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Key Updates on German Arbitration Law

The German Arbitration Law Reform 2024 bolsters Germany's Attractiveness as an International Disputes Forum

Germany is a major arbitration hub in Europe, thanks to its sophisticated arbitration law and the supportive attitude of German courts towards private dispute resolution mechanisms. A Draft Bill for an amendment of the German arbitration law (the ***Proposal***) published by the German Ministry of Justice on 1 February 2024 is expected to further bolster Germany's attractiveness to international parties involved in cross-border arbitrations, marking the first major arbitration law reform in 25 years. The Proposal contemplates various updates triggered by changes in the international arbitration landscape over the last two decades. Such changes include the latest revisions to the UNCITRAL Model Law, recently revised rules of major arbitral institutions such as the International Chamber of Commerce (the ***ICC***) and the German Arbitration Institute, reforms in competing neighbouring jurisdictions (mainly France, Switzerland and Austria) as well as the ever-increasing importance of digitalisation.

We focus on practical changes the Proposal intends to bring to each of the three arbitration phases any party considering or involved in a German-seated arbitration should be aware of:

I. The validity of the arbitration agreement as the 'gating item' for resolving a dispute by means of arbitration;

II. The arbitration proceedings as such, which an arbitral tribunal applying German arbitration law will be able to conduct more efficiently once the Proposal has become law; and

III. Arbitration-related litigation before German state courts, which play a key role in safeguarding the parties' choice to refer their dispute to a private decision-making body and are thus essential to Germany's international arbitration ecosystem.

We conclude with an outlook and briefly describe the next steps necessary for the Proposal to become law **(IV.)**.

I. Validity of the arbitration agreement

a. Freedom of form regarding arbitration agreements in commercial transactions

The Proposal relaxes the formal requirements for arbitration agreements in specific circumstances by amending Section 1031 (4) of the Code of Civil Procedure (*Zivilprozessordnung - ZPO*).

German law currently stipulates that an arbitration agreement must be set out either in a single document signed by the parties or in letters or other forms of communication exchanged between the parties. In short, an arbitration agreement must currently be evidenced by text.

The Proposal allows specific categories of parties – determined by reference to German legal definitions – to deviate from these formal requirements and to conclude arbitration agreements free of form. In particular, the provision opens up the possibility of concluding arbitration agreements orally. Yet, if the arbitration agreement was concluded informally, either party may request the other party to confirm the contents of the arbitration agreement in writing.

By mirroring similar arbitration rules in other countries, the Proposal allows for a more seamless conclusion of arbitration agreements. The Proposal assumes practical significance in the context of global supply chains where, at the time of concluding contracts, it is often uncertain which suppliers will later be involved, and in complex framework agreements where contracts with individual companies might not always include written arbitration clauses.

However, as practical as free-of-form arbitration agreements may be in specific circumstances, it remains advisable to comply with the current formal requirements in order to avoid legal uncertainties and delays in the settlement of disputes. This is primarily for two reasons:

First, the party relying on the conclusion of a free-of-form arbitration agreement must prove the parties' agreement

on the arbitral institution, the applicable substantive law, the seat of arbitration and the number of arbitrators. In reality, it may be extremely difficult to prove an oral agreement on each of these aspects.

Second, the option to conclude free-of-form arbitration agreements is available only if both parties qualify under the German law definition of a merchant (*Kaufmann*), which essentially describes a party operating a substantial commercial enterprise. Small businesses or freelancers cannot conclude a free-of-form arbitration agreement. The rationale is that commercially inexperienced parties should carefully consider their decision to sign an arbitration agreement which effectively waives their right to state court jurisdiction. Still, by introducing exemptions from the formal requirements for arbitration agreements, the Proposal adds another layer of legal complexity which may be misused by respondents seeking to contest the existence of an arbitration agreement.

b. Decision on the existence or validity of the arbitration agreement

The Proposal amends Section 1032 (2) of the Code of Civil Procedure to clarify that the competent Higher Regional Court which has been asked to rule on admissibility of the arbitration may also, upon a party's request, rule on the existence and validity of the arbitration agreement. The Proposal mainly seeks to ensure that the provision setting out the court's power at the pre-arbitration stage mirrors the arbitral tribunal's power. Accordingly, the Proposal does not encroach on the principle of *Kompetenz-Kompetenz*. Under Section 1040 (1) of the Code of Civil Procedure, an arbitral tribunal continues to have the power to determine its own jurisdiction including ruling on the validity of the arbitration agreement.

