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Global Legal Group

The International Comparative Legal Guide to:

International Arbitration 2009

A practical insight to cross-border International Arbitration work

Published by Global Legal Group with contributions from:

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Germany?

The rules of German arbitration law have been incorporated in the German Act of Civil Procedure ("ZPO"). Pursuant to Section 1025 (1) ZPO, the German arbitration law is applicable to all arbitration proceedings which have their place of arbitration within Germany. The legal requirements of an arbitration agreement are either set forth in Sections 1025 et seq. ZPO or follow from the general rules for the formation of contracts. Generally, the formation of a valid arbitration agreement requires that the parties making the agreement have legal capacity. Entities must be duly represented. In addition, the subject matter of the dispute must be arbitrable whereby German law distinguishes between so-called objective and subjective arbitrability (for more details see question 3.1). Content-wise it is required that the arbitration agreement is linked to a specific legal relationship or to a specific dispute. In addition, it must be clear from the arbitration agreement that the dispute shall be decided exclusively by arbitration.

In the commercial area, it is necessary that the arbitration agreement is made in writing (Section 1031 ZPO). Such requirement is met when the arbitration agreement is (i) laid down in a separate document which is signed by the parties, (ii) incorporated as an arbitration clause in a written agreement among the parties, or (iii) can be taken from a written correspondence exchanged between the parties, such as letters, telefaxes etc. Pursuant to the majority view in the legal literature the exchange of e-mails is sufficient. There is, however, no court decision in this respect available yet so that it is recommendable to refer to the traditional means of communication until one can refer to precedence from German courts.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

Provided that the individual is to be regarded as a consumer, i.e. a person who concludes a transaction for non-commercial purposes (Section 13 German Civil Code, "BGB"), it is required that the arbitration agreement is incorporated in a document other than the contract to which it applies.

1.3 What other elements ought to be incorporated in an arbitration agreement?

Even though not required with respect to the validity of the arbitration agreement, it is always recommendable to include at least stipulations as to the number of arbitrators, language of the proceedings, applicable substantive law and place of arbitration.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

The statutory provision of Section 1032 (1) ZPO expressly provides that state court proceedings are inadmissible if the dispute is subject to an arbitration agreement and the defendant objects against the state court proceedings. When deciding on a respective objection by the defendant the courts review whether the arbitration agreement is void or unenforceable. German courts apply this statutory provision to the full extent and declare the state court proceedings inadmissible in favour of arbitration if the relevant arbitration agreement is valid and enforceable. In addition, a party has the option pursuant to Section 1032 (2) ZPO, to request (as long as the arbitration tribunal is not fully constituted) the state court to rule on the admissibility or inadmissibility of arbitration proceedings.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

Unlike for arbitration agreements there is no statutory provision in German law under which an ADR agreement other than an arbitration agreement would render state court proceedings inadmissible. However, in the German legal literature it is discussed whether the parties by entering into an ADR agreement impliedly agree to waive the commencement of state court proceedings as long as the mediation lasts. There is no precedence available yet so that it cannot be determined whether the German courts would follow the approach that proceedings before them are inadmissible if commenced while mediation proceedings regarding the same dispute are pending.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Germany?

The enforcement of arbitration proceedings is governed by Section 1032 ZPO when a party commences state court proceedings in breach of an arbitration agreement. Apart from this rule, the enforcement of arbitration agreement is not subject to express legislation.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

The German arbitration law does not distinguish between domestic and international arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

German arbitration law is based on the UNCITRAL Model Law. There are no significant differences between the governing law and the Model law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Germany?

Mandatory rules governing international arbitration proceedings have been incorporated in Sections 1042 (1) and (2) ZPO. Pursuant to such provision, the parties must be treated equally and must be given full opportunity to present their case. Furthermore, it is prohibited to exclude that the parties are represented by counsel. In Section 1042 (3) ZPO it is stated that subject to such mandatory rules the parties are free to determine the proceedings by themselves or by reference to a set of arbitration rules.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Germany? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The general approach to arbitrability as laid down in Section 1030 ZPO is that disputes involving a so-called "economic interest" are arbitrable. The term "dispute involving an economic interest" is defined as a dispute which relates to a proprietary relationship between the parties and to all claims for money or money-like rights and obligations. Even if the dispute does not involve an economic interest as set out above it may be arbitrable as long as the parties are entitled to enter into a settlement on the issue in dispute. Examples for issues regarding which the parties are not entitled to enter into a settlement are disputes relating to family law, criminal law and private housing lease agreements. In the area of labour law the German Act on Labour Law Proceedings ("ArbGG") provides an exclusive set arbitration rules which must be applied in this area and substantially limit the scope of labour law disputes which are arbitrable.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Pursuant to Section 1040 (1) ZPO, an arbitrator is permitted to rule on the question of his or her own jurisdiction. The opinion of the arbitrator is, however, not binding for German state courts.

