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## Germany as a Place for International and Domestic Arbitrations - General Overview

by K.H. Böckstiegel, S. Kröll and P. Nacimiento

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**Overview**

This valuable publication provides the first full, detailed commentary in English on the German arbitration law, as well as on the rules of the German Institute of Arbitration (DIS). With its clear, detailed discussion of the many issues that can arise in the course of commercial arbitral proceedings, Arbitration in Germany offers comprehensive guidance to all parties either planning to arbitrate in Germany or which are already involved in arbitral proceedings or arbitration-related court proceedings in Germany. In addition, the book will be an invaluable resource for understanding the Model Law in any of the many jurisdictions that have adopted that law.

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# Germany as a Place for International and Domestic Arbitrations – General Overview\*

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**Short Bibliography:** See general bibliography.

	Para.		Para.
I. Arbitration in Germany: Past and Present	1	III. The Arbitration Infrastructure	26
A. The History of Arbitration and the Road to the New Law	1	A. Institutional Arbitration – ad hoc Arbitration	26
B. The present Practice of Arbitration	5	1. Leading Institutions	26
C. Information about Arbitration in Germany	8	2. Ad hoc Arbitration in Germany	31
II. The Legal Framework of Arbitration in Germany	11	B. German State Courts	32
A. The German Arbitration Law	11	IV. Characteristic Features of German Arbitration Law	34
1. The 10 <sup>th</sup> Book of the ZPO	12	A. Territoriality	35
2. Transitional Provisions and old Arbitration Law	15	B. Party Autonomy with few Limits	36
B. Other relevant national Provisions	16	1. General Principles	36
C. International Arbitration Conventions to which Germany is a Party	18	2. Arbitrability	37
1. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958	19	3. Conduct of Proceedings	39
2. The European Convention on International Commercial Arbitration	20	C. Wide Discretion of the Tribunal in the Conduct of the Proceedings	40
3. The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States	21	D. Limited Court Intervention and swift Court Proceedings	41
4. Energy Charter Treaty	23	E. Jurisdiction and early Determination of Tribunal’s Jurisdiction by the Courts	43
5. Bilateral Commerce, Friendship and Investment Protection Treaties	24	F. Prevention of Delay and obstructive Behaviour	44
		G. Promotion of amicable Solutions	45
		V. The Arbitration Agreement	47
		A. Legal Nature and necessary Contents	47
		B. Separability	49
		C. Form Requirements	50
		1. Form Requirements of § 1031 ZPO	50

\* This parts draws on the Country Report ‘Germany’ in the ICCA International Handbook on Commercial Arbitration, Deventer 2007.

	Para.		Para.
2. Agreements providing for Arbitration abroad.....	56	E. The Decision on Costs .....	116
D. Parties to the Agreement.....	57	F. Correction and Interpretation of the Award and additional Awards .....	118
1. No Restriction as to Parties – State Parties.....	57	X. German State Courts and Arbitration.....	120
2. Non signatory Parties.....	60	A. General Principles .....	120
E. Effects of the Agreement.....	63	B. Supervisory Function of the Courts.....	123
1. Jurisdictional and contractual Effects .....	63	C. Supportive Functions of the Courts.....	124
2. The Interpretation of the Arbitration Agreement and the Admissibility of Summary Court Proceedings .....	65	D. Autonomous Procedure for the Taking of Evidence (selbstständiges Beweisverfahren).....	129
3. Summary Proceedings for Recovery of Debt (Mahnverfahren).....	68	XI. Recourse against Awards.....	130
VI. The Arbitral Tribunal.....	69	A. General Principles .....	130
A. Appointment of Arbitrators .....	70	B. The Setting Aside Proceedings pursuant to § 1059 ZPO .....	134
B. Challenge and Dismissal of Arbitrators .....	74	1. General Principles .....	134
C. The Arbitrator’s Contract .....	78	2. Grounds for Setting aside.....	136
VII. The Arbitral Procedure.....	86	3. Procedure.....	142
A. General Principles.....	86	4. Other Means of Recourse.....	144
B. Commencement and Conduct.....	89	XII. Recognition and Enforcement of Awards .....	146
C. Security for Costs .....	92	A. General Principles .....	146
D. Evidence.....	93	B. Domestic Awards.....	148
E. Record of oral Hearing .....	99	C. Foreign Arbitral Awards.....	149
F. Default Proceedings.....	100	1. Enforcement under International Instruments .....	150
G. Representation and legal Assistance ....	101	2. Enforcement under the national Regime for Recognition and Enforcement .....	152
VIII. Interim Relief and Interim Measures of Protection.....	102	3. Grounds to refuse Enforcement .....	155
IX. The Arbitral Award .....	106	XIII. Multi-Party Arbitrations .....	159
A. Types of Award .....	107	XIV. Insolvency of a Party .....	162
B. Making of the Award.....	109		
C. Form and Delivery of the Award.....	110		
D. The Law applicable to the Decision on the Merits .....	112		

## I. ARBITRATION IN GERMANY: PAST AND PRESENT

### A. The History of Arbitration and the Road to the New Law

- 1 Arbitration has a long tradition in Germany. As in many other legal systems, the state court systems actually developed from *ad hoc* tribunals based on consent.<sup>1</sup> But also after state courts with compulsory jurisdiction had been established, arbitral tribunals based on an agreement between the parties were widely considered to be a useful supplement, in particular in commercial matters.<sup>2</sup>

<sup>1</sup> Krause, Die geschichtliche Entwicklung des Schiedsgerichtswesens in Deutschland, Berlin 1930, p. 3.

<sup>2</sup> Krause, Entwicklungslinien des deutschen Schiedsgerichtswesens, in: Nufbaum (ed.), Internationales Jahrbuch für Schiedsgerichtswesen, Vol. III, Berlin 1931, pp. 220 (234 *et seq.*).

In the light of this, the first codification of arbitration law on a federal level in the 10<sup>th</sup> Book of the Code of Civil Procedure (*Zivilprozessordnung* – ‘ZPO’) (§§ 1025 *et seq.* ZPO) in 1879 adopted a very favourable approach to arbitration. The fairly liberal law consisting of only 24 sections was to a large extent already based on the same principles which today underlie the UNCITRAL Model Law on International Commercial Arbitration (ML) – party autonomy and limited court intervention. Arbitration agreements, whether concluded before or after the disputes had arisen, were enforced as a matter of course and led to the exclusion of the jurisdiction of the state courts.<sup>3</sup> Arbitral awards were given the same effect between the parties as judgments of the state courts<sup>4</sup> and were enforced unless one of the few grounds to resist enforcement could be proven.<sup>5</sup> There was no scrutiny of arbitral awards on the merits and considerable freedom was given to the parties in organizing their proceedings. While these principles are widely recognized today, at the time when the law entered into force this favourable attitude to arbitration was in stark contrast to the scepticism with which arbitration was treated in other legal systems. With some minor amendments, in particular concerning the recognition and enforcement of foreign awards, the law remained in force largely unchanged until 1 January 1998, when the new German arbitration law came into force.

Efforts to modernize German arbitration law had started shortly after the adoption of the UNCITRAL Model Law by the General Assembly of the United Nations in December 1985. It was a widely held belief that the incomplete and sometimes outdated provisions of the old arbitration law, irrespective of their arbitration friendliness, considerably diminished the attractiveness of Germany as a place for international arbitrations. It was impossible to be certain of German arbitration law from the text of the statute and some of the default provisions contained in the law, such as the appointment of two-member tribunals, were no longer in line with arbitration practice.

The revision was intended to make German arbitration law more user friendly and to bring it into line with international practice. To these ends, a comprehensive and easily understandable arbitration law was to be devised. A primary objective was to allow potential users to derive the conduct of arbitral proceedings – including the arbitration-related court proceedings – from the wording of the statute. Furthermore, to make the law easily accessible including for foreign users, the drafters decided to stick as closely as possible to the wording of the Model Law. Consequently, the 41 sections of the new German

<sup>3</sup> § 1027a ZPO pre-1998; *Schütze/Tschernig/Wais* (1990), paras 128 *et seq.*

<sup>4</sup> § 1040 ZPO pre-1998; *Schütze/Tschernig/Wais* (1990), para. 526 *seq.*

<sup>5</sup> § 1041 (1) ZPO pre-1998; *Schütze/Tschernig/Wais* (1990), paras 530 *et seq.*

arbitration law contained in the 10<sup>th</sup> Book of the Code of Civil Procedure (§§ 1025–1066 ZPO) are to a large extent a verbatim adoption of the Model Law. The new law was accompanied by a detailed explanatory note which describes the rationale underlying each article<sup>6</sup> and is a valuable tool for interpreting the law.