A court ruling on the validity of the arbitration agreement promotes procedural economy. The parties will have the option to have a legally enforceable declaratory ruling on the validity of the arbitration agreement as early as at the pre-arbitral stage. While the arbitration may continue during the pendency of court proceedings, the arbitration would not proceed after a court has declared the arbitration agreement to be non-existent and / or invalid.

The increased procedural economy, however, comes with the risk of parties making frivolous applications to courts at the pre-arbitral stage to slow down or derail the arbitration proceedings.

II. Adjustments to the arbitration proceedings

a. Digitalisation

In surveys, stakeholders such as counsel, arbitrators, and arbitral institutions named digitalisation as one of the most pressing demands to make international arbitration fit for the future. The German legislator has sought to meet this demand, potentially setting a trend for further digitalisation in arbitration. This culminates in two specific updates:

First, the Proposal makes it easier for tribunals to order a remote hearing by amending Section 1047 (2) of the Code of Civil Procedure. German arbitration law thus far allows for remote hearings only if the parties agree. Under the Proposal, tribunals will be able to exercise their procedural discretion and order a remote hearing even if one of the parties requests an in-person hearing. The parties are, of course, still free to jointly agree on an in-person or a remote hearing.

This welcome development eliminates due process concerns if one party objects to a remote hearing. The Proposal therefore increases legal certainty and allows for arbitrations to be more flexible and cost-efficient, particularly in cross-border disputes. This also includes the possibility to organise hybrid hearings where, for instance, a witness testifies remotely while the hearing otherwise takes place in-person.

Second, the Proposal allows awards to be issued to the parties digitally, disposing of the need for wet-ink signatures by the arbitrators and subsequent couriers of official hardcopy versions to parties who may be located around the world (revision of Section 1054 (2) of the Code of Civil Procedure). The Proposal allows arbitrators to sign the award via a qualified electronic signature. This is a welcome simplification, particularly in cases where arbitrators and parties are based in different parts of the world. However, given that other national laws may require a wet-ink signature version of the award in enforcement proceedings, it may – for now – still be safest for the arbitral tribunal to sign hard copies of the award.

b. Appointment of arbitrators in multi-party arbitration

Pursuant to the Proposal, for the first time, parties will be able to resort to a statutory default mechanism for the appointment of arbitrators in multi-party arbitrations. The Proposal contains an express provision on the joint appointment of an arbitrator by multiple parties on one side of the dispute (new Section 1035 (4) of the Code of Civil Procedure).

If multiple parties on the same side of the dispute fail to jointly appoint an arbitrator, the Proposal clarifies that the competent Higher Regional Court, upon request by the opposing party, enjoys discretionary power to support the arbitration and appoint one or both party-appointed arbitrators. This is largely in line with the previous practice, whereby the courts acted as a fallback appointment authority for party-appointed arbitrators if one side had not appointed an arbitrator and the proceedings stalled as a result. However, an express statutory rule was previously missing in this regard.

By introducing a statutory default mechanism, Germany recognises the importance of multi-party arbitrations. Indeed, the proposed mechanism addresses a practical need, as around a quarter of all arbitration proceedings today are multi-party. The mechanism, however, only applies to ad-hoc arbitrations. Where parties have agreed on institutional arbitration rules (which usually contain similarly specific rules for multi-party arbitrations), such rules take precedence.

c. Dissenting or concurring opinions

The Proposal envisions an express clarification that an arbitrator of a three-member tribunal can provide a dissenting opinion, either regarding the outcome of the case or the reasoning of the award (new Section 1054a of the Code of Civil Procedure). This clarification became necessary in light of a heated debate in Germany on whether dissenting opinions are permitted in the wake of a 2020 court decision suggesting *obiter* that a dissenting opinion could lead to the award being set aside. Notably, German state courts do not issue dissenting opinions (with the exception of the German Constitutional Court).

Although dissenting opinions are commonplace internationally, they are not in German-seated arbitrations. The Proposal anticipates that not more than 4 percent of awards will be accompanied by a dissenting opinion (which will be separate from the 'main' award).