3.3 What is the approach of the national courts in Germany towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Based on Section 1032 (1) ZPO the national court will declare the state court proceedings to be inadmissible upon a respective objection by the defendant if the plaintiff commences such court proceedings in apparent breach of an arbitration agreement.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

A German state court can address the issue of the jurisdiction and competence of the national arbitral tribunal in two instances. The first instance is that a party files a motion pursuant to Section 1032 ZPO, i.e. requests the state court prior to the constitution of the arbitral tribunal to declare the arbitral proceedings admissible or inadmissible. In this context the court will also review whether or not the arbitral tribunal has jurisdiction. The second instance is proceedings for the recognition of an arbitral award or, in turn, for setting an arbitral award aside. When a party seeks to have an arbitral award recognised and declared enforceable by the German state court and the opponent in such proceedings raises the defence that the arbitral tribunal did not have jurisdiction, the German state court will deal with the issue in this context. The same is true for proceedings with the request to set an arbitral award aside.

3.5 Under what, if any, circumstances does the national law of Germany allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The general approach under German arbitration law is that the arbitration agreement is binding only on those parties who have signed it. However, German courts have developed a number of exceptions to such general rule. If the parties, for example, have concluded a so-called third-beneficiary contract the beneficiary (even though not being a signatory to the agreement) is bound to an arbitration agreement relating to such contract. Furthermore, German courts have been permitted that an arbitration agreement can be extended to partners of a partnership even though only the partnership itself is a party to the arbitration agreement as long as the respective partner is personally liable without limitation. It should be noted in this context that the German courts have not (yet) accepted the so-called Group of Companies Doctrine pursuant to which an entity is bound to an arbitration agreement simply by belonging to a certain group of companies. In the event of a legal succession the arbitration agreement may also be extended to a non-signatory. Thus, insolvency receivers are bound to an arbitration agreement signed by the insolvent company and the same rule applies to executors of a will with regard to arbitration agreements signed by the deceased person. Apart from such cases of legal succession by law, legal succession can occur through assignment of rights and the takeover of a debt or a contractual relationship and the legal successor is bound to the respective arbitration agreements. However, regarding guarantees and suretyships an extension of the arbitration agreement contained in the contract which shall be secured by the guarantee or surety is not possible as those contracts are separate from the main contract.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Germany and what is the typical length of such periods? Do the national courts of Germany consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no laws or rules prescribing limitation periods for the commencement of arbitrations in Germany. However, the German Civil Code ("BGB") contains limitation periods for rights and

claims and provides, for example, that the general prescription period is three years. Such limitation periods can only be suspended by commencing an arbitration provided that the respective claim or right is subject to an arbitration agreement. The limitation periods are considered to be substantive and are applicable if the relevant choice of law rules determine that the claim or right is subject to German substantive law.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Pursuant to Section 1051 ZPO, the arbitral tribunal is bound to apply the substantive law agreed upon by the parties. The statute expressly states that, unless otherwise agreed among the parties, the reference by the parties to the substantive law is to be understood in a way that it shall not include the choice of law rules of such law. In the absence of an agreement made among the parties, the arbitral tribunal shall apply the law of the country to which the dispute has the closest connections. The arbitral tribunal may only decide *ex aequo et bono* or as *amicable compositeur* if authorised to do so by the parties (Section 1051 (3) ZPO).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

In Germany, it is still a matter of controversy if and - as the case may be - to what extent mandatory laws of another jurisdiction prevail over the laws chosen by the parties. The German Federal Supreme Court (BGH), i.e. the highest German court for civil matters, has held in 1984 in a case relating to stock exchange transactions that German mandatory rules for such transactions must be applied even though the parties had agreed on the applicability of UK law. In the German legal literature, the views range from an exclusion of the duty to apply mandatory rules of another jurisdiction to a limited application depending on the respective area of law.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