### **B. The present Practice of Arbitration**

- 5 Today, arbitration is widely used in most areas of business and commerce and arbitration has blossomed with the entry into force of the new arbitration law. Numerous standard form contracts suggested by industry organizations or the major form books for contract drafting contain arbitration clauses. Unfortunately, there is only limited empirical data available as a large proportion of arbitrations – in particular the domestic arbitrations – are still conducted on an *ad hoc* basis and awards are rarely published. From the available data,<sup>7</sup> some general inferences can be drawn. First, it is evident that there is a much stronger incentive to resort to arbitration in international cases than in purely national transactions. For the latter, the relatively efficient German judicial system with its specialized commercial chambers in general provides comparatively speedy and competent dispute resolution. With the complexity of the disputes involved, however, the incentive to go to arbitration seems to increase. Furthermore, there are some areas, such as shipping, M&A and, to a certain degree, construction, where arbitration is the norm, while the finance and banking sector so far resorts less often to arbitration. The figures of the leading non-specialized German arbitration institution, the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit* – ‘DIS’) also show a steady increase in cases. From its creation in 1992 out of two existing institutions, the number of cases has increased from 20 in 1992, over 40 in 1997 with a total value of approx. EUR 46 million to 74 in 2006 with a total value of approximately EUR 500 million.
- 6 The growing importance of arbitration is also reflected in the increase in arbitration-related literature and events which have been fuelled to a certain extent by the new German arbitration law.

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<sup>6</sup> Bill of the Arbitration Law Reform Act, BT-Drs. 13/5274.

<sup>7</sup> Surveys conducted by *Price Waterhouse Coopers/Europa-Universität Viadrina Frankfurt (Oder)*, *Commercial Dispute Resolution – Konfliktbearbeitungsverfahren im Vergleich*, Frankfurt 2005; *Ebbing* (2003), p. 39; *Hesse*, *Schiedsgerichtsbarkeit in der Investitionsgüterindustrie – eine empirische Untersuchung*, in: *Briner/Fortier/Berger/Bredow* (eds), *FS-Böckstiegel*, 2001, p. 277; *Schmidt-Diemitz*, *Internationale Schiedsgerichtsbarkeit – eine empirische Untersuchung*, DB 1999, 369.

The case law of recent years<sup>8</sup> shows the clear tendency of the German state courts to respect and enforce the choice of the parties to opt out of the judicial system in favour of arbitration. The decisions of the state courts reflect the readiness to support arbitral tribunals and their findings. State court intervention has been mainly supportive, thus restricting the scope of judicial control. The range of disputes subject to arbitration has also grown considerably to encompass numerous fields of law previously excluded from arbitration.

### C. Information about Arbitration in Germany

There is abundant literature on arbitration in German. Most of it can be found in the online catalogue of the Arbitration Documentation and Information Center (ADIC),<sup>9</sup> the specialized arbitration library created and maintained by the DIS.<sup>10</sup> Regular reports on current developments and new decisions are published in the German Journal for Arbitration (*Zeitschrift für Schiedsverfahren* – ‘SchiedsVZ’) and some other law journals.<sup>11</sup>

In addition, the DIS maintains an excellent database for its members where the full text of nearly all arbitration-related German court decisions can be found. For the most important decisions, an English abstract, which can be freely accessed via the DIS website, also exists. Full text translations into English of the most important German decisions can be found in the Yearbook of Commercial Arbitration. Furthermore, the International Arbitration Law Review regularly publishes annotated summaries of relevant German decisions in English and numerous case abstracts can be found in UNCITRAL’s freely accessible CLOUT database.<sup>12</sup>

Arbitration awards may be published only with the consent of both the arbitral tribunal and the parties involved. On the rare occasions awards are published, the

<sup>8</sup> Annual or bi-annual summaries of arbitration-related case law are published in the NJW by *Kröll* (2001, 1173; 2003, 791; 2005, 104; 2007, 743) and the *SchiedsVZ* (2004, 113; 2005, 139; 2006, 203; 2007, 145); for an evaluation of the jurisprudence on selected issues see *Kröll/Kraft*, Ten Years of UNCITRAL Model Law in Germany, (2007) *World Arbitration and Mediation Review* 439 *et seq.*

<sup>9</sup> See <[www.adic-germany.de](http://www.adic-germany.de)>.

<sup>10</sup> See <[www.dis-arb.de](http://www.dis-arb.de)>.

<sup>11</sup> These are, in particular, the *Neue Juristische Wochenschrift* (NJW); *Betriebs-Berater* (BB); *Internationales Handelsrecht – International Commercial Law* (IHR); *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax); *Recht der Internationalen Wirtschaft* (RIW); *Zeitschrift für den Zivilprozess* (ZZP); *Deutsche Zeitschrift für Wirtschaftsrecht* (DZWiR).

<sup>12</sup> The abbreviation ‘CLOUT’ stands for *Case Law on UNCITRAL Texts*, a system for collecting and disseminating information on court decisions and arbitral awards relating to the Conventions and Model Laws that have emanated from the work of the Commission; *cf.* [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html). Important CLOUT cases are available from the *cisg-online.ch* Website <[http://www.cisg-online.ch/cisg/abfrage\\_nach\\_CLOUTNr.php](http://www.cisg-online.ch/cisg/abfrage_nach_CLOUTNr.php)>.

names of those involved are usually deleted. Published awards or at least reports of awards may be found in the following publications:

- SchiedsVZ (from 2003 onwards);
- Recht und Praxis der Schiedsgerichtsbarkeit (RPS) by the Deutsche Institution für Schiedsgerichtsbarkeit (DIS), semi-annual supplement to the Betriebs-Berater (until 2001);
- Handelsrechtliche Schiedsgerichts-Praxis (Collection of Arbitral Awards and Judgments on Arbitration) by Straatmann/Ulmer (eds);<sup>13</sup>
- Recht der Internationalen Wirtschaft (RIW);
- Yearbook of Commercial Arbitration (Yearbook).

## II. THE LEGAL FRAMEWORK OF ARBITRATION IN GERMANY

### A. The German Arbitration Law

- 11** The core of the German arbitration law is integrated in the German Code of Civil Procedure where it constitutes its 10<sup>th</sup> Book. It is supplemented by a few arbitration-specific provisions in other statutes relating primarily to the non-arbitrability of certain disputes. Furthermore, some of the other provisions of the ZPO may become applicable in arbitration-related court proceedings in support or in supervision of the arbitration. These sources of a purely national background are supplemented by the provisions in international instruments such as the New York Convention 1958 or the numerous bilateral treaties to which Germany is a party and which often provide for dispute resolution by arbitration.<sup>14</sup>

#### 1. *The 10<sup>th</sup> Book of the ZPO*

- 12** The current version of the 10<sup>th</sup> Book of the ZPO, which entered into force on 1 January 1998, is to a large extent a literal adoption of the UNCITRAL Model Law. The few amendments made to the Model Law were considered necessary either to facilitate the application of the law, to provide even greater room for party autonomy or to take into account the established German arbitration practice. In particular, German arbitration law does not distinguish between national and international cases but provides a single regime for both types of arbitrations. The German legislature held the view that, in the light of the few

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<sup>13</sup> Continued online on the website of the Hamburg Chamber of Commerce at <[http://www.hk24.de/produktmarken/recht\\_und\\_fair\\_play/schiedsgerichtemediationschlichtung/schiedsspruchsammlung/index.jsp](http://www.hk24.de/produktmarken/recht_und_fair_play/schiedsgerichtemediationschlichtung/schiedsspruchsammlung/index.jsp)>.

