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Contents

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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. The German court system is known to be quick and efficient, and thus broadly accepted for national disputes. However, where the complexity of the dispute increases or issues of confidentiality arise, arbitration is favoured.

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

1.2 Trends

The landscape of arbitration in Germany is currently affected by third-party funding legal technology, cybersecurity and data protection. In investment treaty arbitration, it is worth mentioning the growing relevance of Brexit, climate change-related disputes and the Achmea case, and a potential impact on the future of intra-EU bilateral investment treaties.

1.3 Key Industries

The presence of arbitration in the energy and IT sectors is experiencing a considerable rise. Energy disputes still relate to classical gas storage and gas price adjustments but, in particular, also to renewable energies, including offshore wind farms. Cross-border disputes on IP issues have also increased exponentially, especially in the technology and pharmaceutical sectors. Arbitration remains the favoured method of dispute resolution after M&A and in shipping disputes.

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. The DIS Rules closely mirror the structure of the German arbitration law. Whilst the DIS does not generally monitor the proceedings nor severely scrutinise the awards, the German Arbitration Institute has many tasks, including giving the decision on challenges and the determination of fees, and frequently acts as appointing authority in ad hoc proceedings.

Furthermore, there are several institutions specialised in certain industries that also offer arbitration services, such as the German Maritime Arbitration Association and the DNotV GmbH (*Deutscher Notarverein*, or German Notary Association). There are also a few arbitration institutions that are focused on particular goods, stock and commodity exchanges, such as the German Coffee Association at the Hamburg Chamber of Commerce and the *Deutsche Börse AG – Frankfurter Wertpapierbörse*. Additionally, some regional chambers of commerce provide arbitration services; ie, the Hamburg Chamber of Commerce (*Handelskammer Hamburg)*.

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, which 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 related to the non-arbitrability *(*see **3.2 Arbitrability***)* of certain disputes or restrictions to party autonomy on the grounds of consumer protection or public order considerations.

The German arbitration law is largely based on the Model Law except for certain provisions that aim 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 the arbitration agreement are more lenient than those under the Model Law as the so-called half-written form is allowed; ie, arbitration agreements in letters of confirmation where the other party did not respond nor 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) and, with regard to the enforcement of interim relief measures (Section 1041 ZPO), a provision concerning arbitral decisions on costs (Section 1057 ZPO) as well as 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.

3. The Arbitration Agreement

3.1 Enforceability

The regulation governing the validity and enforceability of the arbitration agreement is to be found in Chapter Two of the Tenth Book of the German Code of Civil Procedure (Sections 1029 to 1033 ZPO).

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 or 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 incorporated either 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.

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 argument 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). 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).

However, there are some disputes that, due to their nature, may not be submitted to arbitration and must be adjudicated by German courts or public authorities. In particular, the following claims cannot be submitted to arbitration:

- 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*); and
- generally, any criminal law matters.

The general rule is that all commercially related disputes are arbitrable. Thus, except for those claims explicitly excluded by the law, any claim involving an economic interest can be subject of an arbitration agreement.

3.3 National Courts' Approach

In general, German courts 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 discussing the substance of the dispute during the arbitration. In this sense, German courts generally lean towards respecting and enforcing the parties' choice to submit their disputes to arbitration.

Accordingly, German courts will 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 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) 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

The German arbitration law is primarily governed by party autonomy. Thus, 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 the arbitrators' termination upon his inability or failure to perform the tasks assigned to them (Section 1038(1) ZPO). There are no limitations either as to 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 to the arbitration agreement appoint him jointly or if he is nominated by an agency that is not a party to the proceedings (Section 40 German Judiciary Act, or *Deutsches Richtergesetz*).

4.2 Default Procedures

Where the procedure agreed by the parties for the appointment of the arbitrators fails, each party may file a petition with a German court for it 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 considered this to be appropriate (Section 1035(5) ZPO).

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 the parties have either failed to reach an agreement on the appointment of the arbitrators or the procedure agreed has failed. In this case, and upon request by a party, German courts will act as appointing authority (Section 1035 ZPO).

