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Contributing Editor:
Joe Tirado

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Germany

Catrice Gayer & Thomas Weimann
Herbert Smith Freehills Germany LLP

Introduction

Germany – Arbitration-friendly civil law jurisdiction

The use of arbitration as a dispute-resolution mechanism in Germany has a long-standing tradition. In most areas of business and commerce, institutional and *ad hoc* arbitration is commonly and successfully used.

German arbitration law is part of the German code of civil procedure (*Zivilprozessordnung* ("ZPO")) and is contained in Sections 1025 to 1066[1] thereof.

The ZPO is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 ("ML"). Therefore, users will find it particularly easy and predictable to apply.

Under the principle of territoriality, the ZPO is applicable to all arbitrations with a place of arbitration in Germany (Section 1025(1)). Further, the ZPO applies to all arbitrations, whether *ad hoc* or institutional. German lawmakers opted for a unified system: the ZPO provides a single set of rules for national and international arbitration. Lastly, unlike the ML (Article 1(1)), the ZPO is not restricted to "commercial" arbitration.

Currently, a working group of the Federal Ministry of Justice is analysing if the ZPO needs to be revised.

Germany is a signatory state of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention or "NYC"). Germany has not declared a commercial or reciprocity reservation (Article I(3) NYC). Pursuant to Section 1061(1), recognition and enforcement of foreign arbitral awards is governed by the NYC. Germany has also ratified, *inter alia*, the European Convention on International Commercial Arbitration of 1961 ("European Convention").

German lawmakers decided to grant the functional competence for arbitration-related matters to the regional higher courts (*Oberlandesgericht* ("OLG") (Section 1062)) (e.g. appointment and challenge of arbitrators; setting aside and enforcement of (foreign) awards and orders for interim measures; declaring arbitration proceedings admissible). This ensures usually consistent, quick and arbitration-friendly decisions. An appeal against orders of the OLG is limited to complaints on a point of law (*Rechtsbeschwerde*) with the German Federal Court of Justice (*Bundesgerichtshof* ("BGH")) (Sections 1065(1), 1062(1) Nos. 2 and 4).

The most well-known arbitration institution in Germany is the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit* ("DIS")). The DIS administers national and international arbitration proceedings under the DIS arbitration rules of 1998 ("DIS Rules"). The DIS Rules and model arbitration clause are available in the six official

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languages of the United Nations, as well as in German and Turkish. The DIS Rules are currently being revised. Unlike other international arbitration institutions, the DIS has already introduced "Supplementary Rules for Expedited Proceedings" (DIS-*Ergänzende Regeln für beschleunigte Verfahren*) in 2008.

A number of industry-focused arbitration institutions exist in Germany (e.g. German Maritime Arbitration Association (GMAA), *Waren-Verein der Hamburger Börse*, arbitration institutions with stock and commodity exchanges). The Chinese European Arbitration Centre (CEAC) administers international Asia-related arbitration proceedings.

Arbitration agreement

Does the principle of competence-competence apply?

According to the *Kompetenz-Kompetenz* principle, an arbitral tribunal can decide on its own jurisdiction (Section 1040(1) sentence 1). An arbitral tribunal's decision assuming jurisdiction is not binding or final for a court. Any agreement by parties to confer the final and binding decision to an arbitral tribunal is not valid, but in principle, will not invalidate the arbitration agreement as a whole.

Jurisdiction and preliminary rulings of arbitral tribunals

If a party raises objections regarding the jurisdiction of the arbitral tribunal (Section 1040(2)), the arbitral tribunal can assume jurisdiction by way of a preliminary ruling (Section 1040(3)). A preliminary ruling is not an award for the purposes of setting aside proceedings (Section 1059). The ZPO provides a special procedure to have the ruling overturned (Section 1040(3)). The opposing party must file an application with the court within one month after its receipt. Otherwise, the opposing party is precluded from invoking the invalidity of an arbitration agreement in any post-award proceedings. An arbitral tribunal can render an award, although the proceedings under Section 1040(3) are still pending. Reversing its own case law, the BGH recently held that the issuance of an award does not render the application (Section 1040(3)) inadmissible. Further, the three-month deadline for the award debtor to file a setting-aside application against the award will only start to run after the service of the court's decision (Section 1040(3)) denying the jurisdiction of the arbitral tribunal (by way of analogy of Section 1059(3) sentence 2) (BGH, 9.8.2016, NJW 2017, 488).

Does the principle of separability apply?

The arbitration agreement is an agreement independent of the existence, validity or termination of the main contract (Section 1040(1) sentence 2).

What are the substantive mandatory requirements of an arbitration agreement?