<sup>14</sup> For the interpretation of the various provisions see *Kröll/Kraft*, Ten Years of UNCITRAL Model Law in Germany (2007) World Arbitration and Mediation Review 439 (444 *et seq.*).

differences between national and international cases, a single regime for all arbitrations is, in general, justified. It avoids the sometimes difficult distinctions between national and international cases and thereby serves the needs of practice better than two different regimes. For the same reason, the limitation to ‘commercial’ arbitration contained in the Model Law was also dropped, so that the German law applies to all types of arbitration. Thus, users of arbitration do not have to worry about the sometimes difficult and controversial definition of the term ‘commercial’ for which a footnote to Article 1 (1) ML tries to give some guidance.

Other important amendments made to the Model Law concern a considerable easing of the form requirements for the arbitration agreement in § 1031 (2) ZPO, including allowing for the so called ‘half written form’, in particular, arbitration agreements in letters of confirmation, a special procedure to determine the admissibility of arbitral proceedings (§ 1032 (2) ZPO), additional supportive powers of the courts in relation to appointment (§ 1025 (3) ZPO) and enforcement of interim relief (§ 1041 (2) ZPO). Furthermore, the expiry of the three month time-limit for the initiation of setting aside proceedings also influences the availability of possible defences in proceedings for a declaration of enforceability (§ 1060 (2) sentence 3 ZPO). **13**

The new German arbitration law applies to all arbitrations having their place of arbitration in Germany. The procedural theory followed by the old law has been abolished by the new arbitration law. It is, however, still possible to conduct proceedings under German arbitration law where the place of arbitration is in a different country. Furthermore, § 1025 (2) ZPO lists a number of provisions which are also applicable where the place of arbitration is not in Germany or has not yet been determined. **14**

## *2. Transitional Provisions and old Arbitration Law*

Pursuant to the transitional provisions contained in the Bill of the Arbitration Law Reform Act, the revised version of the 10<sup>th</sup> Book of the ZPO applies to all arbitral proceedings or arbitration related court proceedings started after 1 January 1998. Thus, given the lapse of time, the provisions of the old German arbitration law have largely lost their practical importance. The only questions for which they are still of relevance are the conclusion and validity of the arbitration agreement. Arbitration agreements entered into before 1 January 1998 are still governed by the former German arbitration law. This is of particular importance given the differences in the form requirements between the old and **15**

the new law.<sup>15</sup> The former law, *inter alia*, allowed commercial parties to validly conclude an arbitration clause without any form requirements.<sup>16</sup>

### B. Other relevant national Provisions

- 16** In addition to §§ 1025-1066 ZPO, the other provisions of the ZPO may become applicable in the various supportive or supervisory court proceedings provided for in the 10<sup>th</sup> Book, as far as they do not conflict with the specific rules of the 10<sup>th</sup> Book.<sup>17</sup> § 1026 ZPO provides only that courts may not intervene in matters governed by §§ 1025–1061 ZPO except where so provided in the 10<sup>th</sup> Book, but does not exclude the application of other ZPO provisions in connection with the functions specifically entrusted to the courts.
- 17** Furthermore, there are few provisions in other laws dealing with sector specific restrictions. They have, in general, a consumer protection or public policy background and either exclude the arbitrability of certain disputes (e.g. § 37h Securities Trading Act (*Wertpapierhandelsgesetz* – ‘WpHG’) for certain financial service contracts)<sup>18</sup> or limit the parties’ freedom in devising their own arbitration procedure (e.g. § 307 Civil Code (*Bürgerliches Gesetzbuch* – ‘BGB’)<sup>19</sup> for arbitration agreements contained in standard conditions).

### C. International Arbitration Conventions to which Germany is a Party

- 18** The above rules of national origin are supplemented by the provisions of various international instruments to which Germany is a party. The most important of these are the New York Convention 1958 (NYC),<sup>20</sup> the European Convention on International Commercial Arbitration,<sup>21</sup> the International Center for Settlement of Investment Disputes (ICSID) Convention<sup>22</sup> and the Energy Charter Treaty.<sup>23</sup> In

<sup>15</sup> See Part II, *Trittmann/Hanefeld*, § 1031, especially para. 5.

<sup>16</sup> *Lachmann* (2002), para. 241; Bill of the Arbitration Law Reform Act, BT-Drs. 13/5274, p. 39.

<sup>17</sup> *BGH* 27.03.2002, IHR 2003, 43 (provision on legal representation §§ 80 *et seq.* ZPO); *BayObLG* 11.11.2004, available at <www.dis-arb.de> (provisions on separation of costs §§ 91 *et seq.* ZPO); for details see Part II, *Schroeder*, Introduction to § 1062.

<sup>18</sup> For details see Part IV, *Horn*, Arbitration of Banking and Finance Disputes in Germany, para. 13; *cf. Quinke*, Börsenschiedsvereinbarungen und prozessualer Anlegerschutz, Köln 2005.

<sup>19</sup> See on the issue *Hanefeld/Wittinghofer*, Schiedsklauseln in Allgemeinen Geschäftsbedingungen, *SchiedsVZ* 2005, 217; *OLG Bremen* 28.06.2006, available at <www.dis-arb.de>; for details see Part II, *Trittmann/Hanefeld*, § 1029 para. 16.

<sup>20</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, implementing legislation in BGBl. 1961 II, 121; withdrawal of the originally declared reservation under Art. I (3) NYC, BGBl. 1999 II, 7.

<sup>21</sup> European Convention on International Commercial Arbitration of 1961, implementing legislation in BGBl. 1964 II, 425.

<sup>22</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965, implementing legislation in BGBl. 1969 II, 369.

addition to these multilateral treaties, Germany has also concluded numerous bilateral Commerce, Friendship and Investment Protection treaties which contain arbitration-related provisions. Due to their public international law character, these treaties prevail in principle over the national provisions, as is also explicitly stated in § 1064 (3) ZPO. However, most of these treaties contain an opening for more favourable national provisions. Thus their practical relevance is largely limited to the rare cases where the treaty contains more favourable provisions than the German law (e.g. restrictions of the grounds to refuse recognition and enforcement) or where the authority of the tribunal has to be based on provisions of the treaty. In principle, each treaty defines its own scope of application which may, however, be enlarged by virtue of the most favoured national treatment clause contained in another treaty.<sup>24</sup>

1. *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*

The New York Convention of 10 June 1958 provides for the recognition and enforcement of international arbitration agreements and foreign arbitral awards. In Germany, the Convention entered into force on 28 September 1961.<sup>25</sup> While Germany never availed of the ‘commercial matters reservation’, it originally declared the ‘reciprocity reservation’ in Article I (3) NYC. With the entry into force of the new German law, the reciprocity-reservation was also withdrawn with effect as of 1 September 1998.<sup>26</sup> Pursuant to § 1061 ZPO, the recognition and enforcement of foreign awards is now generally subject to the New York Convention 1958. Apart from questions of enforcement of foreign awards, the provisions of the Convention may also become relevant where a party challenges the jurisdiction of the German courts, relying on an arbitration agreement providing for arbitration outside Germany. **19**

2. *The European Convention on International Commercial Arbitration*

The European (Geneva) Convention on International Commercial Arbitration of 21 April 1961 was aimed at safeguarding international arbitration, notably in east-west commercial transactions, in particular with regard to the interference of state courts.<sup>27</sup> It entered into force on 7 January 1964 and was ratified by **20**

<sup>23</sup> Energy Charter Treaty, (1994) 33 ILM 360.

<sup>24</sup> *OLG Dresden* 31.01.2007, at <www.dis-arb.de>; application of the European Convention to arbitral award between an American and a Belorussian party.

<sup>25</sup> BGBl. 1961 II, 122.

<sup>26</sup> Bekanntmachung über den Geltungsbereich des Übereinkommens über die Anerkennung und Vollstreckung ausländischer Schiedssprüche vom 03.12.1998, published in BB 1999, Beilage No. 4, p. 3.

<sup>27</sup> *Lionnet/Lionnet* (2005), p. 93; *Stein/Jonas-Schlosser* (2002), Anhang § 1061 para. 165.

