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Germany

INTERNATIONAL ARBITRATION

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Germany.

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GERMANY
INTERNATIONAL ARBITRATION

1. What legislation applies to arbitration in your country? Are there any mandatory laws?

The German arbitration law is set out in the Tenth Book of the German Code of Civil Procedure (Zivilprozessordnung, ZPO) in Sections 1025-1066. These sections contain basic provisions on the admissibility and conduct of arbitral proceedings, most of which are non-mandatory. Section 1042 ZPO serves as a key provision, pursuant to which the parties shall be accorded equal treatment and each party shall be granted the right to be heard in a fair and effective manner (Section 1042 Para 1 ZPO). Section 1042 Para. 2 ZPO stipulates that attorneys may not be excluded as party representative. In all other aspects, the parties are free to establish rules for the procedure themselves or to refer to an existing set of arbitration rules, in each case subject to the mandatory provisions of the Tenth Book of the ZPO (see Section 1042 Para. 3 ZPO).

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Germany signed the New York Convention (NYC) on June 10, 1958 and ratified it on June 30, 1961. The NYC entered into force in Germany on September 28, 1961. Initially, Germany made a reciprocity reservation, which it withdrew on August 31, 1998.

3. What other arbitration-related treaties and conventions is your country a party to?

Germany is a party to the 1961 European Convention on International Commercial Arbitration (Geneva Convention), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the Energy Charter Treaty (ECT; in November 2022, the German government announced its intention to terminate the ECT). Moreover, Germany is party to a plethora of bilateral investment treaties (BITs) which provide for a dispute settlement mechanism. Finally, a limited number of bilateral treaties contain provisions on international commercial arbitration.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

Germany's arbitration law is based on the UNCITRAL Model Law of 1985, which it largely follows. In contrast to the UNCITRAL Model Law, the German arbitration law does not differentiate between domestic and international arbitration proceedings save as to provisions concerning the recognition and enforcement of arbitral awards which are subject to different provisions: the setting aside of a domestic award is regulated in Section 1059 ZPO, the recognition and enforcement of foreign awards in Section 1061 ZPO.

5. Are there any impending plans to reform the arbitration laws in your country?

The German law on arbitration entered into force on January 1, 1998, replacing the over 100 years old (arbitration) law. The Ministry of Justice has the reform of the arbitration law taken on its agenda. Whether this project will be initiated soon is, however, uncertain.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

The by far leading institution in Germany for the administration of arbitrations and other dispute resolution proceedings for national and international disputes is the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit, DIS). The DIS

offers a broad variety of sets of rules such as rules for mediation, adjudication, conciliation, expert determination and expertise.

There are also other arbitral institutions in Germany, such as the German Maritime Arbitration Association, or the Arbitration of the German Coffee Association, to name a few. Each specializes in a different sector. The DIS itself hosts the German Court of Arbitration for Sport which offers its own set of Rules.

The 2018 DIS Arbitration Rules (with effect as of March 1, 2018) replaced the former set of rules dating back to the year 1998. The DIS Rules for Sport Arbitration are currently under revision and will be launched by 01 January 2023.

7. Is there a specialist arbitration court in your country?

No specialist arbitration court exists in Germany. Nonetheless, there is a specific competence with the Higher Regional Courts (Oberlandesgerichte, OLG) with respect to the enforcement and recognition of arbitral awards and with respect to other questions related to arbitration (see Section 1062 ZPO). At the OLG specialized chambers that deal with arbitration matters are installed. In Bavaria, only the Supreme Court (Bayerisches Oberstes Landesgericht; BayObLG has jurisdiction to deal with commercial arbitration matters whereas all across Germany, set-aside and enforcement actions pertaining to ICSID arbitrations are dealt with by second-instance courts (Landgerichte). It is fair to say that German courts are generally familiar with, and supportive of, the law and practice of domestic and international arbitration.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

Section 1029 Para. 1 ZPO defines ‘arbitration agreement’ as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in future in respect of a defined legal relationship, whether contractual or non-contractual in nature.

The formal requirements are set out in Section 1031 ZPO. Accordingly, the arbitration agreement must be set out either in a document signed by the parties, or in letters, telefax copies, telegrams or other forms of communication exchanged between them that ensure documentary proof of the agreement (see Section 1031 Para. 1 ZPO).

Under certain circumstances, non-objection to a proposed arbitration clause contained, e.g., in General Terms and Conditions, may, pursuant to Section 1032 Para. 2, 3 ZPO, lead to a valid arbitration agreement. This is remarkable as these requirements are less strict than under the NYC. However, where the CISG applies, its stricter rules on the incorporation of contractual clauses will principally prevail, despite the doctrine of separability (BGH SchiedsVZ 2021, 97).

Pursuant to Section 1031 Para. 6 ZPO, any failure to comply with formal requirements is remedied by a plea made on the merits of the matter in the arbitral proceedings.