According to Section 1029(1), an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The first requirement of a "defined legal relationship" only precludes the validity of arbitration agreements providing that all future disputes between the parties, without any reference to a specific relationship (e.g. a specific contract or framework agreement) will be resolved by arbitration.

The fulfilment of the second requirement often raises problems: the parties' agreement to submit all or certain disputes to arbitration. It is essential that it can be clearly and unambiguously derived from the arbitration agreement that the parties' intention was to exclude the state courts as a dispute resolution forum and to have any disputes resolved

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by arbitration. If this requirement is fulfilled, courts enforce arbitration agreements even if the arbitration institution is not unambiguously designated (e.g. KG Berlin, 3.9.2012, SchiedsVZ 2012, 337). Likewise, the parties should clearly use the term *arbitration* and avoid terms such as conciliation, mediation, expert determination, or any other form of alternative dispute resolution. The parties can still agree on multi-tier arbitration agreements.

What are the non-mandatory requirements?

It is highly recommended for parties to agree on non-mandatory issues in the arbitration agreement:

- set of arbitration (institutional or *ad hoc*) rules (e.g. of the DIS, ICC, VIAC, SIAC);
- place of arbitration (e.g. Düsseldorf, Germany);
- number of arbitrators and/or procedure for the constitution of the arbitral tribunal; and
- language of the arbitration.

If the parties wish to apply institutional arbitration rules, it is highly advisable to use the model arbitration clauses of the various arbitration institutions. The latter publish their model clauses on their official websites in various languages.

Emergency arbitrator and fast track rules – opt in or opt out?

Parties need to carefully check whether emergency arbitrator or fast-track rules apply automatically by agreeing on a set of institutional rules ("opt-out system" (e.g. Article 29(6) b) ICC Rules)) or whether they have to explicitly agree to the application of these rules in the arbitration agreement ("opt-in system", e.g. Article 45(1) VIAC Rules).

The parties should also agree on the rules of law governing the dispute in their choice-of-law clause (Section 1051).

(International) mandatory rules and arbitration agreements

Counsel and in-house lawyers need to be particularly considerate of (internationally) mandatory rules when drafting an arbitration agreement and a choice-of-law clause in an agency agreement. The rights of an agent to claim indemnity or compensation – after the principal's termination of an agency agreement – is enshrined in the national laws of the member states of the EU based on Articles 17-19 of Council Directive 86/653/EEC. Articles 17-19 are qualified as internationally mandatory rules, if an agent operates its principal activity and has its seat in the EU (ECJ, Ingmar, C-381/98, EuZW 2001, 50). An arbitration agreement providing for a place of arbitration outside of the EU in tandem with a choice-of-law clause for the governing law of a non-EU country was refused enforcement by a court in Germany (OLG München, 17.5.2006, WM 2006, 1556). The court held that this tandem would pose a "reasonable threat" that an arbitral tribunal (e.g. seated in California) would not apply an agent's mandatory claim for compensation.

In 2016, the BGH overturned the highly disputed decision of the OLG München in *causa* Pechstein (OLG München, 15.1.2015, SchiedsVZ 2015, 40). The BGH held that the arbitration agreement between the ice speed skater Claudia Pechstein and the ISU was valid (BGH, 7.6.2016, SchiedsVZ 2016, 268). It ruled, in particular, that it would not violate (i) the German antitrust law prohibition on abuse of a market dominant position (Section 19(1) GWB (German competition law)), (ii) the fundamental right to free exercise of profession (Article 12(1)GG (German constitution)), or (iii) the right to fair proceedings under Article 6 of the European Convention of Human Rights. Claudia Pechstein has filed a constitutional appeal (*Verfassungsbeschwerde*) against the decision of the BGH with the German Constitutional Court (*Bundesverfassungsgericht*).

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Form requirements of an arbitration agreement

Section 1031 requires an arbitration agreement to fulfil the "writing" requirement. Only arbitration agreements between businessmen (Section 14 of the German civil code (*Bürgerliches Gesetzbuch* ("BGB")) not involving consumers, will be addressed herein.

An orally concluded arbitration agreement does not suffice. The writing requirement is fulfilled if the agreement is signed by the parties or if it is contained in an exchange of letters, telefaxes or other means of telecommunication (e.g. emails), which provide a record of the agreement. The list of means of communication in Section 1031(1) is not exhaustive.

Unlike the ML, Section 1031(2) also provides a more lenient writing requirement. An arbitration agreement is deemed to be in writing if it is contained in a document transmitted from one party to the other party. Unless the receiving party raises objections without undue delay, the contents of the document, and thus the arbitration agreement, become part of the contract in accordance with common usage. Thus, an exchange of means of telecommunications containing the arbitration agreement is not required. Section 1031(2) is of high practical importance in business transactions. Often contracts are concluded orally and one party confirms the content of the agreement by a commercial letter of confirmation (*kaufmännisches Bestätigungsschreiben*). If such a letter reflects the result of the negotiations without significant deviations, the recipient will be deemed to be bound by the contract, unless the recipient objects without undue delay.