Germany on 25 January 1965.<sup>28</sup> The practical importance of this convention was always rather limited, and its importance diminished after the political changes in the eastern European countries.<sup>29</sup> In Germany, it may still be relevant for the recognition of awards set aside in their country of origin for local reasons not recognized in the European Convention.<sup>30</sup> Furthermore, the Convention provides in its Article IV for a procedure to solve uncertainties as to the chosen institution in case of pathological arbitration clauses.

### *3. The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States*

- 21** The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) was promoted by the World Bank in 1965 and created the International Centre for the Settlement of Investment Disputes (ICSID)<sup>31</sup> for resolving investment disputes between a state and national individuals or entities. The Convention entered into force in Germany on 18 May 1969. As a consequence, ICSID proceedings may be brought against Germany by foreign investors or by German investors against any other member state, provided that a valid submission to ICSID arbitration exist. As of January 2007, no ICSID proceedings have so far been brought against Germany, while German investors have on several occasions initiated ICSID proceedings.
- 22** Since December 2005 parties have the opportunity, without the need for specific prior approval, to conduct ICSID proceedings at the Frankfurt International Arbitration Centre (FIAC) – jointly established by the DIS and the Frankfurt Chamber of Industry and Commerce. This is the result of a cooperation agreement under Article 63 ICSID Convention concluded between the DIS and ICSID.

### *4. Energy Charter Treaty*

- 23** The Energy Charter Treaty (ECT), with currently 52 members, was concluded in December 1994 and is in force since April 1998.<sup>32</sup> The treaty was entered into by countries from western, central and eastern Europe, Japan and Australia.<sup>33</sup> It aims to provide a multilateral legal framework for continuous cross-border

<sup>28</sup> *Baumbach/Lauterbach* (2007), SchlAnh VI A 2, vor Art. 1 EuÜbkHSch; *Lionnet/Lionnet* (2005), p. 93.

<sup>29</sup> *Weigand-Weigand* (2002), Germany, paras 78 *et seq.*

<sup>30</sup> See *Nienaber* (2002), pp. 32 *et seq.*; cf. *OLG Dresden* 31.01.2007, available at <[www.dis-arb.de](http://www.dis-arb.de)>.

<sup>31</sup> See <[www.worldbank.org/icsid](http://www.worldbank.org/icsid)>.

<sup>32</sup> BGBI. 1997 II, 4.

<sup>33</sup> See also Part IV, *Escher/Nacimiento/Weissenborn*, Investment Arbitration and the Participation of State Parties in Germany, paras 25 *et seq.*

cooperation between the contracting states in the energy sector and is thus an instrument of investment protection within that field.<sup>34</sup> It also provides for a mechanism of dispute resolution and grants direct rights to non-state parties to initiate claims.<sup>35</sup> Since the security of energy supply is one of Germany's major economical and political issues, one cannot overestimate the importance of the Energy Charter Treaty. In particular in the light of the growing East-West energy dependency, possible disputes deriving there from may gain importance in the future.

##### 5. *Bilateral Commerce, Friendship and Investment Protection Treaties*

Germany has concluded numerous bilateral treaties with foreign states, including the US, the United Kingdom, Switzerland, Austria, Belgium, Greece and Italy. In particular the various investment protection treaties contain offers by both states to submit certain disputes with the other state or its nationals to arbitration. Furthermore, these treaties also often contain provisions for the recognition and enforcement of awards in the territory of the state. Some merely refer to the New York Convention 1958; others provide that recognition and enforcement may only be refused if recognition and enforcement would be contrary to public policy. German and foreign parties have, on several occasions, relied on such treaties either to initiate arbitral proceedings or to have awards declared enforceable in Germany. In the latter case some treaties may in so far be more favourable than the German law as they limit the possible grounds to refuse recognition to public policy<sup>36</sup> or allow recognition of settlements concluded during arbitral proceedings but not rendered in form of an award on agreed terms.<sup>37</sup> **24**

A complete list of the various bi- and multilateral friendship, commerce and investment protection treaties can be found on the website of the DIS.<sup>38</sup> **25**

<sup>34</sup> Detailed references in *Wälde*, Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation, Arb.Int. 1996, 429; *Turner*, Investment Protection through Arbitration: The Dispute Resolution Provisions of the Energy Charter Treaty, (1998) Int.A.L.R. 166.

<sup>35</sup> *Wälde*, Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation, Arb.Int. 1996, 429; *Lew/Mistelis/Kröll* (2003), para. 28-34.

<sup>36</sup> *BGH* 23.02.2006, *SchiedsVZ* 2006, 161 (164) = *IHR* 2006, 125 = (2006) Int.A.L.R. N-59; (German-Soviet Treaty of 25.04.1958) – reliance on procedural defect not possible as not a separate ground for refusal.

<sup>37</sup> *BayObLG* 05.07.2004, *BayObLGR* 2004, 381 (enforcement of a settlement under the Bilateral Treaty with Austria).

<sup>38</sup> <[www.dis-arb.de](http://www.dis-arb.de)>.

### III. THE ARBITRATION INFRASTRUCTURE

#### A. Institutional Arbitration – ad hoc Arbitration

##### 1. Leading Institutions

- 26** There are numerous arbitration institutions in Germany, most of which are specialized on certain sectors. The most important general arbitration institution is the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit e. V.* – ‘DIS’).<sup>39</sup> It was formed on 1 January 1992 by a merger of two pre-existing institutions, the German Arbitration Committee (*Deutscher Ausschuß für Schiedsgerichtswesen* – ‘DAS’) the arbitration rules of which were traditionally used in Germany, and the German Institute of Arbitration (*Deutsches Institut für Schiedsgerichtswesen* – ‘DIS’) which had been established by the German commercial and legal community for the study and promotion of arbitration.<sup>40</sup>
- 27** The presently valid DIS Arbitration Rules (referred to as ‘DIS Rules’), in force since 1 July 1998, are applicable both to national and international arbitrations.<sup>41</sup> They are available in German, English, French, Russian and Spanish versions. The DIS Rules have been revised in the light of the new German law and closely follow the rules of the law. Under the DIS Rules, the role of the DIS focuses on the procedure for establishing the arbitral tribunal. There is no general monitoring of the proceedings or scrutiny of the draft awards.
- 28** The DIS not only administers arbitral proceedings under its own rules but also serves as the competent authority for the duties of the ICC in Germany and regularly acts as appointing authority for UNCITRAL or other *ad hoc* proceedings or gives general advice on the selection of arbitrators. Furthermore, it has been one of the driving forces behind the revision of the German arbitration law and is actively involved in the continuing development of the law *inter alia* through regular conferences, seminars and lectures on the topic, as well as its database of arbitration-related court proceedings. The DIS has recently founded ‘DIS40’, an organization for practitioners under 40 years of age and is also the co-operation partner for the German Arbitration Journal (*Zeitschrift für*

<sup>39</sup> Deutsche Institution für Schiedsgerichtsbarkeit e.V., Beethovenstrasse 5-13, 50674 Köln, Tel.: +49 (0)2 21/ 28 55 20, Fax: +49 (0)2 21 / 28 55 22 22; for further information see Part III or <www.dis-arb.de>.

<sup>40</sup> On the various features of the DIS Rules and the functions of the DIS, see *Kuckenburg/Shackelton*, The German Institution of Arbitration issues new Arbitration Rules, (1998) 13(7) *Mealey’s I.A.R.* 37; *Schütze*, Im Porträt: Deutsche Institution für Schiedsgerichtsbarkeit, *SchiedsVZ* 2003, 178.

<sup>41</sup> For a commentary on the DIS Rules, see Part III; for a German Commentary see *Theune*, DIS, in: *Schütze* (ed.), *Institutionelle Schiedsgerichtsbarkeit*, 2006, pp. 159 *et seq.*

*Schiedsverfahren* – ‘SchiedsVZ’), which is published since the beginning of 2003.