As for the applicable substantive law, German law provides that the parties have the autonomy to agree on the rules governing the formation, validity, and legality of arbitration agreements. In the absence of a relevant agreement the arbitration agreement is governed by the law which the parties have "impliedly chosen". The issue of how to determine such choice is a matter of controversy. Pursuant to one view, it can be assumed that the choice of law for the main agreement is also relevant for the arbitration agreement. Another view taken is that the law at the place of arbitration shall be relevant.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The German arbitration law does not provide for any statutory limits to the parties' autonomy to select arbitrators. In particular, there is no requirement that the arbitrators must have a legal education or have to be admitted to the German bar. While parties are generally free in appointing judges or civil servants as arbitrators they should be aware that this group must obtain the approval of their appointment as arbitrator from their respective supervising authority. Without such approval the agreement between the parties and the arbitrator is null and void which might have a negative impact on the proceedings. Moreover, it must be taken into account that judges and civil servants may only be appointed as a chairman or sole arbitrator.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In order to assist the parties, Section 1035 ZPO provides for a default procedure for the appointment of a sole arbitrator as well as for the appointment of arbitrators in a panel consisting of three arbitrators. If the parties fail to agree on the appointment of a sole arbitrator, the competent German state court will appoint the sole arbitrator upon the request of one of the parties. In a panel consisting of three arbitrators, the state court may be called upon if either a party fails to appoint its arbitrator within the time limit agreed or provided by law or if the parties or the party-appointed arbitrators fail to agree on the chairman.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Pursuant to Section 1035 (3) ZPO, a state court can intervene in the selection of arbitrators if requested to do so by at least one of the parties. The predominant ground for the intervention of a state court is that a party or the arbitration institution chosen either failed to appoint an arbitrator at all (see question 5.2 above) or did for another reason not comply with the applicable appointment procedure. However, the state court can also be requested to intervene if the appointment procedure as originally agreed among the parties is (i) disadvantageous to one of the parties to the extent that it violates public policy or (ii) does not provide for a default mechanism. The intervention proceedings are commenced by filing a written submission with the competent German state court which then will decide by issuing an order after having given the opposing party an opportunity to reply.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

The potential arbitrator must disclose to the parties any circumstances which are likely to give rise to justifiable doubts as to his impartiality or independence (Section 1036 ZPO). In the event that such circumstances arise after the appointment of the arbitrator they must also be disclosed to the parties. If a party has detected that an arbitrator has failed to disclose relevant circumstances it may request that the arbitrator is removed.

5.5 Are there rules or guidelines for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Germany?

Apart from the rule set forth in question 5.4 above, there are no express statutory rules or guidelines for disclosure of potential conflicts of interest for arbitrators. When determining whether or not an arbitrator has breached his disclosure obligation, German courts, however, may refer to the statutory material applicable to the removal of judges (Sections 41 et seq. of the German Code of Civil Procedure) and the case law developed in connection with such

rules. In addition, it can be observed that also in Germany arbitrators more and more refer to the *IBA Guidelines on Conflicts of Interest in International Arbitration* when determining whether or not they have to disclose a specific circumstance.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Germany? If so, do those laws or rules apply to all arbitral proceedings sited in Germany?

German arbitration law in Section 1025 et seq. ZPO provides for several rules governing the procedure of arbitration in Germany. Such rules, in particular, relate to the place of arbitration, the language of the proceedings, the exchange of submissions, oral hearings and written proceedings, the taking of evidence and the default of a party. However, it should be noted that the respective rules are not mandatory and do only apply if the parties have not stipulated rules to govern the proceedings. Thus, the parties have, to a large extent, flexibility for structuring the kind of proceedings they would like to have and at the same time can rely on a set of rules in the event that they cannot agree on respective regulations within the arbitration agreement.

6.2 In arbitration proceedings conducted in Germany, are there any particular procedural steps that are required by law?

Apart from the rule that the parties must have an opportunity to present their case and that they cannot be denied to retain counsel there are no particular procedural steps that are mandatory for arbitration proceedings conducted in Germany.