A contract, complying with the form requirements of subsections 1 or 2 of Section 1031 (signature, exchange of means of communications, failure to raise objections), can also contain a reference to a separate document containing an arbitration agreement. Often arbitration agreements are included in separate standard terms and conditions ("STC"). As long as the reference is such as to make the arbitration agreement part of the contract, the form requirements are fulfilled (Section 1031(3)).

Two questions need to be assessed:

- *First*: Under German law, an arbitration agreement will be validly incorporated into the contract, if the reference is unambiguous and the recipient had the opportunity to review the arbitration agreement (actual review is not required). In recent decisions, courts confirmed that the threshold for a valid incorporation is low. It is sufficient to send the STC containing the arbitration agreement to the other party. It is not necessary to send the institutional rules (referred to in the arbitration agreement) to the other party as long as they are publicly available (e.g. on the website of the arbitration institution) (KG Berlin, 13.06.2016, 20 SchH 1/16).
- *Second*: If German law governs this question, the validity of the STC, and thus of the arbitration agreement itself, is subject to the specific validity requirements set out in Sections 305(1), 307(1), (2) BGB (also applicable between businessmen (310(1) BGB)). An arbitration agreement which fulfils the requirements of a just constitution of an arbitral tribunal and a fair treatment of the parties will be usually considered valid.

Full review of the arbitration agreement and special procedure for admissibility of arbitration proceedings

In case a party initiates court proceedings in violation of an arbitration agreement, the opposing party must invoke the existence of the arbitration agreement prior to the beginning of the oral hearing (Section 1032(1)) (*Schiedseinrede*). Otherwise, it will be deemed that the opposing party has waived its right to arbitrate. The party initiating the court proceedings bears the burden of proof for the invalidity of the arbitration agreement.

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Further, the ZPO stipulates a special procedure not mirrored in the ML: a party can file an application with the OLG to determine, in particular, whether the arbitration agreement is valid (Sections 1032(2), 1062(1) No. 2). This application is admissible prior to the constitution of an arbitral tribunal.

Both procedures (Sections 1032(1) and (2)) apply also if the place of arbitration is outside of Germany (Section 1025(2)). In principle, the courts will make a full review of the validity of the arbitration agreement at this pre-arbitration stage. In many other jurisdictions, the courts assess the validity of the arbitration agreement only on a *prima facie* basis at such a stage, and make a full review only in post-award proceedings. The German approach ensures that parties do not spend time and costs on arbitration proceedings, resulting in an arbitral award which will be set aside or refused enforcement due to an invalid arbitration agreement.

What disputes are arbitrable?

Any claim involving an economic interest is arbitrable. Thus, any monetary claims, also involving questions of antitrust law, the use of intellectual property rights ("IPR"), etc. are arbitrable. The term "economic interest" is broadly interpreted. Further, even claims not involving an economic interest are arbitrable, if the parties are entitled to conclude a settlement on the issue in dispute (Section 1030(1)).

Disputes on the existence of a lease of residential accommodation within Germany are not arbitrable (Section 1030(2)). Due to the rising importance of disputes arising out of (patent) licence agreements, it has been recently heavily discussed in the German arbitration community whether the validity of patents is arbitrable (at least with *inter partes* effect between the parties of the arbitration).

What rules exist for joinder/consolidation of third parties?

The ZPO does not provide any rules for joinder and consolidation of third parties. The parties can agree on institutional rules providing for these cases (e.g. Article 7 ICC Rules). If German law applies to this question, a third party might be bound to an arbitration agreement, if rights and obligations arising out of a main contract containing it, have been validly assigned.

Arbitration procedure

How are arbitration proceedings commenced in your jurisdiction?

Pursuant to Section 1044, arbitration proceedings commence on the date on which a request for a dispute is received by the respondent. Many institutional rules, if agreed upon by the parties, deem proceedings to be commenced on the date on which the institution receives the request for arbitration (e.g. Article 4(2) ICC Rules).

The request under Section 1044 has only to state the names, the subject-matter of the dispute and contain a reference to the arbitration agreement. If the parties agree on a set of institution rules, the requirements of a request for arbitration (Article 4(3) ICC Rules) or a statement of claim (Section 6.2 DIS Rules) are much more elaborate than under Section 1044. A claimant has, e.g., to also state the relief sought, nominate an arbitrator and set out the facts giving rise to the claims.