Further specialized institutions are:

29

- Waren-Verein der Hamburger Börse e.V.  
Große Bäckerstr. 4, 20095 Hamburg  
Tel: +49 (0)40 / 37 47 19-0  
Fax: +49 (0)40 / 37 47 19-19  
E-mail: [info@waren-verein.de](mailto:info@waren-verein.de)  
Website: [www.waren-verein.de/schiedsger.htm](http://www.waren-verein.de/schiedsger.htm)
- Handelskammer Hamburg<sup>42</sup>  
Adolphsplatz 1, 20457 Hamburg  
Tel: +49 (0)40 / 36 138-0  
Fax: +49 (0)40 / 36 138-401  
E-mail: [service@hk24.de](mailto:service@hk24.de)  
Website: [www.hk24.de](http://www.hk24.de)

(also acts as appointing authority for *ad hoc* proceedings under the Rules of the ‘Hamburger freundschaftliche Arbitrage’)<sup>43</sup>

- German Maritime Arbitration Association<sup>44</sup>  
Kölner Straße 34, 28327 Bremen  
Tel: +49 (0)421 / 437 90 70  
Fax: +49 (0)421 / 427 90 72  
E-mail: [gmaa.germany@t-online.de](mailto:gmaa.germany@t-online.de)  
Website: [www.gmaa.de](http://www.gmaa.de)
- Schlichtungs- und Schiedsgerichtshof deutscher Notare  
DNotV GmbH  
Kronenstr. 73/74, 10117 Berlin  
Tel: +49 (0)30 / 20 61 57 40  
Fax: +49 (0)30 / 20 61 57 50  
E-mail: [kontak@dnotv.de](mailto:kontak@dnotv.de)  
Website: [www.dnotv.de](http://www.dnotv.de)

<sup>42</sup> Schiedsgericht der Handelskammer Hamburg, c/o Handelskammer Hamburg, Adolphsplatz 1, 20457 Hamburg, Tel: +49 (0)40 / 36 13 80, Fax: +49 (0)40 / 36 13 84 01; for further information see [www.hk24.de](http://www.hk24.de).

<sup>43</sup> For details see *Korte*, Die Hamburger freundschaftliche Arbitrage – ein Überblick anlässlich des 100-jährigen Jubiläums des § 20 Platzusancen für den hamburgischen Warenhandel, *SchiedsVZ* 2004, 240.

<sup>44</sup> For information see [www.gmaa.de](http://www.gmaa.de) or contact its General Secretary, Dieter Griebel, F.I.C.S., Kölner Straße 34, 28327 Bremen, Tel: +49 (0)421 / 437 90 70, Fax: +49 (0)421 / 437 90 72.

- Deutsche Börse AG/Frankfurter Wertpapierbörse<sup>45</sup>  
Deutsche Börse AG  
60485 Frankfurt am Main  
Tel: +49 (0)69 / 2 11-0  
Fax: +49 (0)69 / 2 11-1 20 05  
E-mail: info@deutsche-boerse.com  
Website: <www.deutsche-boerse.com>

**30** In addition, there are special arbitration institutions at the various stock and commodity exchanges and some of the regional chambers of commerce also offer arbitration services.

## 2. *Ad hoc Arbitration in Germany*

**31** Ad hoc arbitration is widely used in Germany, in particular in corporate disputes.<sup>46</sup> Under German arbitration law, the parties are largely free to devise their own rules for their arbitral proceedings, subject to the very few mandatory provisions ensuring due process and equal treatment of the parties. In particular in corporate matters, it is possible to find fairly detailed arbitration clauses in practice. In the majority of cases, however, the parties generally only agree on the bare minimum, such as the number of arbitrators and the way they are appointed. Agreements on special arbitration rules for *ad hoc* proceedings, such as the UNCITRAL Arbitration Rules or the *Hamburger freundschaftliche Arbitrage*, are generally limited to international cases or commodity contracts. In all other cases and to the extent the parties have not made use of their party autonomy, the German law provides the necessary fall back rules to ensure the proper conduct of the proceedings, in particular the constitution of the tribunal. Pursuant to § 1042 (4) 1 sentence ZPO, the arbitral tribunal is empowered to decide on all open points of the arbitral proceedings left unregulated by the parties, such as the place of arbitration (§ 1043 (1) ZPO), the language of the proceedings (§ 1045 ZPO) and the governing law (§ 1051 ZPO).<sup>47</sup>

## **B. German State Courts**

**32** Under German arbitration law state courts perform important supportive and supervisory functions for arbitral proceedings. In exercising these functions and in line with the spirit of German arbitration law, courts normally adopt a very favourable attitude towards arbitration. Whenever it is clear that the parties have

<sup>45</sup> Deutsche Börse AG, Neue Börsenstrasse 1, 60485 Frankfurt am Main, Tel: +49 (0)69 / 2 11-0; Fax: +49 (0)69 / 2 11-1 10 21; for further information see <www.deutsche-boerse.com> or <www.eurexchange.com>.

<sup>46</sup> See generally Part IV, *Wilske*, Ad hoc Arbitration in Germany.

<sup>47</sup> See Part IV, *Wilske*, Ad hoc Arbitration in Germany, para. 19.

agreed on arbitration, courts will try to uphold the parties' agreement despite any defects.<sup>48</sup> In addition, concerning disputes covered by the arbitration agreement, courts have, in general, opted for a wide interpretation of the arbitration agreement, covering also tort claims or disputes with former shareholders.<sup>49</sup> Other examples of this pro-arbitration attitude are the jurisprudence of the Federal Court of Justice (*Bundesgerichtshof* – 'BGH') concerning the admissibility of arbitration agreements in consumer contracts,<sup>50</sup> the strict enforcement of time-limits concerning the appointment and challenge of arbitrators<sup>51</sup> and the narrow interpretation of the various grounds for setting aside an award or refusing its enforcement, often precluding defences which were not raised in time.<sup>52</sup>

The interpretation in favour of arbitration, however, does not extend to the question of whether the dispute resolution mechanism agreed upon is arbitration or not. Unlike the other methods of alternative dispute resolution (ADR), arbitration amounts to a waiver of the right of access to the state court system. Thus, in cases of doubt courts have normally applied a presumption that – at least where the dispute is of domestic nature – the parties did not want to completely exclude recourse to the courts.<sup>53</sup> **33**

#### IV. CHARACTERISTIC FEATURES OF GERMAN ARBITRATION LAW

From the various provisions of the law, some characteristic features of the German arbitration law can be deduced. These include the principle of territoriality, the prevailing role of party autonomy, the guarantee of due process **34**

<sup>48</sup> E.g. *BGH* 25.01.2007, IHR 2007, 78; *OLG Hamburg* 24.01.2003, *SchiedsVZ* 2003, 284 ('Arbitration, Hamburg'); *KG Berlin* 15.10.1999, *Yearbook* XXVI (2001), 328 = (2000) *Int.A.L.R. N-70* = *CLOUT* 373 (reference to non-existent 'German Central Chamber of Commerce'); *OLG Hamm* 27.9.2005, IHR 2006, 261 = *Yearbook* XXXI (2006), 685 (conflicting clauses); cf. *Kröll*, 'Pathological' Arbitration Agreements before German Courts, IHR 2006, 255.

<sup>49</sup> *BGH* 19.06.2004, *NJW* 2004, 2898 (2899); *id.* 04.10.2001, available at <www.dis-arb.de>; *OLG Schleswig* 19.10.2000, available at <www.dis-arb.de>; *OLG Stuttgart* 06.03.2001, *OLGR Stuttgart* 2002, 57; *KG Berlin* 15.10.1999; *OLG Hamm* 07.03.2000, *ZIP* 2000, 1013; *OLG Köln* 19.01.2001, available at <www.dis-arb.de>.

<sup>50</sup> *BGH* 13.01.2005, *SchiedsVZ* 2005, 95.

<sup>51</sup> *BGH* 04.03.1999, *NJW* 1999, 2370 (no challenge after award has been rendered); *id.* 01.02.2001, *RPS* 2/2001, 14; *BayObLG* 27.05.2003, available at <www.dis-arb.de>.

<sup>52</sup> *OLG Celle* 19.02.2004, *OLGR Celle* 2004, 396 (reliance on procedural irregularity excluded since not raised in time); *OLG Karlsruhe* 29.11.2002, available at <www.dis-arb.de> (possible effect of alleged violation of public policy on award not apparent); *id.* 27.03.2006, *SchiedsVZ* 2006, 335 (preclusion of defences in enforcement proceedings in Germany, if remedies at place of arbitration not used).