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 who 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 ZPO). Absent such agreement, a party must submit to the arbitral tribunal its grounds in writing for the recusal of the arbitrator within two weeks of learning the composition of the tribunal or the circumstance prompting doubts as to his or her impartiality or independence. If the arbitrator refused to resign from office or the other party did 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 above-described procedures fail, the party may file a petition to the German courts to decide on the recusal. During the pendency of the petition, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration proceedings and may deliver an award.

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

4.5 Arbitrator Requirements

Arbitrators must disclose all circumstances that might give rise to doubts as to his or her impartiality to the parties, without undue delay, 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

As a general rule, 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 in that regard (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

A party may file a request to the competent national court for it to determine the admissibility or inadmissibility of arbitration proceedings before the arbitral tribunal is constituted (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 of having received written notification of the preliminary ruling. During the pendency of the challenge, the tribunal may continue the arbitral 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).

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 tribunal has been constituted, its jurisdiction must be objected to the arbitral 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 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 delayed submission.

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 circumstances. 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 defendant may object to the court's jurisdiction by invoking an arbitration agreement between the parties that covers the issue in dispute. If that defendant 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). In this case, the court then must reject the action as inadmissible unless the arbitration agreement is invalid or does not cover the matter in dispute before the national court.

5.7 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 operation of 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. By way of contrast, the DIS Rules now 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 to award 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 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 provisions 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 showing 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 will 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 awarded by national courts is directly enforceable.

In principle, German courts may also grant interim relief in assistance of a foreign-seated arbitration. Even in the absence of a German arbitral seat, the provisions permitting national courts to grant preliminary/interim relief are still applicable (Sections 1025(2), 1033 ZPO). However, it is yet to be determined by German courts whether preliminary/interim relief by national courts can be excluded by virtue of agreement and, if this is the case, selecting a foreign arbitral seat serves to do so.

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 first sets out some mandatory and fundamental principles: the parties' right to equal treatment, the parties' right to be heard as well as the parties' right to be represented by a counsel by permitting lawyers to act as attorneys-in-fact (Section 1042(1) and (2) ZPO).

Apart from these fundamental guiding 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 arbitral proceedings, the language of the proceedings, 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).

Most statutory procedural rules may be amended or deviated from by agreement between the parties. The German arbitration law expressly allows for such agreements by reference to a set of arbitration rules (Section 1042(3) ZPO). The DIS Rules, for example, contain such arbitration rules providing for 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 provisions (eg, the right to request judicial review of the tribunal's jurisdiction) of the German arbitration law are aimed to safeguard 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 on which the respondent receives a request for arbitration that states the name of the parties and the matter in dispute, and makes reference 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 dispensing from 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 default rules of 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 on the arbitrators. 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 foreseen under the DIS Rules (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 legal representative in arbitration proceedings. However, it is expressly provided 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

As to the collection and submission of evidence, there are some specifics under German law as Germany is a civil law jurisdiction where the arbitral tribunal usually takes a more prominent role in deciding which evidence will be needed. According to Section 1042 (3) ZPO, it will be the parties who determine the procedure of the arbitration. 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 by 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 is 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, it is not bound by the general provisions of the ZPO, as these are not applicable in arbitral proceedings.

Arbitral tribunals are often guided by the IBA Rules(IBA Rules on the Taking of Evidence in International Arbitration), 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.

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

As the German law does not provide for a general disclosure obligation, there is no elaborated 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 a fair hearing and the opportunity for each to present its case. If the latter standard is not met, the arbitral award can be reversed by a state court (see **11.1 Grounds for Appeal**).

In the absence of an agreement between the parties, arbitral tribunals will regularly be guided by the Soft Law, such as the IBA Rules, or will declare them as binding. The new Prague Rules (Prague Rules on the Efficient Conduct of Proceedings in International Proceedings) have not (yet) taken a dominant role in active proceedings. As they were only launched on 14 December 2018, it remains to be seen whether they will be able to prevail as a genuine alternative.

It should be noted that under the DIS Rules, the arbitral tribunal will not be bound by the evidence offered by the parties, but has the right, on its own initiative, inter alia, to appoint experts, examine fact witnesses other than those called by the parties and 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 ruled out for lack of a legal basis. However, it is possible to require the attendance of witnesses or experts, having a witness testify under oath or serving 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. Generally, no oral hearing is required (Section 1063 (1) ZPO).