If German substantive law applies to this question, the statute of limitations period is suspended on the date the arbitration proceedings begin (Section 204(1) No. 11 BGB).

Can hearings take place outside of the place of arbitration?

Yes, according to Section 1043(2), unless the parties agree otherwise.

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What are the rules on evidence?

Except for mandatory provisions of the ZPO (in particular, the right to be heard, equal treatment of the parties and representation by counsel (Sections 1042(1) and (2))), the parties are free to determine the procedure themselves or by reference to institutional rules (Section 1043(3)). Failing an agreement of the parties, the arbitral tribunal has wide discretion to conduct the arbitration as it considers appropriate (Section 1043(4)).

The applicable rules on evidence will depend, *inter alia*, on the legal background of the arbitrators and parties, the nature of the dispute and the parties' expectations. Arbitral tribunals and parties can therefore tailor-make the procedure. It is good practice, mostly at the beginning of the proceedings, that an arbitral tribunal will issue special procedural rules and a procedural order no.1 after having heard the parties.

Arbitral tribunals lack coercive powers. They cannot compel witnesses or experts to appear. They cannot administer oaths. Further, they cannot order a third party to produce documents. A party, with the approval of the arbitral tribunal, or the arbitral tribunal itself, can request a court to assist in the taking of evidence or to perform other judicial acts (Section 1050).

Taking of evidence in national arbitrations

The continental civil law tradition of Germany and a limited inquisitorial approach will prevail. Written witness statements are the exception. During an evidentiary hearing, an arbitral tribunal will examine witnesses first. Counsel to parties will typically ask additional, in particular, follow-up questions to the witness to test the witness' credibility and the probative value of the statement. An arbitral tribunal may give directions, such as which facts it considers (ir)relevant, and give a preliminary assessment on the merits of the case, unless the parties agree otherwise. Document production between the parties is the exception.

The ZPO provides a framework for arbitral tribunal-appointed experts (Section 1049), subject to the parties' agreement. The arbitral tribunal may appoint one or several experts and order a party to give the expert any relevant information or to produce, or grant access, to any relevant documents (Section 1049(1)). Experts have a continuing obligation to be impartial and independent (Sections 1049(3), 1036). Otherwise, a party can challenge the expert. This challenge procedure is a special feature of the ZPO, not provided for in the ML. The deadline is two weeks after becoming aware of the expert's appointment or after becoming aware of the circumstances giving rise to the challenge (Sections 1049(3), 1037(2)). The arbitral tribunal will decide on the expert's challenge. A party failing to challenge the expert may be precluded from invoking the expert's lack of impartiality or independence in post-award proceedings (Section 1059(2) No. 1(d), Article V(1)(d) NYC). Parties can appoint their own experts.

Taking of evidence in international arbitrations

Written witness statements are commonly used. In particular, if a common-law party is involved, the examination of witnesses will follow the common law tradition (direct, cross- and re-examination). Sometimes also a hybrid system between common and civil traditions will be adopted.

As regards document production, arbitral tribunals use the IBA Rules on the Taking of Evidence (of May 2010) (Article 3) ("IBA Rules") as guidelines. Usually they will clarify in the special procedural rules that they are not bound by them and use Redfern schedules. Subject to the circumstances of the case, German arbitration practitioners apply

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the requirements of document production under Article 3 IBA Rules rather strictly (the law applicable to the merits, the burden of proof, and the involvement of a party from a common law jurisdiction often plays a role). This strict approach minimises costs and increases the efficiency and speed of arbitration proceedings.

It is common practice that the parties appoint experts. The IBA Rules (Articles 5 and 6) are often used as guidelines. German arbitration practitioners in international arbitrations also use witness conferencing with experts and witnesses.

What rules are applicable regarding privilege and disclosure?

In civil court proceedings, in principle, discovery or disclosure of documents by an opposing party does not exist. The threshold under the exceptions (e.g. Sections 422, 423, 142) is very high. Accordingly, rules regarding privilege do not exist either in the ZPO. In international arbitrations in Germany, various approaches to determine the applicable law to the question of privilege, and different concepts of privilege in numerous jurisdictions, often arise under the IBA Rules (Article 9(2)(b)). Therefore, German arbitration practitioners are experienced in finding appropriate solutions, ensuring a level playing field between parties from different jurisdictions.

Are arbitration proceedings in your jurisdiction confidential? Can the evidence and pleadings be kept confidential?

The ZPO is silent on whether arbitration proceedings are confidential.

The BGH held that an arbitrator has a confidentiality obligation under his/her arbitrator's contract with the parties (BGH, 5.5.1986, NJW 1986, 3077, 3078), unless the contrary is clearly indicated.