<sup>53</sup> *KG Berlin* 11.07.2002, available at <www.dis-arb.de>; *BayObLG* 13.05.2003, *MDR* 2003, 1132; *OLG München* 07.08.2006, *SchiedsVZ* 2006, 286.

and effective proceedings and the limitation of court interference. In concert with the generally arbitration friendly approach adopted by German courts, these features shape the practice of arbitration in Germany.

### **A. Territoriality**

- 35** In line with the UNCITRAL Model Law, the German arbitration law adopts a territorial approach with the place of arbitration as the decisive element. Pursuant to § 1025 (1) ZPO, the German arbitration law applies to all arbitrations having their places of arbitration in Germany. It is no longer possible to submit those arbitrations to a foreign arbitration law, to the exclusion of even the mandatory provisions of the German law. By contrast, only few provisions of the German arbitration law will apply to arbitrations with a place of arbitration in a different country or where the place of arbitration has not yet been determined. These provisions are listed in § 1025 (2)–(4) ZPO and concern the enforcement of arbitration agreements and awards, as well as some measures of court support. The determination of the place of arbitration is, pursuant to § 1043 ZPO, subject to party autonomy and, if the parties fail to agree, will be determined by the arbitral tribunal. As the legal base of the arbitral proceedings, the place of arbitration must be distinguished from the place where the hearings are held. § 1043 (2) ZPO explicitly authorizes the arbitral tribunal, in the absence of agreement between the parties to the contrary, to meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the parties, for consultation among its members, or for inspection of goods or documents.

### **B. Party Autonomy with few Limits**

#### *1. General Principles*

- 36** German arbitration law is, to a large extent, governed by party autonomy.<sup>54</sup> There are few restrictions on the parties' ability to have their disputes resolved by a method agreed by them. With few exceptions, the provisions of German arbitration law are of a non-mandatory nature. They are default rules which apply only where the parties have not regulated an issue either in their arbitration agreement or by submitting their arbitration to a set of arbitration rules or other rules, such as the IBA Rules on Taking Evidence in International Arbitration.

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<sup>54</sup> For the extent of party autonomy also in relation to the effects of the award see *BGH* 01.03.2007, available at <[www.dis-arb.de](http://www.dis-arb.de)>.

## 2. Arbitrability

Nearly all commercially relevant disputes are arbitrable, as the general rule in § 1030 (1) ZPO that ‘any claim involving an economic interest (*vermögensrechtlicher Anspruch*) can be subject of an arbitration agreement’, applies. The requirement of the old German arbitration law, that the parties must be able to conclude a settlement on the issue in dispute, applies under the reformed law only to a limited number of those claims which do not involve an economic interest.<sup>55</sup> **37**

There are only few exceptions to this general rule. In the 10<sup>th</sup> Book itself, only disputes relating to the existence of a lease of residential accommodation within Germany are directly declared non-arbitrable (§ 1030 (2) ZPO). Furthermore, § 1030 (3) ZPO provides that limitation of arbitrability contained in other laws shall not be affected by the general rule of arbitrability. These limitations include disputes concerning the representation of a child (§ 1822 No. 12 BGB) as well as §§ 101–110 Labour Courts Act (*Arbeitsgerichtsgesetz* – ‘ArbGG’). By contrast, disputes concerning the violation of German or European competition or antitrust law are now arbitrable. The former limitation under § 91 (1) Antitrust Law (*Gesetz gegen Wettbewerbsbeschränkungen* – ‘GWB’) has been revoked by the new German arbitration law.<sup>56</sup> The same applies, in general, for disputes related to intellectual property<sup>57</sup> and company law matters, in particular, disputes as to the validity of decisions of shareholder meetings. Despite the possible effects on third parties such disputes should be considered to be arbitrable.<sup>58</sup> **38**

## 3. Conduct of Proceedings

Concerning the proceedings as such, § 1042 (3) ZPO provides as the basic rule that, ‘subject to the mandatory provisions of this book, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules.’ **39**

<sup>55</sup> For constitutional concerns raised by such a broad definition of objective arbitrability and in favour of a restrictive interpretation, see *Voit*, *Privatisierung der Gerichtsbarkeit*, JZ 1997, 120 *et seq.*; *Hesselbarth*, *Schiedsgerichtsbarkeit und Grundgesetz*, Lichtenberg 2004, pp. 131 *et seq.*

<sup>56</sup> Bill of the Arbitration Law Reform Act, BT-Drs. 13/5274, p. 70.

<sup>57</sup> Controversial at least for disputes as to validity of a patent or trade mark where the still prevailing view denies arbitrability in light of the possible effects on third parties; Bill of the Arbitration Law Reform Act, BT-Drs. 13/5274, p. 35; with convincing arguments in favour of arbitrability of all intellectual property disputes see *Frost*, *Schiedsgerichtsbarkeit im Bereich des geistigen Eigentums*, München 2001, pp. 40 *et seq.*; *Stein/Jonas-Schlosser* (2002), § 1030 para. 3; for details see Part IV, *Schäfer*, *Arbitration of Intellectual Property Law Disputes in Germany*, paras 16 *et seq.*

<sup>58</sup> *BGH* 29.03.1996, BGHZ 132, 278 (282 *et seq.*) with note by *Schlosser*, JZ 1996, 1020 *et seq.*; *cf. Musielak-Voit* (2007), § 1030 para. 2; for drafting advice to avoid the agreement from becoming inoperable see *Zilles* (2001), pp. 43 *et seq.* for details see Part IV, *Duве*, *Arbitration of Corporate Law Disputes in Germany*, paras 4 *et seq.*

The limits imposed by the few existing mandatory provisions are intended to ensure that the basic requirements of due process are fulfilled, i.e. that the parties are treated equally and that each party has the opportunity of presenting its case. Finally, the law to be applied to the merits as well as to the arbitration agreement itself may also be determined by the parties (§ 1051 ZPO). In addition, the parties may determine the court which has jurisdiction for the various supportive and supervisory actions either by a specific forum selection clause or by determining the place of arbitration (§ 1062 (1) ZPO).

### **C. Wide Discretion of the Tribunal in the Conduct of the Proceedings**

- 40** Where parties have not made use of their freedom to regulate issues, the tribunal has wide discretion in relation to all questions arising during the proceedings. It is only limited by the few mandatory provisions contained in §§ 1025–1066 ZPO. Pursuant to § 1043 (1) ZPO, the arbitral tribunal may determine the place of arbitration and thereby potentially also the law governing the arbitral proceedings. Furthermore, in relation to the conduct of the proceedings, § 1042 (4) ZPO provides as a general rule that the ‘arbitral tribunal shall conduct the arbitration in such a manner as it considers appropriate’. That includes *inter alia* – as is in part also specifically set out in other sections – the taking of evidence, the language of the proceedings, time-limits for submissions, the necessity of an oral hearing and the appointment of experts. That discretion guarantees the necessary flexibility in shaping the proceedings in the light of the concrete exigencies of the dispute at issue. Furthermore, the wide discretion also has the effect that challenges to the final award based on alleged procedural mistakes are very difficult to establish. This is reinforced by the fact that, under German law, deviations from an agreed procedure will only justify the setting aside of an award or the refusal of its recognition, if this presumably affected the award.<sup>59</sup>

### **D. Limited Court Intervention and swift Court Proceedings**

- 41** § 1026 ZPO expressly limits the extent of court intervention to the instances regulated in the 10<sup>th</sup> Book. There is no inherent jurisdiction of the courts to supervise the arbitral proceedings or even their outcome. No review of the awards on the merits is possible and German courts have been very cautious in making use of the few supervisory powers granted to them.

