

# Kluwer Arbitration Blog

## Modernization of German Arbitration Law: The White Paper of the Federal Ministry of Justice

Reinmar Wolff (University of Marburg) · Wednesday, July 5th, 2023

The German Federal Ministry of Justice published a [White Paper on the Modernization of German Arbitration Law](#) (unofficially translated by the DIS) on 18 April 2023. Its primary goal is to adapt the law to today's needs to enhance its efficiency and strengthen Germany's attractiveness as an arbitration venue. This post details the twelve issues that the Ministry of Justice believes should be included in the draft bill, and the four further matters proposed by the Ministry for discussion.

The White Paper commences the first significant arbitration law reform in 25 years since Germany adopted the [UNCITRAL Model Law on International Commercial Arbitration](#) ("Model Law") as [Book 10 of its Code of Civil Procedure](#) (Zivilprozessordnung – ZPO). Already when becoming a Model Law country in 1998, Germany had made several modifications to attract international arbitrations. These include extending the 1985 Model Law to domestic and non-commercial arbitral proceedings (sec. 1025 ZPO, thereby circumventing the thorny question what "commercial" under Art. 1(2) Model Law means), providing court assistance for foreign arbitral proceedings (sec. 1025(2) ZPO, also beyond the taking of evidence (sec. 1050 ZPO)), and establishing rules on enforcement of interim measures granted by arbitral tribunals (sec. 1041 (2-4) ZPO).

It is against this background that the White Paper rightfully focuses on the 2006 revisions of the Model Law, legal reforms in Germany's neighboring countries, updated institutional rules, and digitalization of procedural law and relevant case law.

### 1. Removing Form Requirements for Arbitration Agreements

Art. 7 of the 2006 Model Law contains more liberal form requirements than the 1985 Model Law and the German arbitration law (sec. 1031 ZPO). The White Paper suggests removing the requirement that a B2B arbitration agreement must be contained in a document signed by the parties or in an exchange of messages. This proposal is appreciated since it brings the German arbitration law back in line with global standards of arbitration-friendliness by restoring the German legal situation before 1998.

### 2. Appointment of Arbitrators in Multi-party Arbitrations

While the Model Law is silent on multi-party arbitrations, German law already allows for the court to constitute the arbitral tribunal if several parties on one side cannot agree on an arbitrator. However, this avenue is not undisputed. The White Paper suggests introducing explicit rules for the appointment of arbitrators by the parties and alternatively by the court. This is a welcome step towards more clarity for multi-party proceedings.

### **3. Setting Aside Negative Decisions on Jurisdiction**

Like the Model Law, the German arbitration law does not provide for a ground for setting aside an arbitral award if the arbitral tribunal incorrectly denies its jurisdiction. The White Paper proposes adding such ground as it already exists for decisions incorrectly assuming jurisdiction. It is questionable whether adding another ground for setting aside qualifies as an arbitration-friendly step: while the parties' right of access to court demands that arbitral decisions assuming jurisdiction are subject to court review, an incorrect negative decision on jurisdiction does not affect such right. This speaks against adding a remedy against arbitral decisions that incorrectly deny jurisdiction. Thus, such decisions and erroneous arbitral decisions on the merits, which are not subject to further review, are also treated equally.

### **4. Hearings by Video Conference**

The White Paper suggests allowing video conferencing in arbitral proceedings unless the parties have agreed otherwise. This is a welcome clarification, in particular if one party objects to a virtual hearing. It is less clear to what extent hearings held by video conference can be recorded, as the White Paper suggests, if not all participants provide their consent.

### **5. Publication of Arbitral Awards**

For reasons of transparency and development of the law, the White Paper suggests permitting arbitral tribunals to publish arbitral awards if the parties agree. This clarification reflects the current state of law under which publication regularly fails for lack of parties' consent. Other mechanisms, including an opt-out solution for the parties, would emphasize the need to publish awards even more effectively.

### **6. Submission of English Documents to Court**

Currently German judges, e.g., during setting aside or enforcement proceedings, can request translation of awards or other documents from arbitral proceedings if they are drafted in a language other than German. The White Paper fulfills a long-standing wish of the arbitration community to allow for submission of documents in English without translation into German. This is an effective step to save time and costs.

## 7. Arbitration Matters before the Commercial Courts

With another ministerial draft bill, the German Ministry of Justice intends to establish Commercial Courts as first-instance senates of the higher regional courts for high-value commercial matters. These Commercial Courts would be more flexible in conducting proceedings and, if parties agree, may conduct proceedings in English.

The White Paper suggests allowing the German federal states (“*Bundesländer*”) to assign jurisdiction for arbitration matters to Commercial Courts. Arbitration-related proceedings could this way also be conducted in English if they went before Commercial Courts. However, in addition to what the proposal notes, the federal states should also be able to arrange for English-language proceedings before the senates currently competent for arbitration matters even if these senates are not Commercial Courts. This option would preserve the arbitration experience and knowledge already existing at these senates.