As regards the confidentiality obligations of parties, the legal situation is not clear: If the parties have not explicitly agreed in their contract or in their arbitration agreement on the confidentiality of the arbitration proceedings, it is subject to scholarly debate whether an implied obligation can be derived from either of the contracts.

Therefore, in practice, the parties and the arbitral tribunal often conclude a confidentiality agreement at the outset of the arbitration proceedings (e.g. in the terms of reference of ICC proceedings). The wording of such confidentiality agreement should be broad, so it also encompasses e.g. the parties' pleadings, expert reports and witness statements. Unlike the ICC Rules, Section 43.1 DIS Rules obliges parties, counsel and arbitrators to keep the arbitration confidential.

Experts, witnesses, court reporters etc. are not bound by such confidentiality agreement. Therefore, separate agreements should be concluded with them.

Arbitrators

Appointment of arbitrators

Unless the parties agree otherwise, the number of arbitrators shall be three (Section 1034(1)).

Party autonomy also prevails as regards the procedure of the appointment of the arbitral tribunal (Section 1035(1)). Failing an agreement by the parties, the default rules of the ZPO provide a standard procedure: In case of a three-member tribunal, each party appoints its own arbitrator and the two party-appointed arbitrators shall appoint the chairman. Should a party fail to appoint its own arbitrator and subsequently fail to do so within one month of a request by the other party, the other party may request the court to make the appointment. In case the party-appointed arbitrators fail to agree on the chairman within one month of their

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appointment, or in case the parties fail to agree on a sole arbitrator, the court will make the appointment upon request of a party (Section 1035(3)).

The ZPO stipulates a special procedure, not mirrored in the ML, which safeguards, also between businessmen[2], an equal treatment of the parties in the constitution of the arbitral tribunal (Section 1034(2)). This procedure allows a court, upon application of one party, to appoint a substitute arbitrator if the arbitration agreement grants preponderant rights to one party (e.g. only one party has the right to nominate the sole arbitrator or the chairman). The disadvantaged party must make the application within two weeks after becoming aware of the constitution of the arbitral tribunal.

Deviating from the ML (Article 11(1)), the ZPO does not prohibit persons from acting as an arbitrator due to their nationality, unless the parties agree otherwise (e.g. Article 13(5) ICC Rules). Depending on the matter in dispute, engineers, accountants, etc. are nominated as arbitrators, in particular, in national arbitrations. The DIS Rules require that a sole arbitrator or the chairman shall be a lawyer, unless otherwise agreed by the parties (Section 2(2) DIS Rules).

How can arbitrators be challenged in your jurisdiction?

Arbitrators must be impartial and independent (Section 1036). Their duty to disclose circumstances that give rise to justifiable doubts as to their impartiality or independence is ongoing from the time of their appointment (Section 1036(1) sentence 2). Otherwise, they can be challenged (Section 1036(2)).

As regards challenges, a two-tier system applies: First, a party has to file a challenge (a "written statement of the reasons of the challenge") with the arbitral tribunal. The deadline is two weeks after the constitution of the arbitral tribunal or after the challenging party becomes aware of the circumstances enumerated in Section 1036(2) (1037(2) sentence 1). In practice, the challenged arbitrator – even if not obligated to do so by law – often refrains from participating in the tribunal's decision on the challenge.

Second, if the challenge is dismissed, the challenging party may apply to the OLG (within one month) to decide on the challenge (Sections 1037(3) sentence 1, 1062(1) No. 1). Otherwise the challenging party is precluded from invoking in post-award proceedings that the arbitral tribunal was not properly constituted (Section 1059(2) No. 1(d) or Article V(1)(d) NYC) (unless public policy applies). The OLG is not bound by the decision of the arbitral tribunal or a third party (e.g. ICC Court (Article 14 ICC Rules)). The parties cannot validly waive recourse to the courts under Section 1037(3). A complaint on a point of law against a decision of the courts with the BGH is not admissible (Section 1065(1)).

The IBA Guidelines on Conflicts of Interest in International Arbitration of 2014 ("IBA Guidelines") are widely known and used by arbitrators in Germany. Courts tend to consider the principles (red, orange and green lists) laid down in the IBA Guidelines, even if not explicitly referring to them.

How is an arbitrator's mandate terminated?

It is terminated, in particular:

- if an award is issued (the arbitral tribunal becomes *functus officio*);
- if an arbitrator withdraws from his/her office;
- by a court's decision in a challenge procedure to remove the arbitrator (Section 1037);
- by a court's decision to remove the arbitrator, if an arbitrator becomes *de jure* (e.g. legal incapacity) or *de facto* unable to perform his functions (Section 1038(1) sentence 2); or
- if the parties agree to terminate the arbitrator's mandate.

