Kluwer Arbitration Blog

German Federal Ministry of Justice and DIS Conference 2023: Convergence of Arbitration and Litigation

Jonice V. Tischer (University of Marburg) · Tuesday, August 22nd, 2023

On 29 June 2023, the Conference focusing on "*Convergence of Arbitration and Litigation*", organized by the German Federal Ministry of Justice ("BMJ") and the German Arbitration Institute ("DIS") took place at the Karlsruhe castle. Around 100 attendees from various legal professions and three panels discussed whether the two dispute resolution mechanisms of arbitration and litigation are becoming more alike. The starting point of this assumption lies, among others, in the draft bill for the law to strengthen Germany as a forum for litigation by introducing commercial courts and English in litigations (*Justizstandort-Stärkungsgesetz*) and the BMJ's white paper on the modernization of German arbitration law, as well as two recent decisions by German courts that might bring arbitration closer to litigation. This report provides an overview of the topics discussed at the Conference and aims to summarize and outline the main aspects.

Introducing the Theme of the Conference: Convergence of Arbitration and Litigation

The Vice-President of the German Constitutional Court ("BVerfG"), Prof Dr Doris König, opened the Conference by emphasizing its aim to promote dialogue between the judiciary and arbitration community. It is the responsibility of the state to guarantee legal protection to its citizens. However, parties likewise have a constitutional right to waive access to court and to submit their dispute to arbitration. Both litigation and arbitration differ in various ways. Currently, the two mechanisms seem to converge, at least partially. The approach must be to achieve compatibility between the two dispute resolution mechanisms and to ensure effective law enforcement, but also to create (and maintain) trust in the individually chosen legal mechanism.

State Secretary at the BMJ, Dr Angelika Schlunck, introduced the term "convergence" in its meaning of "rapprochement" and "conformity". Dr Schlunck questioned whether there is not rather an effective competition between the two systems. The aim is to strengthen Germany's attractiveness and efficiency as a legal center internationally by fostering communication and cooperation between the two systems. As cross-border business relationships continue to grow and with English being a dominant language of business transactions, Dr Schlunck noted that Germany may be supported as a choice of dispute resolution location through the introduction of English as a language of court proceedings. Dr Schlunck suggested seeing competition as an opportunity rather than a threat.

Dr Reinmar Wolff, DIS Board Member, followed up and referred to a survey carried out among 1,500 DIS members, according to which they also do not perceive the draft bills as a threat to arbitration. The priority must be to strengthen Germany as a center for dispute resolution for which the drafts bills are welcomed and expressly encouraged. Dr Wolff emphasized, however, that no miracles should be expected solely from the draft bills. Additionally, a mutual understanding of the mechanisms for each other, an international opening and better international marketing are indispensable to make Germany a strong location for dispute resolution.

Convergence – But How? The Introduction of Commercial Courts and Court Language English

The first panel, moderated by Dr Andrea Schulz (BMJ), addressed the convergence of litigation and arbitration under the draft bill for the *Justizstandort-Stärkungsgesetz*.

Dr Larissa Thole (BMJ) presented the main content of the draft bill. According to Dr Thole, the insufficient development of commercial law, especially in corporate transactions (where most companies choose arbitration as a confidential dispute resolution forum), requires the introduction of commercial courts. While commercial chambers are to be established at the level of regional courts to allow for English-language proceedings, commercial courts are to be created at the level of the higher regional courts, which regularly serve as courts of appeal. The commercial court will be a court of first instance to hear disputes – mainly if chosen by agreement between companies – in the court languages of German or English from a value in dispute of EUR 1 million and will offer advantages such as a verbatim record and case management conferences as known from arbitration proceedings.

Prof Dr Thomas Riehm (University of Passau) described the state judiciary as a provider of dispute resolution services and explained that the competition rather revolves around regaining cases for litigation. He countered the accusation that a two-class justice system will be created, and the introduction of commercial courts would aggravate the existing situation, given that general jurisdiction already lacks resources. As a result, Prof Riehm concluded that commercial courts are not just a gimmick and that the aim, also under the financial aspect, must be to strengthen litigation.

The subsequent lively discussion centered mostly on whether the threshold of EUR 1 million is still too high (the previous draft set it to EUR 2 million). The discussion also focused on missing provisions on the issue of taking of evidence in the draft bill. Compared to the flexibility of the taking of evidence in arbitration proceedings, civil procedure was criticized for (still) lacking modern solutions which also could have been introduced in the *Justizstandort-Stärkungsgesetz*.