6.3 Are there any rules that govern the conduct of an arbitration hearing?

Pursuant to the rule incorporated in Section 1047 (1) ZPO the parties have the option to choose whether or not they would like to have an oral hearing as part of their proceedings. Unless they would like to have the proceedings expedited through waiving an oral hearing, parties in most cases do not make such an agreement. In this case, the arbitral tribunal may decide whether the case is decided based on an oral hearing or based on the submissions and written evidence filed. Only if one of the parties' requests to hold an oral hearing the arbitral tribunal is bound to such request and is not permitted to decide based on the file only.

6.4 What powers and duties does the national law of Germany impose upon arbitrators?

The arbitrator to be appointed must disclose to the parties any circumstances which are likely to give rise to justifiable doubts as to his impartiality or independence (Section 1036 ZPO). In the event that such circumstances arise after the appointment of the arbitrator they must also be disclosed to the parties. Even though not expressly stated in Sections 1025 et seq. ZPO, the German Supreme Court (BGH) has held that the arbitrator is obliged to administer to the best of his abilities orderly and expeditious proceedings in accordance with the law and the arbitration agreement. Arbitral tribunals are not permitted to force a witness to appear and to take the oath from a witness. In both instances the competent state court must render assistance. As regards powers of the arbitrator, German arbitration law grants the arbitrator in several ways the power to structure the proceedings and to make certain determinations in the event that the parties did not agree on the respective issues, e.g. to determine the place of arbitration, the language of the proceedings, the applicable law etc.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Germany and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Germany?

Before most of German state courts the permission to appear as counsel requires the admittance as attorney at law (*Rechtsanwalt*) in Germany which in turn requires that one has passed the so-called Second State Law Examination. However, this restriction does not apply to arbitration proceedings sited in Germany.

6.6 To what extent are there laws or rules in Germany providing for arbitrator immunity?

Unless excluded in the contract between the arbitrators and the parties, arbitrators are liable for negligence and wilful conduct. They are, however, not liable for specific performance and unless acting intentionally for the fact that they have made a mistake on the merits in the award.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Upon the request of at least one of the parties, a national court may have to deal with procedural issues during an arbitration as long as the law grants them jurisdiction to do so. Thus, the state courts may render assistance in connection with the taking of evidence and acts which are reserved to the national courts. The state courts predominantly render assistance in connection with the subpoena of witnesses and the taking of the oath from a witness.

6.8 Are there any special considerations for conducting multiparty arbitrations in Germany (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

The issue of multiparty arbitrations is not dealt with in German arbitration law. However, Section 1034 ZPO permits the parties to agree on the number of arbitrators so that the parties have flexibility in adapting the number of arbitrators to the number of parties involved as long as they observe the rule that the composition of the arbitral tribunal may not be to the detriment to one of the parties.

6.9 What is the approach of the national courts in Germany towards *ex parte* procedures in the context of international arbitration?

German arbitration law permits arbitral tribunals to render injunctive relief decisions based on *ex parte* procedures and the national courts accordingly recognise such decisions. Apart from this exception, *ex parte* procedures are not permitted and would be regarded by the national courts as a breach of the right to be heard.

7 Preliminary Relief and Interim Measures

7.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Under German law, an arbitrator is permitted to award preliminary or interim relief (Sections 1033, 1041 ZPO). However, arbitral tribunals are prevented from enforcing their respective decision as this is reserved to the national courts. The arbitrator may at his own discretion order such measures which he deems to be necessary in the light of the subject of the dispute. Another important rule is that a party who moved for the issuance of an interim relief order is obliged to pay damages to the other party in the event that it turns out that the request for injunctive relief was unfounded from the outset (Section 1041 (4) ZPO).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

A national court is entitled to grant preliminary or interim relief in proceedings subject to arbitration since under German law the national courts and arbitral tribunals have parallel jurisdiction in the area of interim relief. A respective request by a party to a state court does, however, not have an effect on the jurisdiction of the arbitration tribunal.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

German courts fully respect the jurisdiction of arbitral tribunals with regard to interim measure and also do not decline to accept respective requests by parties in the event that the dispute is subject to an arbitration agreement.

7.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

German law does allow for the national court and the arbitral tribunal to order security for costs.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Germany?