9. Are arbitration clauses considered separable from the main contract?

Yes. Section 1040 (1) ZPO provides that an arbitration clause is to be treated as an agreement independent of the other terms of the contract. German arbitration law thus follows the doctrine of separability.

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

German courts do apply a validation principle. Explicit choices of law by the parties with regard to their arbitration agreement are however respected. The German Federal Court of Justice (Bundesgerichtshof, BGH) ruled (BGH SchiedsVZ 2021, 97) that the application of more permissive domestic provisions pursuant to the most favorable treatment clause (Art VII NYC) encompasses the provisions relating to the recognition and enforcement of awards as well as the domestic conflict of laws rules, including the provisions of the law determined to be the law applicable to the arbitration agreement in accordance with such conflict of laws rules. If the arbitration agreement is governed by the laws of a state (determined in accordance with the conflict of laws rules of the state where enforcement is sought) which is more permissive in respect of the form requirement for arbitration agreements, these provisions prevail.

11. Is there anything particular to note in

your jurisdiction with regard to multi-party or multi-contract arbitration?

German arbitration law does not explicitly address multi-party arbitration. However, the 2018 DIS Arbitration Rules contain provisions dealing with multi-contract and multi-party arbitration in its Articles 17 and 18, respectively.

Art. 17.1 stipulates that claims arising out of or in connection with more than one contract may be decided in a single arbitration ("Multi-Contract Arbitration"), provided that all of the parties to the arbitration have agreed thereto.

Art. 18.1 provides that claims made in an arbitration with multiple parties ("Multi-Party Arbitration") may be decided in that arbitration if there is an arbitration agreement that binds all of the parties to have their claims decided in a single arbitration or if all of the parties have so agreed in a different manner.

The fact that multiple parties are involved also effects the constitution of the arbitral tribunal (Art. 20 of 2018 DIS Arbitration Rules).

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

A third party can be bound by an arbitration agreement solely with its consent. Exceptions exist in the case of legal succession. Moreover, there is the possibility of an arbitration agreement for the benefit of third parties. This also applies to contractual third-party beneficiaries, as the Higher Regional Court of Hamburg highlighted in its order dated May 23, 2019 (OLG Hamburg, BeckRS 2019, 42871 at para. 20).

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

Any dispute concerning patrimonial rights *("vermögensrechtlicher Anspruch")* or rights subject to settlement may be submitted to arbitration. This is provided in Section 1030 of the ZPO.

Conversely, disputes in certain areas are not arbitrable. An arbitration agreement regarding legal disputes relating to residential tenancy law, most family law matters, as well as employment law matters is ineffective and therefore non-arbitrable.

A significant evolution has taken place in the field of shareholder disputes. Such disputes were considered to be non-arbitrable since the BGH kept serious reservations about the arbitrability of disputes over defects in shareholder resolutions from the point of view that, according to Sections 248 Para. 1 sentence 1, 249 Para. 1 sentence 1 of the German Stock Corporation Act (AktG), which are applicable mutatis mutandis in the law governing limited liability companies, the decisions which are made in legal disputes of this kind and which uphold the action have effect for and against all shareholders and corporate bodies even if they did not participate in the proceedings as a party (see BGH, decision dated 29 March 1996, II ZR 124/95 – "Arbitrability I"). Then in 2009, the BGH changed its view and held that even without an express statutory provision of the effects of sections 248 (1) sentence 1, 249 (1) sentence 1 AktG, disputes involving the validity of resolutions recorded as having been adopted at a shareholders' meeting are "arbitrable" by virtue of an arbitration agreement stipulating this by analogy in the articles of association or an individual agreement made outside the articles of association with the participation of all shareholders and the company. The arbitration proceedings must, however, be structured in a manner equivalent to legal protection by state courts – i.e. in compliance with a minimum standard of participation rights resulting from the principle of the rule of law (see BGH, decision dated 06 April 2009, II ZR 255/08 – "Arbitrability II").

This decision has established the cornerstones for solving shareholder disputes by means of arbitration: the consent of all shareholders to the arbitration agreement, the opportunity for all shareholders to participate, the equal influence on the constitution of arbitral tribunal and the concentration of all proceedings before the same arbitral tribunal.

On this basis the DIS has launched an additional set of rules for shareholder disputes which reflect the above requirements. It has been added as Annex V to the current Arbitration Rules in order to adapt the existing rules only to the extent necessary.

Since then the BGH has issued two further decisions in this regard. The decision of "Arbitrability II" dealt with the limited liability company ("GmbH") only. In 2017, the scope of these principles was extended to limited partnerships ("Kommanditgesellschaft", see BGH, decision dated 06 April 2017, I ZB 32/16 – "Arbitrability III") and recently, in 2021, to partnerships (see BGH, decision dated 23 September 2021, I ZB 12/21 – "Arbitrability IV").

