducted in English. Furthermore, in arbitration proceedings the parties may nominate arbitrators who not only speak English and, if applicable, have English degrees, but who also possess highly specialised legal expertise, for example in post-M&A disputes, in commercial agency law, and so on. For the parties, especially in high-value disputes, the greater specialisation of arbitrators is compelling.

These issues, which are crucial for international parties and multinational companies, have not gone unnoticed by German policymakers. In a further attempt to strengthen the attractiveness of state jurisdiction for international parties, so-called 'commercial courts' were established in Stuttgart and Mannheim in 2020. These commercial courts are composed of English-speaking judges who also possess extensive experience and excellent knowledge of commercial law. Furthermore, these commercial courts have been staffed in a way that allows disputes to be regularly handled by the entire chamber, as is usual in arbitration proceedings, by a three-member panel. The commercial courts also offer, like arbitration proceedings at established institutions, an early organisational hearing to structure

the subsequent conduct of the proceedings – a case management conference. To enable proceedings to be conducted swiftly and with greater efficiency compared to a proceeding held before a 'regular chamber', commercial courts can hold hearings and take evidence for several days in a row.

In addition, the German Federal Council (Bundesrat) has taken another initiative to strengthen Germany as a judicial location with a legislative proposal dated 11 March 2022. The proposed law provides the possibility for the federal states to establish one or more chambers at higher regional courts at which commercial proceedings with an international aspect and an amount in dispute of more than €2m can also be conducted in the first instance (commercial court) if a corresponding agreement on the place of jurisdiction has been reached. These commercial courts will not only be able to conduct proceedings in English but will also have the option, as is customary in arbitration proceedings, to arrange for a verbatim record of the oral proceedings and the taking of evidence to be prepared upon the parties' concurring request. The proposed law explicitly provides that these innovations are intended to address the migration of international commercial disputes to foreign countries or to

private arbitration institutions.

In another development that brings the German judiciaries closer to arbitration, since 2022, communication with both the court and the opposing party is now handled via an electronic mailbox that has been specially created for this purpose. The digitalisation of the judiciary has been accelerated in recent years, partially due to the coronavirus (COVID-19) pandemic, beyond pure electronic communication. For instance, the German Code of Civil Procedure has been adjusted and now provides, among other measures, for the possibility of conducting oral hearings and witness examinations via video. Furthermore, the growing acceptance of and experience with EU regulations aimed at procedural harmonisation and their increasing application by the courts are accelerating state proceedings and enhancing their efficiency. These innovations have contributed to the fact that the German judiciary works efficiently and swiftly in comparison with its international counterparts, and that the average duration of proceedings before the regional courts is just under eight months.

As evident from the 11 March legislative proposal, German policymakers have recognised the disadvantages and deficien-

cies of state jurisdiction, as well as the key advantages of arbitration. The transition of legal disputes to arbitration proceedings is becoming a major thorn in the side of policymakers. Not only are state courts deprived of the opportunity to proactively react to and shape legal developments, unlike decisions of the Federal Supreme Court which can then be used as guidelines, arbitral awards are not published and therefore cannot contribute to the development of the law in a similar way. Consequently, in reforming the judiciary, the state is not only concerned with maintaining general, abstract control, but also wants to promote and strengthen a constantly developing public state jurisdiction, as only this creates legal security and certainty.

The reform attempts carried out since 2010 have clearly established arbitration as the main competitor to the state judiciary. The German judiciary and the newly established international chambers and commercial courts are in direct, substantial competition with arbitral institutions, as both the jurisdiction of an arbitral tribunal and the international jurisdiction of a German state court require party agreement.

In contrast to cost-intensive arbitration proceedings, in which the costs cannot be realistically determined in advance

and full reimbursement of costs is the norm, proceedings at German state courts are attractive since, under the Court Costs Act and the Lawyers' Remuneration Act, the cost risk is transparent and can be determined in advance. In addition, the confidentiality that must be maintained in arbitration proceedings can also be disadvantageous, especially if the proceedings are intended to create pressure on the opposing side or if litigation is to be pursued simultaneously. In such cases, proceedings before the state courts are clearly favourable.

Parties should consider, prior to the conclusion of a contract, which form of dispute resolution, whether state jurisdiction litigation or arbitration, could be more advantageous in the event of a dispute – particularly in proceedings with multinational parties. The enforceability of a verdict obtained should also be considered in advance. Arbitral awards still have clear advantages over judgements from state proceedings if they can or should be enforced outside the EU.

From the perspective of the German legislator, arbitration proceedings and the procedural rules provided by individual arbitral institutions continue to be the benchmark against which state jurisdiction must be assessed in competition. Even if the

state is slowly adopting and further developing the 'best practices' that have been exemplified by arbitration for years, institutionally organised arbitration remains the benchmark. Whether the improved international state jurisdiction will be able to convince parties of its further advantages in the future will be shown by developments over the next few years. The race is on.

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