Gerald Höbler (Fritz Winter Eisengießerei) and Dr Wolfgang Junge (MSC Mediterranean Shipping Company) then dealt with the draft bill from a corporate perspective and questioned whether more commercial disputes will be brought to German courts. Mr Höbler highlighted the need to have judgments recognized and enforced internationally, pointing out the benefits of arbitration, namely under the New York Convention of 1958. In the same vein, Dr Junge emphasized the effective protection of business secrets and the confidentiality that makes arbitration proceedings still (more) attractive for companies. Dr Junge added that companies still prefer jurisdictions that they perceive as liberal. Therefore, the choice of law also influences choice of forum. The speakers were,

therefore, careful with statements about an increase in commercial disputes.

Convergence to Litigation: The *Pechstein* and *Steinbruch* Decisions

Moderated by Johanna Wirth (DIS), the second panel discussion attended to the impact of the *Pechstein* decision of the BVerfG as well as the *Steinbruch* decision of the German Federal Supreme Court ("BGH").

In the *Pechstein* decision, the BVerfG declared an arbitration agreement in sports arbitration invalid under Art. 6(1)(1) ECHR which did not provide for a right to a public hearing since one party had no other choice but to submit to arbitration. As arbitration agreements hardly ever provide for public hearings, the finding of a lack of actual freedom of choice has the *de facto* effect of rendering the arbitration agreement invalid. Prof Dr Gerhard Wagner (Humboldt University Berlin) demonstrated that the *Pechstein* decision was limited to sports arbitration. According to him, there is no basis for extending the doctrine of the *Pechstein* case, granting a right to a public arbitration hearing. Conclusively, confidentiality in arbitration can still be seen as one of the fundamental elements which need to be maintained. If the principle of publicity were applied, commercial arbitration would also lose its high status for companies.

Prof Dr Wolfgang Kirchhoff (BGH) subsequently addressed the *Steinbruch* decision and the question of the *révision au fond*. In the decision, the BGH decided that the correct application of fundamental norms (antitrust prohibitions) by the arbitral tribunal should be fully reviewable. Prof Kirchhoff placed the *Steinbruch* decision in the line of previous case law and summarized that arbitral awards are also subject to comprehensive control (factual and legal) by the ordinary courts regarding the provisions of antitrust law due to their character as part of the public policy (section 1059(2) No. 2 lit. b ZPO).

To achieve a comprehensive overview, Michael E. Schneider (Lalive) considered the decision from an external perspective. Mr Schneider highlighted the more restrained approach of foreign courts and considered various options for the lawmaker and the parties.

What Are the Consequences for Germany as a Dispute Resolution Location?

The third panel was moderated by Dr Nadine Lederer (BMJ) and specified the consequences for Germany as a dispute resolution location.

Dr Andreas Singer (Higher Regional Court of Stuttgart) welcomed the draft bill and highlighted that the judiciary must improve its services for parties to become internationally competitive. He likewise stressed that his approach comes in "friendly mission" with arbitration.

The panel concluded with Julia Klesse (GLNS) emphasizing that litigation and arbitration mutually strengthen each other. According to Ms Klesse, a strong place of arbitration also increases the popularity and the reputation of the judicial location. While strengthening Germany as a place of arbitration, it leads to more domestic arbitration proceedings, which in turn increases the number of ancillary and review proceedings before state courts. Consequently, the attempts to strengthen the judicial and the arbitral location must interact.

Ruth Schröder (BMJ) closed the fourth Karlsruhe Conference and highlighted the constructive and inspiring discussions which provided for new and important impulses to the reforms. In conclusion, Ms Schröder stated that Germany already has good conditions as a location for the judiciary, which can be further enhanced by the draft laws. Nevertheless, the time ahead will be challenging for Germany's legal system. Additionally, Prof Dr Stefan Kröll (DIS) sent the attendees off with a positive conclusion. The Conference achieved its goal of promoting the dialogue between the judiciary and arbitration.

Conclusion

The Conference provided the room and time to share thoughts and discuss unclarities or/and criticisms and has thereby made a valuable contribution to the future legal framework. The BMJ has the newfound food for thought to consider when revising the drafts. It was once more shown that promotion of Germany as a location for dispute resolution can only be reached through the essential dialogue of all actors in question.

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