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

The BGH ruled on November 26, 2020 (BGH SchiedsVZ 2021, 97) that the **formal** validity of the arbitration agreement is to be assessed under (i) general principles as laid down in Art. II(2) of the NYC; (ii) the requirements pursuant to Section 1031 of the German ZPO; and (iii) the law applicable to the arbitration agreement for substantive purposes.

When applying these requirements to the case at hand, the BGH found that the **law of the seat** of the arbitration governs the **substantive** validity of the arbitration agreement where there is no express choice by the parties. Interestingly, though the arbitration was seated in Amsterdam, the Court applied the CISG, as a part of the Dutch law governing the contract for cross-border sales. The Court reached this decision after the fruitless application of Art. II(2) of the NYC and due to the *favorem validitatis* approach under Article VII(2) of the NYC.

In the end, the alleged arbitration agreement, the BGH found, was invalid on formal grounds.

Therefore, while the formal validity of the arbitration agreement can be assessed under different regimes, its substantive validity is to be governed by only one law – i.e., the law of the seat of arbitration under German case law.

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

According to Section 1051 (1) ZPO, it is the parties who determine the applicable law. Section 1051 (2) ZPO stipulates that absent a designation of the applicable legislative provisions by the parties, the arbitral tribunal is to apply the law of that state that has the closest connection to the subject matter of the proceedings.

16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

German Courts have not applied UNIDROIT principles as the substantive law. In the absence of a choice of law, non-state law cannot be determined as the governing law. This is clear from the wording of Section 1051 Para. 2 ZPO. State courts may not adopt such an approach either, which also follows from the wording of Art. 4 Rome I Regulation. Arbitration tribunals may resort to the UNIDROIT principles as persuasive authority. It has been discussed that parties might agree on UNIDROIT as law governing their contracts.

17. In your country, are there any restrictions in the appointment of arbitrators?

There are no specific restrictions in the appointment of arbitrators under German law. As in most jurisdictions, only basic principles under due process apply to arbitrator appointments and to arbitrator conduct, meaning arbitrators must be (and remain) impartial and independent. Moreover, an arbitrator does not necessarily have to have a legal background, though this is advisable in most situations.

Section 40 Para. 1 of the German Law on Judges prescribes that judges may only be granted permission to act as arbitrator or to give an expert opinion in arbitration proceedings if all parties to the arbitration agreement agree or if the judge is nominated by an independent institution.

18. Are there any default requirements as to the selection of a tribunal?

As a general rule, the parties are free to agree on the qualifications and number of arbitrators. The qualifications agreed to by the parties must be observed also by courts in the applicable circumstances (see Section 1035 Para. 4 ZPO). As to the number of arbitrators, the default number is three, absent an agreement by the parties (Section 1034 Para. 1 ZPO). The parties are also free to agree on a procedure for appointing the arbitrator or arbitrators (Section 1035 Para. 1 ZPO). Choosing an institutional set of rules typically constitutes such divergent agreement.

19. Can the local courts intervene in the selection of arbitrators? If so, how?

Section 1035 (3) ZPO stipulates that absent an agreement made by the parties regarding the appointment of arbitrators, the court will appoint a sole arbitrator upon request by one party if the parties are unable to come to an agreement regarding the

appointment of the arbitrator. In arbitral proceedings with three arbitrators, each party appoints one arbitrator; the two arbitrators thus appointed will appoint the third arbitrator, who will act as presiding arbitrator. If a party has not appointed the arbitrator within one month of receiving a request to do so from the other party, or if the two arbitrators are unable to agree upon the third arbitrator within one month of their appointment, then the court is to appoint the third arbitrator upon a party's request.

In appointing an arbitrator, Section 1035 (5) ZPO states that the court is to have due regard for all prerequisites stipulated with regard to the arbitrator by the agreement of the parties and should take account of all factors ensuring the appointment of an independent and impartial arbitrator. In appointing a sole arbitrator or a third arbitrator, the court also should consider whether the appointment of an arbitrator of a nationality other than those of the parties may serve the intended purpose.

Where the parties have agreed on an institutional set of rules, the procedures set forth therein will take priority.

20. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

Notwithstanding any applicable institutional rules, the appointment of an arbitrator can be challenged under Section 1036 (2) ZPO only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if they do not meet the prerequisites agreed by the parties. A party may challenge an arbitrator whom they have themselves appointed, or in the appointment of whom the party has participated, solely for reasons the party became aware of only after the appointment was made. Another reason for challenging an arbitrator is where an arbitrator is unable, whether de jure or de facto, to perform their functions or fails to perform their functions within a reasonable time for other reasons, their mandate will end upon their withdrawal from office or upon the parties agreeing to terminate the mandate (Section 1038 (1) ZPO). In that case, either party may request that the court decide on the termination of the arbitrator's mandate.