This is nevertheless an important clarification given that a dissenting opinion typically improves the quality of arbitral awards. Since a dissenting co-arbitrator will issue a 'separate' opinion, it may be easier for the other two arbitrators to find common ground instead of wrangling for a compromise acceptable to all three tribunal members that may weaken the quality of the award, and in the worst-case scenario, increases the risk of the award being set aside.

d. Publication of awards

The Proposal contains a new provision on the publication of awards, according to which the arbitral tribunal may publish the award with the consent of the parties (Section 1054b of the Code of Civil Procedure). While this in itself would not be new, the Proposal further provides that the parties' consent is deemed to be given unless a party objects to the publication within a month after the tribunal has requested to provide such consent.

This satisfies the long-standing demand for more transparency in commercial arbitration, also considering the practical importance of accessing awards for the purpose of developing the law and jurisprudence. It is also argued that publishing arbitral decisions could improve the quality of awards. Overall, this is in line with the trend in institutional arbitration rules encouraging the publication of awards (such as the ICC Rules).

Nonetheless, the Proposal respects and preserves the parties' legitimate confidentiality concerns. The parties continue to have the final say in whether and how an arbitral award should be published. *First*, each party can object to and thereby avoid publication. *Second*, the Proposal envisages an anonymised publication, along with the possibility to publish only excerpts from the award, omitting sections containing sensitive information that could allow direct or indirect conclusions about the parties involved.

III. Arbitration-related court proceedings

a. Arbitration-related litigation in English

The Proposal allows certain arbitration-related state court proceedings (ie particularly setting-aside and enforcement proceedings) to be conducted entirely in English (Sections 1062 (5), 1063a et seq., 1065 (3), (4) of the Code of Civil Procedure). The competent bodies to hear such cases are the English-speaking Commercial Courts at the Higher Regional Court level. This allows international parties to submit their briefs and exhibits and conduct oral hearings in English. The judgment would also be rendered in English.

Subsequent appeals before the Federal Court of Justice (the ***FCJ***) may also be conducted entirely in English, if requested by the appellant and ultimately approved by the FCJ.

It is expected that English-language proceedings will become the standard for litigation in international arbitration cases in Germany. While the Proposal requires that the parties must agree on English as the language of the court proceedings, such an agreement can be implicit – which may well be the case in international disputes. While each federal state in Germany is free to decide whether or not to set up Commercial Courts that will hear cases in English, it seems certain that the courts in the German arbitration hubs (e.g. Frankfurt, Hamburg, Berlin, Düsseldorf and Munich) will be keen to implement this option.

Even if the proceedings are being conducted in German, pursuant to the Proposal, parties would be able to submit the arbitral award and the arbitration case file in English. While some judges already informally permit this today, this will no longer be at the individual judge's discretion.

As a result, arbitration-related state court proceedings would be simplified, rendered more cost-efficient and would mirror the international environment most arbitrations take place in. More importantly, the German language will no longer be a barrier for international parties to commence arbitration-related court proceedings in Germany.

b. Retrial of a case – an extraordinary legal remedy

German law, in line with international practice and the New York Convention, upholds the finality of arbitral awards. It prohibits a *de novo* review of the award for legal and factual accuracy and only allows the setting aside of awards based on narrowly defined procedural shortcomings. The Proposal maintains this approach in principle.

Yet, in exceptional cases, justice may require that a final decision by an arbitral tribunal is overturned because of an extraordinarily significant violation of fairness. The Proposal therefore introduces a legal recourse against final awards that has long been available against court judgments – the so-called request for retrial of a case (suggested new Section 1059a of the Code of Civil Procedure). While German courts have permitted access to this recourse against arbitral awards in limited cases (depending on the seriousness of the violation), the Proposal seeks to formally clarify and codify the availability of this remedy against arbitral awards in extraordinary circumstances. In line with the new approach, the Higher Regional Courts would also be able to conduct such a retrial in English.

The legal remedy is limited to exceptional cases, such as awards rendered on the basis of a forged document, or an arbitrator found guilty of a criminal offence in connection with the arbitral proceedings. Further, this recourse is only admissible in cases where the requesting party was unable to assert the cause in earlier proceedings, such as setting-aside proceedings. Accordingly, the Proposal concludes that '*grounds for retrial of the case are an exceptionally rare occurrence*', and the number of successful requests is thus '*likely to be low*'.