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Immunity of arbitrators

Arbitrators are generally immune from liability for damages in their capacity as a decision-maker. They cannot be held liable if they render a decision that is legally incorrect, except for cases of intentional misconduct (Section 44.1 DIS Rules) or criminal offences. They enjoy more or less the same privilege as German state judges (by way of analogy of Section 839(2) BGB).

However, arbitrators are generally liable for breaches of their contract with the parties, in particular, in cases, where they:

- resign without good cause;
- fail to disclose circumstances which may lead to a challenge for lack of impartiality or independence; or
- unduly delay or even refuse to continue with the arbitration proceedings.

In their contract with the arbitrators or by reference to institutional rules, the parties can agree to restrict (e.g. Section 44.2 DIS Rules) or exclude the arbitrator's liability (e.g. Article 40 ICC Rules). The validity of the restriction or exclusion is subject to the applicable law.

Interim relief

Can the parties apply with both courts and tribunals for interim relief?

Under the ZPO, the parties to an arbitration agreement are free to choose whether to seek interim relief with a court or an arbitral tribunal (Sections 1033, 1041). The parties can opt out of seeking interim relief with arbitral tribunals (Section 1041(1)). Whether the parties can also validly waive recourse to the courts is disputed among scholars and courts.

Before or during arbitration proceedings, a party can request a court to order interim relief (Section 1033), even if the place of arbitration is outside of Germany (Section 1025(2)) and if the court assumes international jurisdiction. In practice, German courts can order interim relief, subject to the circumstances and the fulfilment of certain requirements, *ex parte* and within 24 hours.

What types of interim relief are available to parties?

Courts may, for example, grant: (i) a pre-award attachment (Arrest) to secure a monetary claim; (ii) a preliminary injunction (*einstweilige Verfügung*) to secure any other claim; or (iii) a procedure to preserve evidence (*selbstständiges Beweisverfahren*).

Arbitral tribunals have a wider discretion than courts as regards the types of interim reliefs they can order. Contrary to a court, arbitral tribunals can only order interim measures against the parties to the arbitration agreement. Lacking coercive powers, arbitral tribunals cannot enforce interim measures if a party does not voluntarily comply with them. Upon request of a party, a court can enforce them (Section 1041(2)).

If the opposing party can prove that the interim measure – ordered by the court or an arbitral tribunal – was unjustified from the outset, the applicant is liable for damages (Sections 945, 1041(4)) resulting from the enforcement of such a measure.

Arbitration award

Are there any formal requirements for an arbitration award?

An award must:

- be in writing;

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- be signed by the sole arbitrator or, in case of a three-member tribunal, by its majority;
- state the reasons upon which the arbitral tribunal has based its decision (unless the parties agree otherwise); and
- state the date of the award and the place of the arbitration (Section 1054).

A copy of the award signed by the arbitrators must be delivered to each party. A specific form of delivery is not required (Section 1054(4)).

Is a time frame stipulated for the arbitration award?

Unless agreed otherwise by the parties, the ZPO does not specify a time frame for rendering the award.

Can an arbitral tribunal order costs for the parties? If yes, under what criteria?

An arbitral tribunal has the power to allocate the costs of the arbitration at its discretion, unless the parties agree otherwise (Section 1057). By exercising such discretion, the arbitral tribunal must take into account all circumstances of the case, particularly its outcome. In practice, German arbitration practitioners usually follow the "costs follow the event" rule. Depending on the circumstances of the case, arbitral tribunals may also take into account e.g. "guerrilla tactics", or the outcome of jurisdictional objections or voluminous requests to produce.

Can interest be included in the award and/or costs?

An arbitral tribunal can grant interest in the award if a party has filed a respective claim. Otherwise, granting interest would qualify as an *ultra petita* ruling and constitute a ground for setting aside or refusing the enforcement of an award (Section 1059(2) No. 1(c) and Article V(1)(c) NYC).

Challenge of the arbitration award

On what grounds can an award be challenged?

According to Section 1059(2) (mirroring Article 34(2) ML), an award may be set aside only if:

1. the applicant shows sufficient cause that:
   (a) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid; or
   (b) the opposing party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case; or
   (c) the arbitral tribunal has exceeded its authority; or
   (d) the composition of the arbitral tribunal or the arbitration proceedings was not in accordance with the ZPO or with an admissible agreement of the parties and this presumably affected the award; or
2. the court finds that:
   (a) the subject-matter lacks objective arbitrability under German law; or
   (b) recognition and enforcement of the award would violate public policy.