Section 1037 (1) ZPO makes it clear that the parties are free to agree on a procedure for challenging an arbitrator. In the absence of such agreement, the arbitral tribunal decides on the challenge. If this challenge is not successful, then the challenging party may request, in accordance with Section 1037 Para. 3 ZPO, that the court decides on the challenge.

21. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

The 2018 DIS Arbitration Rules reflect the duty of independence and impartiality of the arbitrator in Article 9.1, which states that "[e]very arbitrator shall be impartial and independent of the parties throughout the entire arbitration."

22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in Halliburton v Chubb?

We are not aware of recent decisions addressing the issue of subsequent appointments as arbitrator, as this was the case in the above-mentioned judgment. However, Germany did not succeed in its attempt before ICSID to disqualify the tribunal in the Vattenfall case after alleging that an arbitrator had not disclosed an issue of potential conflict. Under German law, the duty to disclose is an ongoing one, also circumstances arising after the appointment of the respective arbitrator must be disclosed.

23. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

Under Section 1038 Para. 1 ZPO, an arbitrator that fails to perform its functions may be removed when the parties agree to terminate the arbitrator's mandate. If the parties fail to reach such agreement, each of the parties may request that the courts do so. In such a case, a substitute arbitrator is to be appointed (Section 1039 ZPO).

Furthermore, tribunals under German arbitration law are authorized to render decisions and awards by majority (Sections 1052(1) and 1054(1) ZPO). Section 1052(2) expressly addresses situations in which "an arbitrator refuses to participate in a vote", providing that the other arbitrators may decide on the matter without the arbitrator who refuses to participate.

24. Are arbitrators immune from liability?

Under German arbitration law, there is no set of rules regarding immunity of arbitrators. In general, arbitrators are bound by the contractual obligations they entered into with the parties. That is why an arbitrator may be held liable for contractual breaches under German law. In case of an arbitrator's agreement, they may be, for instance, liable for failure to disclose any and all circumstances likely to give rise to doubts as to their impartiality or independence. Though, in practice, such claims are unusual.

Art. 45 of the 2018 DIS Arbitration Rules contains provisions in this regard. Accordingly, an arbitrator shall not be liable to any person for any acts or omissions in connection with such arbitrator's decision-making in the arbitration, except in case of an intentional breach of duty (Art. 45.1). Following Art. 45.2 of the 2018 DIS Arbitration Rules, for any other acts or omissions in connection with the arbitration, an arbitrator shall not be liable, except in case of an intentional breach of duty or gross negligence.

25. Is the principle of competence-competence recognized in your country?

Yes. Section 1040 Para. 1 sentence 1 ZPO stipulates that the arbitral tribunal may rule on its own jurisdiction and in this context on the existence or the validity of the arbitration agreement. However, if a party challenges the competence of an arbitral tribunal before the courts, the courts will perform a full review the arbitral tribunal's jurisdiction in parallel to the conduct of the arbitral proceeding (Section 1040(3) ZPO).

There is a special feature under German law: Section 1032 Para. 2 ZPO provides for the option to file a request with the court to decide upon the admissibility of arbitral proceedings if such request is filed before the constitution of the arbitral tribunal. This specific provision restricts the concept of competence-competence in practice. Even though arbitral proceedings may be continued (see Section 1032 Para. 3 ZPO) even if a request under 1032 Para. 2 ZPO has been filed, the impact is significant as an award rendered even if a state court has declared arbitral proceedings as inadmissible might face severe obstacles when it comes to enforcement the latest.

26. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

German courts are arbitration friendly. Section 1032 (1) ZPO states that "[w]here an action is brought before a court in a matter that is the subject of an arbitration agreement, the court is to dismiss the action as inadmissible, provided that the respondent has raised a corresponding objection prior to commencement of the hearing on the merits of the case, unless the court finds that the arbitration agreement is null and void, ineffective or incapable of being performed." Local courts do comply with this provision without exception and do provide the opportunity to tacitly deviate from the arbitration agreement if no party raises any objection with reference to an existing arbitration agreement.

27. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?

The initiation of arbitral proceedings has the same effect as the initiation of state court proceedings: the statute of limitation is suspended, see section 204 German Civil Code (*Bürgerliches Gesetzbuch*, BGB).

Therefore it is required that, unless the parties agree otherwise, the arbitral proceedings in respect of a particular dispute must commence which is on the date the respondent receives the request for arbitration, see Section 1044 ZPO.

In cases administered under the 2018 DIS Arbitration Rules, the dispute commences when the institution receives the request for arbitration with the specified minimum requirements, namely the names and addresses of the parties, a statement of the specific relief sought, a description of the facts and circumstances on which the claims are based, and the arbitration agreement(s) on which the Claimant relies (Arts. 6 and 5.2 of the 2018 DIS Arbitration Rules).

It is to be noted that under the German law, the statute of limitation is a matter of substantive rather than procedural law. Hence, time bars under German law only become relevant if German substantive law is applicable to the dispute.

28. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

Under public international law, immunity is a concept preventing States from exercising jurisdiction over

another State in matters where the issue at stake in a given case is whether such other State has itself exercised sovereign prerogative (e.g., with regard to the claimant-party) in a legally compliant manner ("par in parem non habet iurisdictionem"). In the case of arbitration, no such interference is, however conceivable.

29. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

Whereas in German civil proceedings any allegations that is not explicitly disputed may be considered as admitted, such rule does not transfer into arbitration. If a respondent fails to submit its statement of defence in due time, the arbitral tribunal may continue the proceedings but without treating such failure to comply with procedural rules, in and of itself, as an acknowledgment of the claimant's allegations (see Section 1048 Para. 2 ZPO). The same applies if a respondent fails to make appearance at a hearing or fails to produce documentary evidence within a time-limit that has been set: the arbitral tribunal may continue the proceedings and may render and award based on the submissions and the evidence provided by one party only (Section 1048 Para. 3 ZPO).

Local courts may be petitioned to assist with the gathering of evidence pursuant to Section 1050 ZPO, including, as the case may be, where such evidence would have to be procured from a non-participating party

30. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

German arbitration law is silent on these issues, and there is no case law on the possibility of voluntary intervention by third parties.

In addition, Art. 19 of the 2018 DIS Arbitration Rules provides for the possibility of joinder of a third party, but such request must be made by one of the parties before the appointment of any arbitrator (Art. 19 Para 1 DIS Arbitration Rules). Therefore, this article does not address voluntary intervention of a third party, but rather a compelled involvement of this third party to the arbitration. Nonetheless, there seems to be no restriction against voluntary intervention of third parties if the involved parties and the tribunal agree to it.

31. Can local courts order third parties to participate in arbitration proceedings in your country?

German arbitration law does not address this topic. However, taking into account the whole set of rules of the Tenth Book of the ZPO it does not seem possible for local courts to order third parties to participate in arbitration proceedings in Germany. However, evidence (including witness evidence) from non-participating individuals or entities may be gathered with the assistance of state courts, pursuant to § 1050 ZPO.

32. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

Section 1033 ZPO states that it is not incompatible with an arbitration agreement for a court to order an interim measure or measure of protection concerning the subject matter of the dispute submitted to arbitration. Any such measures may be issued interim measures before or after the constitution of the arbitral tribunal.

It is important to note that German courts may only grant interim measures which are available in German litigation proceedings. These include asset freezing orders (Section 916 ZPO) and other interim injunctions (Section 935 ZPO).

Section 1041 Para. 1 sentence 1 ZPO provides that, unless otherwise agreed by the parties, the arbitral tribunal may order, at the request of a party, such interim measures or measures of protection as it considers necessary under the facts of the dispute.

33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

Under German law, anti-suit injunctions are not available as interim measure.

34. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

Section 1042 Para. 4 ZPO provides that the tribunal has the discretion to decide on the admissibility of taking evidence, to take evidence and to freely assess the evidence submitted in the arbitral proceeding.

Section 1050 ZPO further addresses court assistance in taking evidence and other judicial acts and stipulates that the arbitral tribunal or, with the approval of the arbitral tribunal, a party may request that a court aids in taking evidence or by exercising any other judicial measures for which the arbitral tribunal is not authorized. Unless it regards the request to be inadmissible, the court deals with such request in accordance with its own procedural rules for the taking of evidence or any other judicial acts. The arbitrators are entitled to participate in the court hearing at which evidence is taken and to ask questions.

Applying the abovementioned general rules with Section 380 Para. 2 ZPO, the forcible production of witness testimony may be ordered by a tribunal and compelled by local courts.

35. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

German arbitration law does not provide for ethical codes or other professional standards that would apply to counsel and arbitrators conducting proceedings. Counsel and arbitrators are therefore only bound by the ethical codes or other professional standards applicable in their respective jurisdictions or bars.

36. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

As in other arbitration-friendly jurisdictions, confidentiality is not expressly provided for under German arbitration law itself, but rather contained in arbitration rules of the national institutions.

In this regard, Art. 44 of the 2018 DIS Arbitration Rules stipulates that, unless the parties agree otherwise, the parties and their outside counsel, the arbitrators, the DIS employees, and any other persons associated with the DIS who are involved in the arbitration shall not disclose to anyone any information concerning the arbitration. This particularly includes 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. Pursuant to Art. 44.3 of the 2018 Arbitration DIS Rules the DIS may publish an arbitral award only with the prior written consent of all the parties. Art 44.2 of the 2018 DIS Arbitration Rules states that disclosures may nonetheless be made to the extent required by applicable law, by other legal duties, or for purposes of the recognition and enforcement or annulment of an arbitral award.

