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Was It Worth the Wait? The Proposed Revision of the 1998 German Arbitration Law

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On 12 July 2024, more than 25 years after adopting its current arbitration law, the German government agreed on a draft reform law ("Draft Law"). It is based on a White Paper issued in April 2023 (reported here), including comments received thereon (see here). The now adopted version (dated 26 June 2024, to be submitted to parliament) is a further revised version of the draft law presented by the German Ministry of Justice in February 2024.

The Draft Law updates the German arbitration law, contained in the 10th Book of the German Code of Civil Procedure (*Zivilprozessordnung* – "ZPO"), which was based on the 1985 version of the UNCITRAL Model Law ("1985 Model Law"). It aims at strengthening the competitiveness of Germany as an arbitral seat, taking into account the 2006 update of the UNCITRAL Model Law ("2006 Model Law") as well as reforms in neighbouring states, such as Switzerland, Austria and France, while not specifically addressing the ongoing reform process of the English Arbitration Act. Inter alia, it sets out to clarify (some long) disputed issues, to adapt provisions to the digital age, and to reduce language barriers in court proceedings.

No Form Requirements for Arbitration Agreements in Commercial Transactions

In line with Article 7 of the 1985 Model Law, the current German arbitration law requires arbitration agreements to be in writing and signed by all parties (Section 1031 ZPO).

The 2006 Model Law introduced a second option for Article 7, dropping all form requirements. The Draft Law follows this second option, save for two deviations. *First*, Draft Section 1031 ZPO maintains particularly strict requirements for arbitration agreements with consumers. *Second*, Section 1029 ZPO still contains the wording of Article 7(1) of the 1985 Model Law, which states that an "arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement". Given the clear intent to drop all form requirements, maintaining this sentence should not be interpreted to require a written agreement.

An important and positive change from the February 2024 draft is that the Draft Law no longer limits the form-free standard only to arbitration agreements in "commercial transactions". This had been heavily criticized by the arbitration community (see here and here), as it was prone to create uncertainties as to its application, especially for foreign users, given that the term "*commercial*

transaction" ("*Handelsgeschäft*"), has a specific meaning under German law (see Section 343 of the German Commercial Code).

Consequently, according to the Draft Law, all arbitration agreements (save those with consumers) could be concluded even orally. While the aim to ease form requirements for arbitration agreements is to be welcomed, the practicability of a purely oral arbitration agreement is questionable in terms of proving its existence.

Upfront Court Review of Arbitration Agreements

The German arbitration law contains a special provision permitting domestic courts to decide on the admissibility of arbitration proceedings if a respective application is filed with the German courts prior to the constitution of the arbitral tribunal (Section 1032(2) ZPO). Recent cases have shown different uses of this provision.

On the bright side, based on this provision, the Higher Regional Court of Berlin recently confirmed the admissibility of an arbitration proceeding, thereby preventing the – albeit unlikely – enforcement of an anti-arbitration injunction issued by Russian courts under their "counter-sanction" provision, Article 248 of the Russian Arbitration Procedure Code (discussed here).

On the dark side, this provision was also relied upon by the German Federal Court of Justice ("BGH") in its infamous decision declaring that ICSID intra-EU investment arbitrations are inadmissible despite the ICSID Convention prohibiting the interference of domestic courts (see here and here). As part of their assessment under Section 1032 ZPO, German courts examine whether an arbitration agreement exists, is effective and capable of being performed.

The Draft Law now expressly provides that, when deciding on the admissibility of the arbitration proceeding, the court can also and separately decide on "*the existence or the validity of the arbitration agreement*" itself. Unfortunately, the Draft Law has not used the current reform to clarify the scope of Section 1032(2) ZPO. Looking only at the wording of Section 1025(2) ZPO, it could apply also to any arbitrations seated outside Germany even if no connection to Germany exists.

Moreover, in its aforementioned decision, the BGH "boldly" interpreted the intent of the historic legislator to establish one uniform arbitration law applicable to both domestic and international arbitrations so as to mean that also "delocalised" ICSID arbitrations are covered. A clarification, limiting the scope of this provision, would have been welcomed. However, given the continued relevance and highly political nature of intra-EU arbitrations, it's not unsurprising that the German government decided to keep Section 1032(2) ZPO.

Flexible Approach to Appointing Arbitrators in Multi-Party Proceedings

Until now, German law did not specifically address multi-party arbitrations. The Draft Law proposes that, unless otherwise agreed, the multiple parties on one side of the arbitration must jointly appoint one arbitrator. Where they cannot agree, the appointment is made by the court. The Draft Law does not mandate that also the other party-appointed arbitrator must be appointed by the

court (as suggested by the 1992 *Dutco* decision), it follows the Swiss approach and grants the court discretion on this matter (see also the 2023 French decision in *Vidatel*, discussed here).