Unless otherwise agreed among the parties, the arbitral tribunal has the power to structure the taking of evidence and to decide which evidence is to be taken. The arbitral tribunal has therefore great flexibility in this respect.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

Based on the flexibility granted to arbitrators in connection with the taking of evidence, arbitrators have the authority to order the disclosure of documents by the parties to the arbitration. Such authority does not extend to third parties so that no disclosure can be ordered in this respect. Furthermore, it should be noted that in proceedings before the German state courts, the disclosure of documents can only be requested in very limited instances. Thus, in domestic arbitrations it is uncommon that the arbitrators use their discretion in a way that the evidentiary proceedings involve the production of documents.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

The national court is not able to intervene in matters of disclosure/discovery.

8.4 What is the general practice for disclosure / discovery in international arbitration proceedings?

German arbitration law does not expressly address the issue of disclosure/discovery. As a consequence, there is no general practice observable and it is up to the arbitrators in international proceedings taking place in Germany to structure and to decide on disclosure/discovery proceedings.

8.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

There are no laws, regulations or professional rules applying to the production of written and/or oral witness testimony in arbitral proceedings. Before German state courts, a witness is reminded that he has to tell the truth. The witness, however, is only sworn in at the end of his testimony if the taking of the oath is requested by at least one of the parties. Furthermore, the witness is primarily questioned by the judge. The counsel have the opportunity to question the witness once the examination by the judge is completed but the questions must be related to the subject regarding which evidence is taken. Thus, the questioning by counsel cannot be regarded as a U.S.-style cross-examination.

8.6 Under what circumstances does the law of Germany treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

German arbitration law does not address the issue of privilege in connection with the production of documents in arbitral proceedings. However, documents exchanged between counsel and party are subject to the general attorney-client-privilege and, even if so ordered by the arbitral tribunal, need not to be produced.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award?

In the absence of a respective agreement made among the parties, the arbitral award must be made with the majority of the votes of the arbitrators (Section 1052 (1) ZPO). Furthermore, it must be in writing and has to be signed by the arbitrators (Section 1054 ZPO). In the event that an arbitrator obstructs the making of the award by refusing to sign it, Section 1054 (1) ZPO provides that the signature

of the majority of the arbitral tribunal is sufficient. Provided that the parties have not waived this requirement by agreement, the arbitral award must contain the reasons for the decision made.

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

The grounds for challenging an award under German arbitration law are identical to the ones contained in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, i.e. (i) arbitration agreement invalid, (ii) violation of due process, (iii) unauthorised excess of authority, (iv) improper composition of arbitral tribunal and violation of procedural arbitration rules and (v) violation of public policy.

10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

Under German law, a general waiver of any basis of appeal or challenge against an arbitral award is null and void. The same applies to a waiver of grounds for an appeal which relate to public policy and are not in existence at the time of the waiver. Parties may, however, waive a ground for an appeal which is to be reviewed by the state court only upon request by a party and is already in existence.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Parties may agree to expand the scope of appeal of an arbitral award beyond the grounds available in German law.

10.4 What is the procedure for appealing an arbitral award in Germany?

In order to appeal an arbitral award a party must file a written submission with the competent German court in which it expresses the appeal. The submission must be accompanied by the arbitral award and a translation in the event that the award is in a language other than German. The other party is notified by the court of the request made and is given an opportunity to present its argument. Subsequently, the court will order to hold an oral hearing and finally issues a judgment.

11 Enforcement of an Award

11.1 Has Germany signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Germany has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

11.2 Has Germany signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Germany has signed/ratified bilateral agreements relating to the recognition and enforcement of arbitral awards with Switzerland, Belgium, Austria, Israel, Norway, Spain, the USA and the former Soviet Union.

11.3 What is the approach of the national courts in Germany towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

German courts have developed a high level of expertise in connection with the recognition and enforcement of arbitral awards. Their respective decisions are often published so that parties can rely on them when presenting their case. In order to have an arbitral award recognised and declared enforceable a party must file a written submission with the competent German court in which it expresses the request. The submission must be accompanied by the arbitral award and a translation in the event that the award is in a language other than German. The other party is notified by the court of the request made and is given an opportunity to present its argument. If the other party opposes the request to recognise the award and to declare it enforceable which might include the request to set aside the award (in cases where the place of arbitration was Germany) the court will order to hold an oral hearing and finally issues a judgment.

11.4 What is the effect of an arbitration award in terms of *res judicata* in Germany? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An arbitral award which has been recognised and declared enforceable deploys *res judicata* effects between those parties who are bound to the underlying arbitration agreement. Thus, certain issues which have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court as long as the proceedings before the national court involve parties who are bound to the arbitration agreement.