Section 1059(2) provides an exhaustive list of grounds on the basis of which an award can be set aside. The grounds in No. 1 have to be pleaded by the applicant ("[…] shows sufficient cause […]"). The grounds in No. 2 are considered by the court *ex officio* ("[…] the court finds […]"). A review of the merits by a court is not admissible (prohibition of the *révision au fond*).

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The wording of Section 1059(2), "may be set aside", has to be read as "shall be set aside". A court does not have any discretionary powers: it has to set aside an award if a ground exists. An oral hearing is mandatory (Section 1063(1), first alternative).

Deviating from the ML (Article 34(4)), Section 1059(4) provides that a court will set aside the award and remit the case, in appropriate cases, to the arbitral tribunal. Further, Section 1059(5) stipulates that the arbitration agreement becomes operative again once the award has been set aside (except if the arbitration agreement is invalid).

Before arbitration proceedings are initiated, parties cannot validly waive setting-aside proceedings. After the award is issued or once a party becomes aware of a circumstance giving rise to invoke a ground listed in Section 1059(2) No. 1, a waiver to invoke this ground is valid. The grounds of No. 2 of Section 1059(2) (lack of objective arbitrability and violation of public policy) cannot be validly waived.

Is it possible to modify the arbitration award?

An application for the correction, interpretation or an additional award with the arbitral tribunal is admissible within one month after receipt of the award, unless agreed otherwise by the parties (Section 1058(1), (2)).

What are some recent examples regarding successful and unsuccessful attempted challenges of arbitral awards in your courts?

A recent order of the OLG München illustrates the general approach of courts to apply the grounds under Section 1059 in setting aside proceedings restrictively (OLG München, 9.11.2015, SchiedsVZ 2015, 303). The arbitral tribunal had incorrectly applied the applicable law. The OLG confirmed the prohibition of the *révision au fond* in post-award proceedings. It held that an award would only violate *ordre public* (Section 1059(2) No. 2(b)) if the violated provision is not only mandatory, but forms the basis of a functioning public or economic life. Further, the OLG held that the threshold of the violation of a party's right to be heard is high (Section 1059(2) No. 1(b), (d), No. 2(b)): if an arbitral tribunal has given a legal assessment of the merits of the claim, it can deviate from this assessment in the award. The right to be heard is only violated if the arbitral tribunal failed: (i) to inform the parties of the change of legal assessment; and (ii) to grant them the right to comment. The OLG also confirmed that arbitral tribunals do not have to address in the award every legal and factual argument submitted by the parties in a complete and exhaustive manner. Only if the reasons of the award are, in particular, self-contradictory, can an award be set aside for violation of Section 1054(2) (Section 1059(2) No. 1(d)).

Enforcement of the arbitration award

The application in enforcement proceedings is admissible if:

- it is in writing or put on record at the court registry (Section 1063(4)); and
- if the award or a certified copy is annexed to the application (Section 1064(1)). The stricter admissibility requirements under Article IV NYC (e.g. original or duly certified copy of the arbitration agreement; translation of the award into official language of enforcement state) do not apply (Article VII(1) NYC). In practice, the applicant submits a translation of the award, or at least of its operative part.

A foreign award can be refused enforcement based on the reasons of Article V NYC.

Can an arbitration award be enforced if it has been set aside at the seat of arbitration?

An OLG has to refuse enforcement of an award which has been validly set aside (Article V(1)

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(e) NYC). If the European Convention applies, the application of Article V(1)(e) NYC is limited. Pursuant to Article IX(2) European Convention, a court can refuse enforcement only if the award has been set aside for reasons stated in Article IX(1)(a)-(d) European Convention (being identical to the reasons set out in Article V(1)(a)-(d) NYC). If an award has been set aside, e.g. for violation of public policy or lack of arbitrability at the place of arbitration, Article V(1)(e) NYC cannot be applied by the courts in Germany under the European Convention.

What are the trends of enforcement in your jurisdiction?

The vast majority of foreign awards are enforced in Germany.

Counsel and award debtors have to be aware of the "preclusion" case law in Germany: is an award debtor precluded from invoking grounds under Article V NYC in enforcement proceedings in Germany if he fails to invoke the same grounds in setting aside proceedings within the statutory time limits of the *lex loci arbitri*? The BGH had to decide on this question of preclusion only for the invalidity of arbitration agreements (Article V(1)(a) NYC). It held that an award debtor is not precluded from invoking the invalidity of an arbitration agreement in enforcement proceedings, even if he had not initiated setting-aside proceedings invoking the same ground (BGH, 16.12.2010, NJW 2011, 1290). As regards any grounds other than the invalidity of the arbitration agreement (e.g. violation of right to be heard, *ultra petita* decision, flawed constitution of arbitral tribunal (Article V(1)(b), (c), (d) NYC)), this question of preclusion has not yet been decided by the BGH. Although criticised by scholars and courts, the majority view of the OLGs[3] seems to be in favour of preclusion.