Possibility to Set Aside Awards Declining Jurisdiction

Currently, German law (Section 1059(2)), like the 1985 and 2006 Model Law (Article 34(2)), only provides for the setting aside of an award if the tribunal issued an award, although it lacked jurisdiction, but not where the tribunal incorrectly declined jurisdiction. The BGH had declined to apply the existing setting aside reason by analogy.

Therefore, as announced in the White Paper, the Draft Law adds – somewhat hidden in Draft Section 1040(4) ZPO) – a respective ground for setting aside an award which incorrectly declines jurisdiction. This amendment aims at strengthening the competitiveness of Germany as an arbitration seat by creating a possibility to set aside awards which unjustifiably close the door to arbitration proceedings – although this is done at the expense of overriding an award.

Slippery Slope: Retrial of Setting-Aside Proceedings

Not particularly arbitration-friendly is however the Draft Law's proposed Section 1059a ZPO, which allows a party to request the setting aside of an award even after the time limit for such an application has elapsed. This is meant to synchronize the legal force of arbitral awards and judgments.

The February 2024 draft "over accomplished" this aim by making it easier to retry setting-aside proceedings for awards than for judgments. The Draft Law fortunately corrected this. It now mirrors more closely the provisions for judgments (Section 580-581 ZPO).

However, like judgments, awards still can be set aside not only for criminal acts to the detriment of the requesting party (e.g. false statements, forged documents, procedural fraud, etc.) but also when the requesting party later discovers (without any fault of that party) a new document which would have secured a more favourable outcome. By treating awards like judgments also with regard to the latter ground for retrial, the Draft Law neglects that arbitrations are particularly aimed at quickly achieving a final resolution of the dispute. Therefore, this provision should be critically reviewed in the parliamentary process.

Improved Enforceability of Interim Measures

Draft Section 1025(2) ZPO aims at clarifying an issue which has been controversially discussed in Germany for years, namely whether interim measures adopted by arbitral tribunals seated outside Germany can be declared enforceable by German courts. The Draft Law resolves this dispute in favour of the enforceability. It obliges German courts to permit the enforcement of interim measures (of German- and foreign-seated arbitral tribunals) with certain exceptions. These exceptions largely mirror the grounds provided in Article 17(I) of the 2006 Model Law and include, in particular, the grounds also applicable for setting aside awards. These are welcome

amendments strengthening the enforceability of interim measures issued by arbitral tribunals.

English Language in Arbitration-Related Court Proceedings

The Draft Law also introduces possibilities to use English in arbitration-related proceedings before German courts. Draft Section 1063b(1) ZPO permits that English-language documents submitted in arbitral proceedings may be submitted without translation in court proceedings, making proceedings more time/cost-efficient and user-friendly.

In addition, Draft Section 1063a ZPO offers the possibility to conduct proceedings entirely in English before the newly installed "commercial courts" (law adopted on 4 July 2024, see here). While these only exist in a number of German states (*Bundesländer*), this is an important and long-awaited milestone, which goes beyond the possibilities offered in some neighbouring countries, and will thus definitely increase the competitiveness of Germany as an arbitration seat.

Further Improvements

In addition to the above, the Draft Law includes a number of further welcome amendments:

- Draft Section 1047(2)-(3) ZPO offers a welcome clarification that oral hearings may be conducted via **video conference** unless the parties agree otherwise.
- Draft Sections 1054(2), (4) and 1064(1) ZPO allow awards to be "contained in an **electronic document**", if signed by each arbitrator with their "qualified electronic signature" and no party objects. The latter ensures that parties may still obtain an award signed in hard copy if necessary for international enforceability. While, in the EU, the requirements for a "qualified electronic signature" are stipulated by the eIDAS Regulation, questions might arise regarding the interpretation and application of this requirement for arbitrators sitting outside of the EU.
- Draft Section 1054a ZPO expressly allows arbitrators to issue **concurring or dissenting opinions**, unless the parties agree otherwise. This clarification was triggered by an *obiter dictum* in a 2020 decision of the Higher Regional Court of Frankfurt suggesting that concurring or dissenting opinions may violate the confidentiality of tribunal deliberations and, thus, German public policy (discussed here and here).
- Draft Section 1054b ZPO provides that arbitral awards and, if applicable, also any concurring or dissenting opinions may be **published** in anonymised or pseudonymised form unless a party timely objects within three months from the tribunal's request to publish. Unlike the White Paper still suggested, publication is now the default, requiring parties to actively opt out.

Conclusion

The Draft Law goes a long way into modernizing the German arbitration law and providing for a legal arbitration framework that is more efficient and aligned to technological advancements. With the proposed changes, the Draft Law will boost Germany's competitiveness as an arbitration venue setting new standards that have not yet been adopted in other jurisdictions. On the other hand, several reform ideas discussed were not picked up, such as implementing a provision on

emergency arbitrators or concentrating the jurisdiction for arbitration matter at the BGH. It remains to be seen whether some of the criticised issues may still be introduced during the parliamentary process.

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