

A VIEW FROM GERMANY: IS GERMANY ON ITS WAY TO BECOMING A TRUE ARBITRATION POWERHOUSE?

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Legal Briefings - By **Dr Patricia Nacimiento, Partner, Thoman Weimann, Partner and Dr Mathias Wittinghofer, Partner**

Germany, the dominant economy in the European continent, appears to be an anomaly in the world's current economic climate. While other countries continue to discuss concerns regarding the Euro or are worried about the UK's exit from the European Union, Germany's economy works like Swiss clockwork with quite literal German efficiency. Germany manages to maintain its GDP and to grow its exports, with exports increasing by 6.2% to €1,193.6 billion compared with 2014.¹ Germany's largest companies help to power this continuing growth as world leaders in auto manufacturing, finance, electronics, automation, pharmaceuticals and chemical production. Even the US legal enquiries focused on Deutsche Bank or VW led only to a temporary shiver in the stock price but did not affect the market's generally bullish attitude. Germany also hosts the European headquarters of many international corporates, including numerous Japanese and Chinese companies. Given Germany's importance on the world stage and the extent of its international trade, it comes as no surprise that arbitration has grown in popularity and importance as a method of dispute resolution for cross-border transactions.

The growth in popularity of arbitration in Germany is driven by the same factors that steer any multi-national towards arbitration. Confidentiality, autonomy, party choice, neutrality of venue and the ability to appoint arbitrators with experience in the sector or subject matter are all considered crucial. While some national court systems may have their attractions, particularly in Germany where a statutory cap on costs borne by the losing party makes litigation attractive, these attractions may not outweigh the very obvious draw of arbitration.

The involvement of German parties in arbitration is very apparent from the statistics of one of the major arbitral institutions, the International Chamber of Commerce (ICC). German parties were the second most frequent nationality using ICC arbitration in the cases filed in 2015, up from fourth in 2014. The German arbitral institution, DIS, has also seen growth since 2005, from 72 cases in 2005 to 140 in 2015, many of which are international, rather than domestic.

Germany's importance in arbitration is not confined to the realm of commercial arbitration. As the creator of the concept of a Bilateral Investment Treaty, albeit without an investor-state dispute settlement mechanism, it is unsurprising that Germany has one of the highest number of BITs and Treaties with investment provisions - 132 and 54 respectively, that are in force.² It is therefore also not a surprise that Germany features highly as the nationality of claimants in investor state cases, with 53 known cases where the claimant is German.³ Germany emerges relatively unscathed though in terms of claims made against it as the respondent state, with only three known cases.

So it is clear that German parties are arbitrating in both the commercial and investment arbitration spheres. And German arbitration practitioners are also in high demand, both as counsel and arbitrators. The ICC statistics for 2015 demonstrate that German nationals are the fifth most frequent nationality chosen, behind the UK, USA, Switzerland and France. Yet whilst Germany features strongly for its users of arbitration and for its arbitrators, Germany is not as well renowned as many other jurisdictions for being an arbitral seat. Germany does not have one, single place where arbitrations take place.

Germany's federal system means that Frankfurt, Hamburg, Dusseldorf, Munich, Stuttgart and Berlin are all commonly chosen seats of arbitration. But as a result, that "key" city is somewhat lacking. In contrast, the cities of Paris, London, Stockholm, New York and increasingly, venues like Hong Kong and Singapore, far eclipse any alternative venues for arbitration within those countries: it would be a rare group of international parties that seated their English, French or Swedish seated arbitration in Bristol, Lille or Örebro!

When parties are choosing a seat for their arbitration, German cities may also lose out on the basis that another seat has a particular perceived quality. Stockholm may be seen as "neutral" while Paris has a long established history of arbitration and is the centre of operation of the ICC. London has the benefit of English as a global language and the prevalence of English law in contract and finance transactions. The Asian centres benefit from proximity to many of the newer, fastest growing corporates.

Because of the vast involvement of German business in multi-national trade and industry, German arbitral seats may also not be seen as neutral; it may be viewed as better to choose another civil law jurisdiction rather than offering a home turf advantage to one of the contracting parties.

But all of Germany's potential seats warrant real consideration and their attractions are starting to be properly recognised. Germany is a modern and efficient economy, offering excellent infrastructure and hearing venues, whilst being very easily accessible from across Europe and the wider world. A signatory to the New York Convention, Germany also has modern arbitration legislation based on the UNCITRAL Model Law, incorporated as §1025 ff of the German Code of Civil Procedure (ZPO). The Courts of Appeal of Germany's Federal States all have experienced judges who are assigned to deal with applications related to, or in support of, arbitration. The grounds for annulling or challenging an arbitral award under German law are limited, offering parties real legal certainty. Germany also offers strong options for arbitral institutions, from DIS to the Germany Maritime Arbitration Association and the Chinese European Arbitration Centre in Hamburg. Frankfurt also offers the Frankfurt International Arbitration Centre to host Treaty arbitrations under the ICSID Convention following an agreement of cooperation with ICSID in 2005.

Even if the parties do not choose a German seat, the increase in German users of arbitration makes German counsel attractive. Arbitration agreements may require that arbitrations be held in the German language or bilingually. Many of Germany's international arbitration counsel will be fluent in English and potentially other languages as well. For the German client, these language skills, understanding of international arbitral procedure, but also the national court process can be invaluable. German counsel will recognise that their German client will not be expecting the cross-examination process. German counsel may also be able to push for a more "civil law" approach to document production and seek to limit the burden on their client.

For all these many and varied reasons, it is perhaps of little surprise that Herbert Smith Freehills' German disputes practice, opened in Frankfurt and Berlin in 2013, has developed into a full-size offering, with an additional office opened in 2015 in Dusseldorf. Opening with one partner, Dr Mathias Wittinghofer, the team now includes two additional well-known German arbitration practitioners, Dr Patricia Nacimiento and Thomas Weimann. Their team of associates has also expanded, with 8 associates working full time on arbitration matters in Germany. Working for both German and international clients on commercial and investment arbitration, the team is set to continue their rapid growth in coming years.

ENDNOTES

1. www.destatis.de/EN/FactsFigures/NationalEconomyEnvironment/ForeignTrade/...
2. <http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iiaInnerMenu>
3. <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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