Kluwer Arbitration Blog

2023 Berlin Dispute Resolution Days: A Deep Dive into How Arbitration is Done in Germany, From a National and International Perspective

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On 14 September 2023, the DIS Autumn Conference "A World Map of Arbitration in the 21st Century – and What to Find in Germany" showcased Germany's eminent position in the field. While arbitration hubs like Paris and London enjoy widespread renown, Germany, often underappreciated internationally, offers its own legacy and contemporary prowess. As summarised in this post, the conference highlighted the upcoming revision of German arbitration law, the first update in 25 years.

This reform signals Germany's continued commitment to maintaining its arbitration system's dynamism and relevance in the fast-evolving legal landscape. Spearheaded by the DIS, the event was a convergence of distinguished practitioners who, through their insightful discussions, painted a portrait of Germany as a powerhouse of arbitration.

Fireside Chat between DIS Secretary General Ramona Schardt and John Beechey

The first panel kicked off with a fireside chat between the DIS Secretary General Ramona Schardt and John Beechey. The panel set the scene for the ensuing conference and shed light on arbitration in Germany. Building on decades of experience as an arbitrator and a former president of the ICC's International Court of Arbitration, John Beechey offered invaluable outside perspectives in this regard.

Regarding the planned reform of the German arbitration law, he called into doubt whether the organization of the use of video conferences should be regulated by the *lex arbitri*. He suggested that this matter could be left for tribunals to decide. In contrast, John Beechey was impressed by the idea to allow for set aside and enforcement proceedings in English which also forms part of the planned modification of the German arbitration law.

The Outside Perspective: Famous German Efficiency?

The second panel, chaired by Inka Hanefeld and entitled the "Famous German Efficiency (?) – the

Outside Perspective," further expanded on the outside perspective on international arbitration in Germany. The panel's analysis focused on the toolbox offered by Annex 3 of the 2018 DIS Rules ("**Annex 3**").

Nathalie Voser underscored that efficiency was not an end in itself but had to be achieved while paying due regard to the right to be heard. Hence, initial page limits or a prefixed number of witnesses (Annex 3 A. and B.) could not be imposed but required consent of the parties.

Expanding on Annex 3 C. and D., Raëd Fathallah observed the similarity of these provisions to other major institutional rules (*e.g.*, Appendix IV a) ICC Rules). He opined that bifurcation of the proceedings could be a useful tool if the tribunal was well prepared and the decisive issues were clear from the outset. With regard to the use of preliminary decisions in partial awards and procedural orders, tribunals should rely on procedural orders rather than arbitral awards. This would prevent the underlying party from inhibiting the arbitration by challenging the partial award while the arbitration was ongoing.

James Hosking turned to the limitation of document production requests and the use of modern technology (Annex 3 E. and F.) offering innovative perspectives in this regard. In order to limit document production requests, he proposed an early discussion of the draft document request between the parties and the tribunal which would force the parties to agree on a number of document requests from the outset. Regarding the use of information technology, he proposed a cautious approach. The idea was not to let ChatGPT draft procedural orders. New guidelines are being drafted on this issue (*see, e.g.*, here).

The panel concluded by offering perspectives on the possibility for tribunals to provide the parties with a non-binding assessment of the case. Whereas this feature of German litigation would have been shocking for international practitioners several years ago, this possibility now trickled into the international mainstream. Inka Hanefeld wrapped up the panel by concluding that Annex 3 provided tribunals with a useful toolbox that – when used wisely – could lead to more efficient and streamlined arbitrations.

Should Settlements Be Encouraged?

The third panel, moderated by Sabrina Frank, entailed a mock deliberation on whether settlements should be encouraged. Axel Reeg listed the preconditions for settlement facilitation, *i.e.*, no objection by the parties, a clear distinction between settlement facilitation and mediation, and that the case is submitted fully. Arbitrators had to know the case when addressing settlement early.

Patricia Peterson addressed the question of how arbitrators should approach settlement facilitation. For example, the tribunal could point out its view on important issues, or the evidence that is required. Patricia Peterson recommended the CEDR Report on Settlement in International Arbitration, and the ICC Report "Facilitating Settlement in International Arbitration." She further highlighted that the tribunal was also obligated to assist the parties in reaching a settlement.