## 8. Action for Restitution against Arbitral Awards

The White Paper suggests introducing an extraordinary remedy to eliminate final domestic arbitral awards. Under this proposal, an action for restitution against arbitral awards will be admissible for the same reasons as against state court judgements. These reasons include settings in which the decision has been induced by a criminal offence like procedural fraud, forgery of documents, or bribery.

## 9. Enforcement of Interim Measures Granted by Foreign Arbitral Tribunals

The White Paper proposes explicitly allowing enforcement of interim measures granted by foreign arbitral tribunals. This is another sensible step to promote an arbitration-friendly legal framework.

## 10. Extended *res iudicata* of the Court Decision on the Admissibility of Arbitral Proceedings

A party wishing to file a claim may be uncertain whether the claim is covered by a valid arbitration agreement. Sec. 1032(2) ZPO provides that prior to the composition of the arbitral tribunal, a party may apply to the court to determine whether arbitration is admissible. The White Paper suggests extending the *res iudicata* effect of the decision on admissibility to the existence of the arbitration agreement. If, for example, the court finds that arbitration is admissible, a subsequent arbitral award cannot be set aside due to the absence of a valid arbitration agreement.

## 11. Remittal to the Tribunal after Unsuccessful Enforcement Application

If a setting-aside application against an arbitral award has been successful, the court may, where appropriate, upon a request of a party remit the case to the arbitral tribunal (sec. 1059(4) ZPO). German courts also apply this rule *mutatis mutandis* if the award has been set aside during

enforcement proceedings (sec. 1060(2)(1) ZPO). The White Paper suggests implementing a clarifying rule to the law. That is appreciated.

## 12. *Ex-parte* Provisional Enforcement

Under sec. 1063(3)(1) ZPO, the enforcement court can order provisional enforcement of an award without hearing the party opposing the application. Such *ex-parte* orders are admissible only in urgent cases to preserve the constitutional requirements of due process. The White Paper rightfully suggests adding such express urgency criterion to the text of the provision.

## Other Modernization Measures Considered in the White Paper

The Ministry of Justice also intends to conduct an open and unbiased review of four more issues.

First, the White Paper flags that the Ministry of Justice considers implementing emergency arbitration in the German arbitration law. While the parties' right to agree on an emergency arbitrator already follows from party autonomy and does not need further regulation, allowing for enforcement of emergency arbitrator orders would promote Germany as an arbitration-friendly jurisdiction.

Second, the White Paper proposes addressing dissenting opinions. This intervention traces back to an *obiter dictum* in a [decision of 16 January 2020](#) of the Higher Regional Court of Frankfurt. In this decision, the court had raised doubts whether a dissenting opinion in a domestic award violates the secrecy of deliberations of the tribunal and thus the German public policy. Given the stir that this specific decision has caused internationally, a clarifying provision would be welcome.

Third, the White Paper also proposes addressing joint panels of the higher regional courts for arbitration matters. By way of background, these courts currently serve as courts of first instance for (almost) all arbitration matters. Their jurisdiction should indeed be maintained and not be shifted to the Federal Supreme Court as this would cause significant delays and burden the Federal Supreme Court with numerous enforcement cases. It would likewise not be prudent to adopt the Swiss and Austrian models of concentrating only setting-aside proceedings at the Federal Supreme Court while enforcement proceedings remain with other courts given the similarity in the scope of review for both types of proceedings. To increase expertise, it is sensible to concentrate arbitration matters at only some higher regional courts. The White Paper's suggestion to explicitly allow for joint panels of higher regional courts could facilitate the implementation of this concentration.

Fourth and finally, the White Paper proposes addressing court assistance in aid of arbitrations. Although the higher regional courts have jurisdiction over nearly all arbitration matters, the local courts are currently responsible for providing court assistance in taking evidence and other judicial acts like prompting service of process abroad or ordering service by publication (sec. 1062(4), 1050 ZPO). The White Paper notes that the Ministry will examine transferring this competence to the higher regional courts. This would make sense to ensure court assistance in English – a few higher regional courts are a better choice than multiple local courts.

## Further Proposals and Conclusion

An upcoming modernization effort should also incorporate the 2006 amendments to Articles 2a and 35(2) Model Law. Article 2a Model Law specifies that the provisions of this law (i.e., the German arbitration law based on the Model Law) are to be interpreted in accordance with their international origin. Art. 35(2) Model Law now stipulates that a simple copy of the award is sufficient for recognition and enforcement proceedings. Incorporating these amendments would bring the entirety of German arbitration law up to date.

Notwithstanding these comments, with its White Paper on the Modernization of German Arbitration Law, the Ministry of Justice is taking significant steps toward enhancing Germany's appeal as a venue for both domestic and international arbitrations.

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