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<sup>59</sup> *OLG Braunschweig* 12.05.2005, *SchiedsVZ* 2005, 262; *OLG Celle* 19.02.2004, *OLGR Celle* 2004, 396 for details see Part II, *Kröll/Kraft*, § 1059 paras 67 *et seq.*

Furthermore, the various court proceedings in support and in supervision of the arbitral proceedings are regulated in a way to ensure that they are conducted in a fast and efficient manner. Pursuant to § 1062 ZPO, the jurisdiction for nearly all arbitration-related proceedings is concentrated at the Higher Regional Courts (*Oberlandesgericht* – ‘OLG’);<sup>60</sup> most Federal States (*Bundesländer*) have assigned one senate at a particular Higher Regional Court to deal with these matters.<sup>61</sup> Only assistance in taking evidence and other judicial acts are left to the Local Courts of first instance (*Amtsgericht* – ‘AG’), which are usually closer to the parties. All decisions are taken in the form of an order with the consequence that, in general, no oral hearing is required (§ 1063 (1) ZPO).<sup>62</sup> In addition, to limit the potential disruptive effects of court proceedings, they are usually restricted to one instance. Only in actions relating to the admissibility or non-admissibility of arbitral proceedings or the determination of the tribunal’s jurisdiction, are complaints on points of law (*Rechtsbeschwerde*) to the Federal Court of Justice (*Bundesgerichtshof* – ‘BGH’) available at the pre-award stage. And even in these cases, the remedy is, pursuant to §§ 1065, 574 (1), (2) ZPO, only admissible if it is either of primary importance or necessary to develop the law or a decision of the Federal Court of Justice is required to ensure consistent jurisprudence.

#### **E. Jurisdiction and early Determination of Tribunal’s Jurisdiction by the Courts**

Challenges to the tribunal’s jurisdiction are a common occurrence in arbitration. Under the previous German arbitration law, parties could also refer disputes as to the tribunal’s jurisdiction to arbitration for a final determination.<sup>63</sup> It becomes clear from the legislative materials and has been confirmed by the Federal Court of Justice that this possibility no longer exists and courts are not bound by the tribunal’s determinations in relation to its own jurisdiction.<sup>64</sup> While the tribunal has the power to rule on its own jurisdiction (*Kompetenz-Kompetenz*), the final decision now lies with the courts. That entails the risk that the parties spend time and money in arbitral proceedings only to find out at the post-award stage that

<sup>60</sup> The underlying rationale for proceedings relating to arbitration being initiated before these Courts of Appeal is that the function of the first instance is performed by the arbitral tribunal; see the official report Bill of the Arbitration Law Reform Act, BT-Drs. 13/5274, p. 63.

<sup>61</sup> A list may be downloaded from the website of the DIS <[www.dis-arb.de](http://www.dis-arb.de)>.

<sup>62</sup> Cf. § 128 (4) ZPO.

<sup>63</sup> *BGH* 05.05.1977, *BGHZ* 68, 356 (366); *id.* 26.05.1988, *NJW-RR* 1988, 1526; *Ahrendt*, *Der Zuständigkeitsstreit im Schiedsverfahren*, Tübingen 1996, pp. 18 *et seq.*

<sup>64</sup> Bill of the Arbitration Law Reform Act, BT-Drs. 13/5274, p. 44; *BGH* 13.01.2005, *SchiedsVZ* 2005, 95 = *NJW* 2005, 1125.

the tribunal lacks the necessary jurisdiction. The German legislature and the courts have tried by several means to minimize this risk and to ensure a final decision on the tribunal's jurisdiction by the courts at an early stage. The most obvious tool is the introduction into German law of § 1032 (2) ZPO, according to which a party may, prior to the constitution of the tribunal, i.e. until the last arbitrator has been appointed,<sup>65</sup> apply to the courts to determine the admissibility or non-admissibility of arbitral proceedings. Furthermore, Articles 17 and 8 ML have been adopted with a slightly amended wording showing a clear preference for an early decision by the courts on the tribunal's jurisdiction. Thus, courts have always engaged in a full review of the arbitration agreement when its existence and validity became an issue in proceedings either in the context of § 1032 ZPO or in proceedings in support of arbitration. Unlike in other countries, a right of the tribunal to engage in the first comprehensive review of its jurisdiction has never been accepted.<sup>66</sup> There is no negative *Kompetenz-Kompetenz*.

#### F. Prevention of Delay and obstructive Behaviour

- 44 The German arbitration law contains several provisions to prevent parties or party appointed arbitrators successfully engaging in delaying tactics or obstructive behaviour. Firstly, the various fall back provisions contained in §§ 1034 *et seq.* ZPO ensure that the arbitral tribunal may be constituted despite a party's failure to cooperate or take the necessary steps in the appointment proceedings. The required appointments will then be made by the courts, not only in cases where the place of arbitration is in Germany, but also in cases where it has not yet been fixed.<sup>67</sup> Secondly, § 1048 ZPO explicitly provides for default proceedings where one party does not take the necessary steps in the arbitral proceedings. Though the failure of the respondent to submit its defence shall not in itself be treated as an admission of the claimant's allegations, the tribunal may continue the proceedings and basically make the award on the evidence before it.

<sup>65</sup> *BayObLG* 10.12.1998, RPS 1/99, 18; *id.* 09.09.1999, RPS 1/2000, 16 with note by *Sessler*, p. 9; *Schroeter*, Antrag auf Feststellung der Zulässigkeit eines schiedsrichterlichen Verfahrens, *SchiedsVZ* 2004, 288 (290 *et seq.*).

<sup>66</sup> See, in particular, *BGH* 13.01.2005, *SchiedsVZ* 2005, 95; for full review in appointment proceedings see *OLG Naumburg* 16.09.2005, available at <[www.dis-arb.de](http://www.dis-arb.de)>; *cf.* on the issue of jurisdiction *Kröll/Kraft*, Ten Years of UNCITRAL Model Law in Germany, (2007) *World Arbitration and Mediation Review* 439 (452 *et seq.*).

<sup>67</sup> In this respect, the Model Law has been supplemented to also ensure that in the cases where the place of arbitration has not yet been fixed, the arbitration agreement cannot be frustrated by non-participation in the appointment process. In their pro-arbitration attitude, German courts have interpreted the provision very broadly, e.g. *BayObLG* 05.10.2004, *SchiedsVZ* 2004, 316 note by *Wagner* = (2005) *Int.A.L.R.* N-47 with note by *Kröll*.

The same applies to all other failures to take required steps in the proceedings. Thirdly, and consistently with the second point, the tribunal may, pursuant to § 1046 (2) ZPO, exclude any belated amendments or additions to claims and defences, where they may lead to additional delay.<sup>68</sup> Fourthly, the potential for derailment of the arbitral proceedings through court proceedings has been limited by various means. In particular, arbitral proceedings may be commenced, continued and an award rendered, irrespective of the fact that the admissibility of the proceedings, the tribunal's jurisdiction or the impartiality of its members is challenged in court proceedings or that parallel proceedings on the merits are pending in the courts.<sup>69</sup> Furthermore, to limit the potential disruptive effects of court proceedings, they are usually restricted to one instance. Only in actions relating to the admissibility or non-admissibility of arbitral proceedings or the determination of the tribunal's jurisdiction are appeals on points of law available at the pre-award stage. In addition, pursuant to § 1064 (2) ZPO, decisions declaring an award enforceable may themselves be declared provisionally enforceable. Thus, even the initiation of a complaint on a point of law to the Federal Court of Justice does in general not prevent the preliminary execution of the award in so far as it is necessary to secure the applicant's rights.

### G. Promotion of amicable Solutions

It is a salient feature of German arbitration practice that, during the proceedings, parties frequently agree on a settlement of their dispute. In fact, it is estimated that around 2/3<sup>rds</sup> of the domestic arbitrations in Germany result in such an amicable settlement. This is to a great extent due to the fact that, at least in domestic arbitrations, the parties expect the arbitrators to promote, at an appropriate time, an amicable settlement and play an active role in this process.<sup>70</sup> Thus, when in their view an appropriate time has come during the arbitral procedure, the arbitrators may ask the parties whether they could be helpful in this regard. If the parties then agree, the arbitrators may discuss this further with the parties and suggest an amicable settlement.<sup>71</sup> 45

According to § 1053 ZPO, such a settlement may be recorded in the form of an arbitral award on agreed terms, if so requested by the parties. This frequently occurs in practice and the tribunal may only refuse to issue an award on agreed 46

<sup>68</sup> For details see Part II, *Sachs/Lörcher*, § 1046 paras 8 *et seq.*

<sup>69</sup> See, in particular, §§ 1032 (3), 1034 (2) sentence 3, 1037 (3), 1040 (3) ZPO.