Martje Verhoeven-de Vries Lentsch emphasised the preparation of counsel for settlement discussions. The considerations include maintaining relationships, the risk of publicity, and the question of whether there is a need for a decision to avoid similar conflicts in the future. These issues should be considered from both a legal and a business perspective, while keeping the

underlying interests and needs of the parties in mind.

Discussion with the German Courts

In an engaging segment of the conference, the fourth panel focused on a "Discussion with the German Courts." It examined the pro-arbitration stance of German courts. Lisa Reiser chaired the panel and, intriguingly, used ChatGPT for an assessment showing German courts as arbitration-friendly and Germany as a preferred venue for arbitration. This preliminary view was further explored through a survey among the conference participants.

Under the theme "Let's Put Some Flesh on the Bone: Facts & Figures," Reinmar Wolff led an empirical analysis substantiating the pro-arbitration stance of German courts. He compared German setting-aside rates with those of Switzerland which is known for its arbitration-friendliness. His comparison revealed a notable parity in the treatment of domestic and foreign awards by German courts, affirming that Germany can indeed compete with Switzerland in terms of arbitration-friendliness.

Jens-Daniel Braun, judge at the Higher Regional Court Frankfurt, provided insights into the conduct of set-aside proceedings before a German court. He emphasized his preference for reviewing case files in English to avoid potential losses in quality due to translations. Typically, an oral hearing would take place about three months after the application, but this depends on the senate's availability.

In a subsequent discussion, Bernd Odörfer, judge at the Federal Court of Justice ("**BGH**"), described the course of a set-aside decision before the BGH. He explained that the BGH first reads the decision of the Higher Regional Court, then the appeal, and checks the admissibility of the application, dealing only with the complaints raised. The BGH carefully considers whether to set aside an arbitral award. The outcome depends on the individual case.

Finally, the panelists, including Boris Kasolowski, discussed potential improvements. A general consensus was that introducing English as a court language could be a significant improvement, although the time might not yet be ripe for it.

New German Law on Arbitration

The final panel entailed a discussion on the new German Arbitration Law aimed to answer whether it is fit for purpose. Moderated by Robert Hunter, the panel took a comparative, cross-cultural approach, discussing certain aspects of the new law from a national and international perspective.

Nadine Lederer of the German Federal Ministry of Justice argued that the current German arbitration law is already advantageous, and that this reform does not serve to rewrite the law. Its goal was to improve and modernise it to compete successfully with other jurisdictions (*see also* the Ministry's white paper for more details).

First, the reform introduces the opportunity to conclude arbitration agreements in any form, thus, abolishing the writing requirement for B2B transactions. Vale?ry Denoix de Saint Marc confirmed

that this move is not unfamiliar, as it has already been implemented in France.

Second, the reform expressly allows for dissenting opinions. In the past, it has been argued that a dissenting opinion could be considered a breach of the secrecy of the deliberations, and a public policy violation. Jacomijn van Haersolte-van Hof welcomed this step. She emphasised that dissenting opinions were rather rare and not seen very often at the LCIA. They were typically authored by learned arbitrators who genuinely had a differing opinion on a point of law.

Third, the reform will allow Commercial Courts to hear arbitration-related cases, namely set-aside and enforcement proceedings. These proceedings shall be entirely in English to avoid expensive and lengthy translations.

Finally, the law encourages the publication of awards with the agreement of the parties to increase transparency. Kai-Uwe Karl stressed the possibility and importance of redacting arbitral awards. There was a need for and a benefit in publishing awards (*e.g.*, for research purposes), but the right balance between transparency and the right to confidentiality had to be found.

Conclusion

The DIS Autumn Conference 2023 illuminated Germany on the international arbitration map. Far from uncharted territory, Germany asserts itself as a formidable fortress of arbitration expertise underscored by the anticipation of the first major arbitration law update in 25 years. The conference not only highlighted Germany's solid standing but also showed its path forward. In this light, the conference marked a pivotal moment, transitioning from misconceptions to a broadened understanding of Germany's vibrant role in shaping the future of international arbitration.

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