12 Confidentiality

12.1 Are arbitral proceedings sited in Germany confidential? What, if any, law governs confidentiality?

Arbitral proceedings sited in Germany are confidential to the extent that hearings are generally not open to the public. Furthermore, it is common view that the arbitrators have the obligation to keep secrecy. There are, however, no statutory rules in this respect. Thus, the parties should enter into a confidentiality agreement (which can be part of the arbitration agreement) in order reach a higher level of confidentiality. In the absence of such an agreement the parties are not obliged to secrecy.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Failing an agreement to the contrary, information disclosed in arbitral proceedings may be referred to and/or relied on in subsequent proceedings.

12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Whenever state courts are involved in the arbitral proceedings, e.g. in

enforcement proceedings, and the state court orders to hold an oral hearing such hearing is open to the public. Thus, anything said in the course of the hearing with respect to the arbitral proceedings as well as to the merits of the dispute might become public if the oral hearing is attended by people in the audience. In addition, it must be taken into account that state courts may publish their decisions and this does also apply to decisions made in enforcement proceedings relating to arbitral awards. Furthermore, the parties must be aware that witnesses unless bound by a non-disclosure agreement or ethical rules are generally not under an obligation to keep secrecy. Even the parties are under German law not under a general obligation to keep facts about or in connection with the arbitral proceedings confidential unless they have entered into a respective agreement.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The remedy of punitive damages is not supported by German law and German courts have held that decisions awarding punitive damages violate public policy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Interest is available under German substantive law, i.e. the German Civil Code ("BGB"). The applicable interest rates are five percentage points over the German Base Rate if consumers are involved and eight percentage points over the German Base Rate in transactions between non-consumers, e.g. business entities.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Pursuant to Section 1057 ZPO, the parties may find an agreement on the allocation of costs. The arbitral tribunal may decide on the allocation of costs in the event that the parties have not made such agreement. In making such decision the arbitral tribunal has discretion. It is difficult to determine a general practice in this context. The mandatory rule in state court proceedings according to which the defeated party has to bear the costs of the prevailing party is not necessarily applied in arbitral proceedings. Apart from the allocation of costs in terms of percentage the arbitral tribunal also has discretion as to which extent it deems costs to be reimbursable.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

In Germany, an award itself is not subject to tax. It might, however, be that a party must pay tax on an amount awarded in an arbitral award.

14 Investor State Arbitrations

14.1 Has Germany signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Germany has signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

14.2 Is Germany party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Germany is party to a significant number of Bilateral Investment Treaties and it is also a party to the Energy Charter Treaty.

14.3 Does Germany have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Germany has a model BIT containing standard terms or model language for usage in its investment treaties. The intended significance of the respective language is to balance investor rights with state rights.

14.4 In practice, have disputes involving Germany been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in Germany been to the enforcement of ICSID awards and how has the government of Germany responded to any adverse awards?

Most recently, Germany has been sued by the company Vattenfall under the Energy Charter Treaty which is the first ICSID case ever against Germany. The arbitration is still pending so that no statement can made as to whether the government of Germany will respond to any adverse awards.

14.5 What is the approach of the national courts in Germany towards the defence of state immunity regarding jurisdiction and execution?

German courts follow the approach that a state has waived the immunity defence through signing the arbitration agreement. In addition, proceedings relating to the recognition and declaration of enforcement are not regarded by the German courts to be as a means of enforcement but as a preparation of such enforcement so that a state is precluded from raising the defence anyway.

15 General

15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Germany? Are certain disputes commonly being referred to arbitration?

The success story of arbitration in Germany is continuing which is demonstrated by the fact that more and more commercial agreements are made subject to arbitration agreements. It is, furthermore, demonstrated by the fact that in some areas of law the use of arbitration is either introduced or increased. The German Institution for Arbitration (DIS), for example, recently introduced a set of arbitration rules dedicated to disputes in the area of sports law.

Disputes commonly referred to arbitration involve, *inter alia*, post-M&A disputes as well as conflicts in construction, distribution and long term agreements.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in Germany, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

The completely modernised German arbitral law has taken effect on January 1, 1998. Thus, while regarding certain provisions might be insignificantly amended in the future one should expect major legislative initiatives within the next years.

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