Investment arbitration

Germany is currently a party to more than 130 effective BITs, the ICSID Convention and the ECT.

Public debate in Germany has been fuelled by the ICSID arbitration pending between, *inter alia*, Vattenfall AB, a Swedish power company and Germany since 2012 (ICSID case No. ARB/12/12). Vattenfall AB made investments in a number of nuclear power plants in Germany. The ECT dispute arose from the 2011 amendment to Germany's Atomic Energy Law ("Amendment"). The Amendment stipulated that Germany's nuclear power plants are to be phased out by 2022. Vattenfall AB is claiming damages of more than four billion euros. In October 2016, the arbitral tribunal held a hearing on jurisdiction, merits and quantum[4]. The latest publicly known development of the case is that the arbitral tribunal issued a procedural order concerning production of documents and the procedural calendar.

Further, the BGH made a referral for a preliminary ruling to the ECJ to decide on the compatibility of arbitration clauses in Intra-EU BITs with EU law, in particular Articles 344, 267 and 18 TFEU (BGH, 3.3.2016, SchiedsVZ 2016, 328 (Achmea B.V./Slovak Republic)).

* * *

Endnotes

1. Unless explicitly stated otherwise, any reference to sections are those of the ZPO.
2. As defined in Section 14 BGB.
3. OLGs: Regional higher courts.
4. Except for this hearing – which was made public via streaming on the ICSID website – the proceedings have been largely non-transparent.

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Catrice Gayer
Tel: +49 211 957 59 136 / Email: catrice.gayer@hsf.com

Catrice Gayer regularly acts as counsel in international and national arbitration cases under the auspices of various institutional rules (ICC, DIS, SIAC etc.) and *ad hoc*. The proceedings are governed by a variety of substantive and procedural rules. Her particular fields of industry are energy/infrastructure, IP and antitrust (including FRAND), commercial (agency, trade, distribution, licence), and post M&A-related disputes. She also regularly acts as (co-)counsel in setting aside and enforcement proceedings of awards and in other arbitration-related disputes before German courts and abroad. She has a particular expertise in Asia-related arbitrations. Her track record also includes the representation of national and foreign clients in civil and commercial disputes before the regional courts, share and asset deals, advising in compliance matters, and advising and drafting a broad range of supply, distribution, sale and corporate contracts.
She is a regional chair of the DIS40 (German Institution for Arbitration – below 40 group), a co-chair of the Young CEAC (Chinese European Arbitration Centre – below 45 group) and a member of the Executive Committee of the AIJA (*Association Internationale des Jeunes Avocats*). She is a graduate from the Universities of Mayence (Germany), Paris XII and Queen Mary/UCL (London) and holds a *Maîtrise en Droit* and a Postgraduate Laws Certificate. Catrice regularly speaks on international arbitration at conferences and publishes on international arbitration and corporate matters.

Thomas Weimann
Tel: +49 211 957 59 136 / Email: thomas.weimann@hsf.com

Thomas Weimann is the co-head of Herbert Smith Freehills' Disputes practice in Germany. Before joining HSF, he was a partner at Clifford Chance for many years and head of that firm's Düsseldorf arbitration and litigation practice. Thomas enjoys a practice that spans a wide range of arbitration work with a special focus on high-value construction-related disputes including plant construction, industrial engineering and civil construction projects and disputes (*inter alia* turn-key civil construction projects, power plants with a focus on turbines, sludge water plants, pulp mills, off-shore windfarms with a special focus on cable laying and converter platforms, chemical industry, subway projects, shopping malls and museums). He also sits as an arbitrator in proceedings under the auspices of the ICC, DIS, CIETAC and PCA and other renowned arbitral institutions. He has been counsel in more than 60 major construction arbitrations with a regional focus on Germany, the Arab region, the US and Russia. As the President of the Chinese European Legal Association (CELA) and one of the founders of the Chinese-European Arbitration Centre (CEAC) seated in Hamburg, he has well developed links with China. Thomas speaks frequently at seminars and conferences, in particular in Greater China. Furthermore, he speaks at international conferences, *inter alia* the annual meeting of the International Bar Association and the St. Petersburg International Legal Forum. Thomas is one of the co-organisers of the China Arbitration Day and a lecturer at the Düsseldorf International Arbitration School.

Herbert Smith Freehills Germany LLP

Breite Straße 29-31, 40213 Düsseldorf, Germany
Tel: +49 211 975 59 136 / Fax: +49 211 975 59 099 / URL: www.herbertsmithfreehills.com

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