9. Confidentiality

9.1 Extent of Confidentiality

There are no explicit regulations in the 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, there exists a general consensus 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. On the other hand, there is no specific statutory provision imposing upon the parties obligations of confidentiality. The parties are free to decide on a confidentiality clause or refer to their chosen institutional rules. In 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, which, of course, is regularly appropriate and therefore common. The award shall also state the date of the decision and the place of arbitration. 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 makes a declaration of enforceability impossible. 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

The 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. However, it is not possible to award punitive damages in Germany. According to the German Federal Court of Justice, 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 that 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 arbitration award on the allocation of costs. This includes legal fees that were necessary in order to file a request for arbitration or to defend against such a request. 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). According to these principles, arbitral tribunals regularly decide according to the principle 'costs follow the event', which also applies in German state court litigation.

Whether a party is entitled to interest is not regulated in German procedural law (apart from restitutions 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 default to settle a payment claim (Section 288 BGB). This amounts to 5 or 9 percentage points above the base interest rate. 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 the state court litigation (Section 291 BGB).

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

The rules on costs were also adjusted by the DIS. 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 circumstances that it considers to be relevant. 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 is intended to encourage parties to conduct arbitration proceedings efficiently.

The costs of the arbitration shall include the arbitrators' fees and expenses as well as fees of any expert appointed by the arbitral tribunal; the reasonable costs of the parties that were 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

An appeal against awards is not provided for by German law. 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 an agreement is very rare, but has already 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 by 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. Otherwise it will be the Higher Regional Court in Berlin (*Kammergericht*).

The setting aside of an arbitral award requires the existence of a ground for setting aside (cf Section 1059(2) ZPO). These are based on the UNCITRAL Model Law, so that a

distinction must be made between two categories: grounds to be invoked by the applicant and grounds to be observed ex officio.

The applicant may assert that:

- one of the parties to the arbitration agreement did not have the capacity to do so or that the arbitration agreement is invalid; or
- it has not been properly notified of the appointment of an arbitrator, or of the arbitration proceedings, or that he 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.

Irrespective of a complaint by the applicant, the court must always take into account whether there is arbitrability of the subject matter in dispute under German law and whether the recognition or enforcement of the arbitration award leads to a result contrary to public policy (*ordre public*).

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.

In principle, the 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) ZPO). This presupposes, however, that the decision has a fundamental significance and serves the further development of the law or a uniform case law.

Parties are not obliged to initiate a setting aside procedure. They can also 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, an arbitral award can be corrected, interpreted or changed by the arbitral tribunal within the scope of Section 1058 ZPO. It may correct spelling errors or grammatical mistakes, interpret specific parts of the award and amend the award regarding claims that were brought up within the proceedings 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 is intended to ensure limited judicial review.

Similarly, a waiver of the application for annulment in its entirety in advance 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 only upon request of a party can be waived; however, only if 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 enumerated for the setting aside 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 under Article I(3) made upon ratification of the Convention. German courts will now enforce foreign arbitral awards even in the absence of reciprocity.

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 like the Energy Charter Treaty.

12.2 Enforcement Procedure

The recognition and enforcement of foreign arbitral awards is governed by the New York Convention (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 Article IV(1) (a) and (b) New York Convention.

The court merely examines whether there is a ground for refusal according to Article 5 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 5 of the New York Convection, the court shall refuse recognition. There is no discretion. In this case, 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.

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

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).

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*) has 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

German courts are considered arbitration-friendly.

Current practice shows that the denial of the recognition and enforcement of a foreign award is limited to exceptional cases. Also, the violation of public order 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).

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 document signed by the parties themselves, business-to-customer arbitration proceedings are de facto non-existent.

In 2009 the DIS adopted the Supplementary Rules for Corporate Law Disputes, 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 general 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. A consolidation would only be possible if the parties explicitly consent to it or if it is provided by the applicable rules of the chosen arbitration institute; 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 procedures 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 Third Parties

See **5.7 Third Parties**.

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