37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

We are not aware of any recent public decision on the admissibility of evidence unlawfully obtained. However, hacking may be punishable under the German Criminal Code (*Strafgesetzbuch*, StGB), to the extent that constitutes a criminal offense pursuant to Sections 202a (data espionage) and 202b (phishing) StGB.

38. How are the costs of arbitration proceedings estimated and allocated?

If the parties have concluded an arbitration agreement, the costs of the arbitration are dealt with as set out in the respective agreement. In the absence of an agreement on costs, the arbitral tribunal has the discretion to allocate the costs between the parties.

Section 1057 Para. 1 ZPO states that, unless otherwise agreed by the parties, the arbitral tribunal is to decide, in its arbitral award, on the share of the costs of the arbitral proceedings that each of the parties is to bear, including the costs incurred by the parties that were necessary to properly pursue their claim or defense. In this context, the arbitral tribunal will decide at its discretion while taking account of the circumstances of the individual case, in particular the outcome of the proceedings.

Section 1057 (2) ZPO further states "[i]nsofar as the costs of the arbitral proceedings are fixed, the arbitral tribunal is to also decide on the amount to be borne by each party. If the costs have not been determined, or should it be possible to determine them only after termination of the arbitral proceedings, the arbitral tribunal will rule on the matter by separate award."

The renumeration in state court proceedings is determined in accordance with the lawyers' remuneration act (*Rechtsanwaltsvergütungsgesetz*,

RVG) which determines lawyers' fees depending on the amount in dispute. Arbitral Tribunals are not bound by the RVG and cost submissions on the basis of the actual costs incurred due to fee arrangements on a time spent basis are standard practice.

German law is in accordance with the general principle of "costs follow the event", under which each party bears its costs in proportion to its degree of success or failure.

39. Can pre- and post-award interest be included on the principal claim and costs incurred?

This question is not addressed by the German arbitration law. However, the arbitral tribunal can award interest to the extent that the applicable substantive law allows a claim for interest. The BGB as substantive law foresees an interest rate of 5 percentage points above the reference rate for contractual relationships where a consumer is involved and 9 percentage points above the reference rate for all the other contractual relationships.

40. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

Pursuant to Section 1055 ZPO, where the seat of the arbitration was in Germany, an arbitral award has its seat in Germany, the effect of a final and binding judgment handed down by a court. The arbitral award must satisfy the formal and content requirements set out in Section 1054 ZPO, such as a writing requirement, signature from the (majority of) the arbitrators, place and date of the award, and delivery of a counterpart of the arbitral award to each of the parties. More specifically, Section 1054 Para. 2 ZPO provides a reasoning requirement, unless the parties agree that no reasons are to be provided or in case an award on agreed terms is issued.

With regard to foreign arbitral awards Section 1061 (1) ZPO determines that the recognition and enforcement of foreign arbitral awards is governed by the New York Convention.

Concerning the enforcement of domestic arbitral awards, Section 1059 ZPO stipulates the criteria under which an award may be set aside. The criteria mirror those stipulated in the the NYC but adapt to the domesting setting, i.e. that Article V Para. 1 e) NYC has not been incorporated.

41. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

Generally, enforcement proceedings can be expected to be fast. Usually, it takes only a few months.

In line with Section 1063 Para. 3 ZPO, the party demanding enforcement has the possibility to request an interim order to ensure enforceability of the arbitral award.

42. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

In general, the standard of review for recognition and enforcement of a foreign award is very similar to the standard for a domestic award. Section 1059 ZPO, which provides grounds for setting aside an arbitral award, mirrors almost exactly the wording of Article V of the NYC including the differentiation between which grounds must be raised by the parties (Section 1059 Para. 1 ZPO; Art. V(1) NYC), and which grounds may be found *sua sponte* by the competent court (Section 1059(2) ZPO; Art. V(2) NYC). Moreover, the German ZPO expressly applies the NYC to the recognition and enforcement of a foreign award, without any modifications (Section 1061 ZPO). Art. V(1)(e) of the NYC has no mirrored provision under the German ZPO given that it is a provision that can only be applied in case of recognition and enforcement of foreign awards.

43. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

As a rule, German arbitration law does not impose limits on the available remedies. However, remedies which are awarded by an arbitral tribunal and are contrary to public policy (*ordre public*) render the award unenforceable. Thus, such an award can be set aside in line with Section 1059 (2) no. 2b) ZPO.

44. Can arbitration awards be appealed or

challenged in local courts? What are the grounds and procedure?

Generally, German arbitration law does not provide for an appeal mechanism. Section 1059 (1) ZPO determines that the only remedy available against an arbitral award is an application to have it set aside by a court. Please see answer to question 42 above for the grounds to have an award set aside.

As to the procedure to have an award set aside, Section 1059 (3) ZPO states that unless the parties agree otherwise, the application for setting aside the arbitral award must be filed with the court within a period of three months. This period begins on the day the party filing the application has received the arbitral award. The application for setting aside the arbitral award no longer may be filed once a German court has declared the arbitral award enforceable.

45. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

In line with jurisprudence, it is not possible to exclude the right to challenge an award in advance. Any such agreement is considered void.

46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

Awards against a state can successfully be enforced, unless the state's sovereign immunity impedes such enforcement. An immunity objection can also be raised at the enforcement level if the enforcement measure is aimed at assets that serve sovereign purposes. It is irrelevant whether the subject matter of the award was related to sovereign or fiscal matters.

47. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

A third party can only be bound with its consent or in a case of legal succession. Under German arbitration law, third parties cannot challenge the recognition of an award.

48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

German arbitration law does not address the issue of third-party funding. Under German procedural law, no obligation exists to disclose third-party funding. We are not aware of court decisions dealing with that topic with regard to arbitration.

49. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

German arbitration law does not provide for emergency arbitrator relief nor do the 2018 DIS Arbitration Rules.

However, within the framework of party autonomy, the parties can of course agree on a set of rules, e.g. the ICC Rules, which provide for emergency arbitrator proceedings. According to the prevailing opinion, these are binding at least under substantive law within the framework of Section 315 of the German Civil Code, similar to expert determination. According to one opinion, emergency arbitrator orders are also admissible for enforcement pursuant to Sec. 1041 Para. 2 ZPO, at least in the case of a domestic place of arbitration. The provision refers to urgent measures that do not take the form of an arbitral award. Pursuant to Section 1041 Para 2 ZPO, an emergency order issued by the constituted, regular arbitral tribunal may also be "enforced".

50. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

Annex 4 to the 2018 DIS Arbitration Rules provides for "Expedited Proceedings" under an "opt-in" regime. Pursuant to Art. 27.4 (ii) of the 2018 DIS Arbitration Rules and with a view to increasing procedural efficiency, the arbitral tribunal shall specifically discuss this possibility with the parties. However, these proceedings do not refer to a certain value of the claim.

51. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

In general, Germany actively participates in the debate about diversity alongside a wide range of legislative measures.

Aiming at encouraging gender equality in international arbitration, the DIS partnered with the Equal Representation in Arbitration Pledge (ERA Pledge) to create the DIS-ERA Pledge Gender Champion Initiative in October 2019. A Gender Champion within every participating firm and organization monitors the appointments of the arbitrators. The goal is to raise awareness for gender equality in international arbitration.

52. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

Section 1061 Para. 3 ZPO provides that "[w]here, after having been declared enforceable, the arbitral award is set aside abroad, an application may be filed seeking to have repealed the declaration of enforceability". However, we are not aware of any recent court decision involving such fact patterns.

53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

As a general rule, German courts cope with the issue of corruption as a matter of tort law. There is no certain standard of proof applied. In accordance with German procedural law, the party putting forward the argument of corruption bears the burden of proof. However, Germany has a secondary principle in civil procedure called "burden of substantiation", whereby the opposing party has a burden to thoroughly substantiate its defence against the party who has the burden of proof, including the production of evidence. This principle is applicable to German court litigation. There is no known decision applying this principle or any specific standard of proof or different burden of proof to arbitration proceedings concerning corruption matters.

54. Have there been any recent court decisions in your country considering the judgments of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16), Republic of Moldava v Komstroy LLC (Case C-741/19) and Republiken Polen v PL Holdings Sarl (Case C-109/20) with respect to intra-European investor-state arbitration? Are there any pending decisions?

On October 31, 2018, the German Federal Court of Justice (Bundesgerichtshof, BGH) ruled that, pursuant to the *Achmea* decision of the Court of Justice of the European Union, arbitration clauses in bilateral investment treaties between EU Member States (so-called "intra-EU BITs") are incompatible with EU law. Arbitral awards based on intra-EU BITs are therefore to be set aside.

With reference to the Court of Justice of the European Union's judgments in *Komstroy* and *PL Holdings*, the BGH confirmed the incompatibility of provisions of an intra-EU BIT between two EU Member States with EU law in a decision dated November 17, 2021.

55. Have there are been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

We are not aware of any (pending) court decisions in this regard.

56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

The most prominent German arbitral institution, the DIS, has taken several measures in response to the COVID-19 pandemic, *inter alia*:

- Organizational adjustments in case management (e.g. encouraged working from home)
- Increased use of electronic communication:
    - Extending the time for submissions, if request for extension of time is justified with a reference to the Covid-19 pandemic and this request is sent to all parties

- The initiation of arbitration proceedings shall preferably be effected by electronic transmission of a request for arbitration by e-mail
- Submitting arbitral awards electronically

57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

See our prior answer to question 56.