This is supported by the fact that other jurisdictions offering similar provisions, such as Switzerland and Austria, have not seen a significantly higher number of overturned awards. This is also in line with the experience with requests for retrial against German court judgments. Thus, the concept of arbitration as a single-instance procedure remains unchanged.

c. Enforcement of interim measures issued by foreign tribunals

A major step in enhancing Germany's profile as an arbitration-friendly jurisdiction is that interim measures (such as asset freezing orders or injunctive relief) issued by *foreign* arbitral tribunals can be enforced in Germany once the Proposal becomes law (amendment of Sections 1025 (2) and 1041 (2) of the Code of Civil Procedure). Given the current economic headwinds and financial struggles a responding party might face, it may be critical for a claimant to safeguard its interests during the pendency of arbitral proceedings by obtaining a freezing order from an arbitral tribunal and subsequently securing the respondent's assets located in Germany through the Higher Regional Court (proceedings under Sections 1062 et seq. of the Code of Civil Procedure).

Under the current arbitration law, only interim measures issued by *domestic* tribunals are subject to enforcement in Germany. Interim measures granted by foreign tribunals are not enforceable, neither under German arbitration law nor under the New York Convention as they do not qualify as arbitral awards. So, if a party (usually the claimant) to an arbitration with a foreign seat seeks to freeze their opponent's assets in Germany, this party would have to apply to a German state court in parallel to the arbitration proceedings pending abroad. The Proposal encourages a claimant to instead apply to the arbitral tribunal familiar with the case at hand regardless of its seat, which will enable swifter decisions on interim measures and secure assets located in Germany until the arbitration has been concluded.

The Proposal clarifies that German courts no longer have discretion to enforce an interim measure issued by a tribunal. Also, German courts will not perform a *de novo* review of the measure. In line with the enforceability of final awards, permission is to be granted except (i) where the interim measure suffers from flaws that would justify setting aside an award, (ii) where the party seeking enforcement has in parallel filed an application for an interim measure with a state court, (iii) where the tribunal has suspended or revoked the measure in the meantime, or (iv) where the party seeking enforcement has failed to furnish security requested by the tribunal. As arbitration laws and rules around the globe provide for different forms of interim measures, a German court is afforded the power to recast the measure to ensure its enforceability within the German system.

The party requesting enforcement must formally apply to the Higher Regional Court. Proceedings may be conducted in English language. The application shall be supported by the tribunal's decision and demonstrate all factual allegations relied upon to the satisfaction of the court, a test that is usually met by adducing an affidavit.

The Proposal makes it significantly easier for parties to international disputes to seize their counterparty's assets in Germany. So, international parties looking to obtain interim measures should keep in mind Germany's revised rules on cross-border enforcement.

d. Setting aside negative decisions on jurisdiction

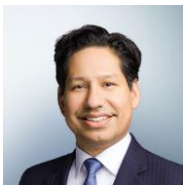
Unlike cases where an arbitral tribunal incorrectly *assumes* jurisdiction, the parties currently have no means of recourse to state courts to set aside a negative decision on jurisdiction (ie where an arbitral tribunal declines jurisdiction over a dispute). Under the current rules and FCJ case law, the only, albeit dysfunctional, option is to request the court to set aside the decision on jurisdiction for reasons that would justify setting aside a final award (for an *ordre public* violation or similarly severe flaw).

The Proposal introduces a much-needed right to recourse against negative decisions on jurisdiction (suggested new Section 1040 (4) of the Code of Civil Procedure). It clarifies that an arbitral tribunal shall issue a so-called procedural award should it find that it lacks jurisdiction over the merits. The aggrieved party may then request the Higher Regional Court to set aside such a procedural award. The high threshold for setting aside final awards does not apply, rather the court will assess whether the tribunal erroneously found the arbitration agreement to be invalid or the subject matter of the dispute to be outside the scope of the arbitration agreement. For practical purposes this new right to recourse is deemed to be a request for setting aside an award, meaning that the Higher Regional Court may conduct proceedings in English and eventually refer the dispute on the merits back to the tribunal.

IV. Conclusions and outlook

The Proposal incorporates many of the changes demanded by stakeholders. It is a welcome attempt to modernise the German arbitration law – using new opportunities in the digital age, internationalising arbitration-related court proceedings, and responding to reforms introduced by other European arbitration hubs. Although not all of the Proposal's new rules are currently perfect, the Proposal is an important step to further promote Germany as an arbitration-friendly and attractive seat of arbitration.

The Proposal is currently undergoing consultation by the federal states and interested parties (such as arbitral institutions) until 14 March 2024. As next steps, the Proposal will need to be adopted by the German Government before it can be introduced as a bill in parliament (*Bundestag*). We expect the Proposal to improve throughout this iterative process, while retaining the key suggested changes. The revised rules may enter into force as early as at the beginning of 2025.



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