The 2018 DIS Arbitration Rules update provides for a more cost-effective conduct of arbitrations (Arts. 32 *et seq.*, Annex 2). During the COVID-19 pandemic the DIS has encouraged the greater use of electronical means (see Announcement of Particular Procedural Features for the Administration of Arbitrations in View of the Covid-19 Pandemic dated July 1, 2020).

58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

In Germany, the insolvency of a party does not affect the arbitration agreement. Thus, an arbitration can continue if one of the parties has to file for insolvency. Practically, the insolvency administrator replaces the insolvent party and enters the current proceedings. The insolvency administrator has to be granted a stay of the proceedings in order to familiarize with the matter and take a decision if and how he intends to continue the proceedings.

59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

Germany is amongst the Contracting Parties to the Energy Charter Treaty. It initially supported a modernization of the ECT following the example of Chapter 8 of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU and the inclusion of provisions implementing the 2015 Paris Agreement. Germany also wished to replace the current dispute settlement mechanism set forth in Article 26 ECT with a multilateral permanent investment court. In November 2022, the German government announced its intention to terminate the ECT.

60. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

In a notable order dated March 24, 2021, the German Federal Constitutional Court held that certain provisions of the German Federal Climate Change Act, addressing national climate targets and permissible annual emission amounts allowed until the year 2030, violate fundamental rights insofar as they lack sufficient specifications for further emission reductions from 2031 onwards.

A climate lawsuit by a Peruvian farmer against RWE, a German energy group, concerning the energy supplier's contribution to climate change is also noteworthy. German judges of the Higher Regional Court of Hamm and court-appointed experts arrived in Peru to assess plaintiff's allegations that his home is threatened by glacial melt as a result of climate change. The on-site visit was completed by the end of May 2022.

Aiming at a greater protection for the rights of people and of the environment in the global economy, the German Supply Chain Act was passed and will enter into force on January 1, 2023. The rationale behind this is to ensure compliance with fundamental human rights standards such as the ban on child labor and forced labor. Branches of foreign companies in Germany will also be covered if the company has more than 3,000 employees (from 2023) or 1,000 employees (from 2024) in Germany.

61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

The European Commission has been mandated by the Member States to coordinate the work of the UNCITRAL Working Group III on the future of ISDS. EU Member States coordinate their positions with the European Commission. We are thus not aware of any specific German views on the topic. The first in-person session since the COVID-19 pandemic was held from September 5 to 16, 2022 discussing topics such as the selection and appointment of ISDS tribunal members by a standing mechanism, assessment of compensation and damages and third-party funding. The next two sessions of the

Working Group are scheduled to be held in Vienna and New York by the end of January and March 2023, respectively.

62. Has your country implemented a sanctions regime (either independently, or based on EU law) with regard to the ongoing crisis in Ukraine? Does it provide carve-outs under certain circumstances (i.e., providing legal services, sitting as an arbitrator, enforcement of an award)?

On October 6, 2022, the EU agreed on the eighth package of sanctions against Russia, including further import bans and export restrictions (see Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine). The Council Regulation is a legal act that applies automatically and uniformly to all EU countries as soon as it enters into force. Thus, there is no need to transpose these regulations into national law. Since Germany is an EU Member State, this Regulation applies.

Accordingly, it shall be prohibited to provide legal advisory services to the Government of Russia or legal persons, entities or bodies in Russia. In line with the recitals (no. 19) of the Regulation, the term 'legal advisory services' covers: the provision of legal advice to customers in non-contentious matters, including commercial transactions, involving the application or interpretation of law, participation with or on behalf of clients in commercial transactions, negotiations and other dealings with third parties, and preparation, execution and verification of legal documents. 'Legal advisory services' does not include any representation, advice, preparation of documents or verification of documents in the context of legal representation services, namely in matters or proceedings before administrative agencies, courts or other duly constituted official tribunals, or in arbitral or mediation proceedings.

On a national level, the Sanctions Enforcement Act I (Sanktionsdurchsetzungsgesetz I) has been in force since May 28, 2022. The provisions in the Sanctions Enforcement Act I serve to close short-term regulatory gaps at the enforcement level for sanctions enforcement.

63. Have arbitral institutions in your country taken any specific measures to administer arbitration proceedings involving sanctioned individuals/entities? Do their rules address the issue of sanctions?

When the sanctions were issued, what has not been considered is that even the initiation of arbitration proceedings against a sanctioned company – and the companies in Annex XIX cover a significant part of the Russian economy – results in both oneself and the arbitration institution and arbitrators entering into transactions with the Russian party.

For arbitral institutions such as the DIS, there was a significant risk of violating EU sanctions simply by initiating proceedings. Therefore, the DIS, together with several other European arbitral institutions, convinced the EU Commission to mitigate this regulation. The sanctions have been modified in this regard: transactions necessary for the initiation and conduct of arbitration proceedings will in principle no longer violate the EU sanctions against Russia. However, these are in turn subject to conditions that must necessarily be met in order to exempt the transactions from the sanctions measures.

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