<sup>70</sup> S. 31 (1) DIS Rules explicitly requires the arbitral tribunal to encourage a settlement at any time; *Raeschke-Kessler/Berger* (1999), paras 803 *et seq.*

<sup>71</sup> *Berger*, Integration mediativer Elemente in das Schiedsverfahren, RIW 2001, 881 (886 *et seq.*); *cf. Raeschke-Kessler*, The Arbitrator as Settlement Facilitator, *Arb.Int.* 2005, 523.

terms if the content of the settlement is in violation of public policy (*ordre public*), including the non-arbitrability of the dispute.<sup>72</sup> Awards on agreed terms ‘shall have the same effect as any other award on the merits of the case’ and are, in general, subject to the same form requirements as any other award. Thus, the award is enforceable according to §§ 1060 and 1061 ZPO and may also be set aside under § 1059 ZPO, if e.g. the settlement was obtained by fraud.<sup>73</sup> If declarations contained in the award on agreed terms would normally require notarisation to be binding (such as the transfer of immovable property), the arbitral award itself fulfils this requirement (§ 1053 (3) ZPO).<sup>74</sup>

## V. THE ARBITRATION AGREEMENT

### A. Legal Nature and necessary Contents

- 47 The arbitration agreement, as an indispensable prerequisite for all arbitrations, is defined in § 1029 (1) ZPO as ‘an agreement by the parties to submit to arbitration all or certain legal disputes which have arisen or which may arise between them in respect of a defined legal relationship’. The Federal Court of Justice has classified the arbitration agreement as a substantive contract concerning procedural rights.<sup>75</sup> It is procedural in its main effects: the transfer of jurisdiction to the tribunal and the limitation of the jurisdiction of the courts. It is contractual in its conclusion and resulting mutual obligations. As a consequence, its validity will be determined both by procedural and by substantive law. While the former determines the admissibility and the necessary form requirements, the other questions of its conclusion are governed by substantive contract law.<sup>76</sup>
- 48 As to the minimum content of an arbitration agreement, German law imposes very few requirements. It is only necessary that the parties’ intention to submit their disputes to arbitration and to opt out of state court proceedings can be

<sup>72</sup> *Mankowski*, Der Schiedsspruch mit vereinbartem Wortlaut, ZJP 2001, 37 (61 *et seq.*); for a slightly broader right of refusal *Bilda*, Beendigung des Schiedsverfahrens durch Vergleich: Probleme des Schiedsspruchs mit vereinbartem Wortlaut, DB 2004, 171 (174 *et seq.*).

<sup>73</sup> BGH 02.11.2000, NJW 2001, 373 (374); for this case see also notes by *Voit*, Anmerkung zu BGH vom 02.11.2000, ZJP 2001, 351 *et seq.*; *Kröll*, Geltendmachung der arglistigen Täuschung im Verfahren zur Vollstreckbarerklärung, WUB 2001, 351.

<sup>74</sup> For details, see Part II, *von Schlabrendorf/Sessler*, § 1053 paras 38 *et seq.* *cf.* Part II, *Kröll*, § 1060 para. 9 for the controversy concerning entries into public registers.

<sup>75</sup> BGH 30.01.1957, BGHZ 23, 198 (200); for an analysis of the jurisprudence on the arbitration agreement see *Kröll/Kraft*, Ten Years of UNCITRAL Model Law in Germany, (2007) *World Arbitration and Mediation Review* 439 (457 *et seq.*).

<sup>76</sup> In the literature, the view that the arbitration agreement is a procedural contract is gaining ground; see, for example, *Wagner* (1998), pp. 578 *et seq.*; *Reithmann/Martiny-Hausmann*, Internationales Vertragsrecht, 6<sup>th</sup> edn Köln 2004, para. 3218; *Geimer*, Das Schiedsvereinbarungsstatut in der Anerkennungsperspektive, IPRax 2006, 233.

clearly deduced from the agreement. The further requirement of a ‘defined legal relationship’ to which the agreement must relate is interpreted so broadly that it poses no problems in practice.<sup>77</sup> The necessary details such as the number of arbitrators, their appointment or the place of arbitration are provided for by the 10<sup>th</sup> Book or the applicable institutional rules. Thus, courts have enforced minimalistic agreements such as ‘Arbitration: Hamburg’.<sup>78</sup> Furthermore, courts have usually made considerable efforts to give a workable meaning to vague or inconsistent arbitration agreements, referring, for example, to non-existing institutions, such as the ‘German Central Chamber of Commerce’,<sup>79</sup> or which were seemingly in conflict with other dispute resolution clauses.<sup>80</sup>

## B. Separability

Arbitration agreements may, pursuant to § 1029 (2) ZPO, either take the form of a separate agreement or be included in a contract as one clause among others. Even in these latter cases, the arbitration clause is considered to be a separate contract, independent from the main contract in which it is included. § 1040 (1) ZPO explicitly provides that, for the purpose of the tribunal’s jurisdiction, ‘an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract’. Thus, the termination, repudiation or initial invalidity of the main contract in itself does not affect the validity of the arbitration agreement. In general, even the joint termination by all parties of a contractual relationship is not interpreted as extending to the arbitration clause. Rather, the arbitration clause is considered to retain its validity for all disputes which arise at a later stage out of the terminated relationship.<sup>81</sup> This separability does not, however, exclude that both agreements may be affected by the same defect. In particular, lack of consent to the main contract will, in general, also affect the arbitration agreement included in it.

<sup>77</sup> *OLG Bremen* 28.06.2006, SchiedsVZ 2007, 51 = (2007) Int.A.L.R. N-20.

<sup>78</sup> *OLG Hamburg* 11.03.2003, SchiedsVZ 2003, 284; *OLG Brandenburg* 12.02.2001 (unpublished); *OLG Dresden* 26.10.2004, available at <www.dis-arb.de>.

<sup>79</sup> *KG Berlin* 15.10.1999, RPS 1/2000, 12 = Yearbook XXVI (2001), 328 = (2000) Int.A.L.R. N-70 = CLOUT 373; cf. *OLG Köln* 26.10.2004, SchiedsVZ 2005, VI; *OLG Frankfurt* 24.10.2006, available at <www.dis-arb.de>; but see also for a case where the agreement was invalid since it was not possible to determine which institution was chosen *BayObLG* 28.02.2000, RPS 1/2000, 15 = (2002) Int.A.L.R. N-41.

<sup>80</sup> *BGH* 12.01.2006, SchiedsVZ 2006, 52; *BGH* 25.01.2007, IHR 2007, 78; *OLG Hamm* 27.09.2005, IHR 2006, 261 = Yearbook XXXI (2006), 685; cf. *Kröll*, ‘Pathological’ arbitration agreements before German Courts, IHR 2006, 255.

<sup>81</sup> *OLG Koblenz* 28.07.2005, SchiedsVZ 2005, 260 (261).

### C. Form Requirements

#### 1. Form Requirements of § 1031 ZPO

**50** § 1031 (1) ZPO provides that the arbitration agreement:

*'shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement'.*

- 51** While this wording is a literal adoption of Article 7 (2) sentence 2 ML, the form requirements of the German arbitration law are in fact much more lenient than those of the Model Law. § 1031 (2) ZPO in fact abolishes for a number of cases the necessity of a double written form contained in the 'exchange' requirement and allows for the so called 'half written form'. Pursuant to that provision, the form requirement of subsection (1) is also deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party provided that, in accordance with common usage, that document is considered to become part of the contract if no objection is raised. Consequently, arbitration agreements concluded orally and later confirmed by one party in a confirmation letter, not simply an invoice, will fulfil the form requirement.<sup>82</sup> By contrast, unilateral references to arbitration agreements concluded orally which do not make them part of the contract are not sufficient.<sup>83</sup>
- 52** The form requirement is also fulfilled, according to § 1031 (3) ZPO, by a reference to general conditions containing an arbitration clause in a contract complying with the form requirements of subsections (1) and (2) 'provided that the reference is such as to make that clause part of the contract'. Whether this is the case is decided under the law applicable to the arbitration agreement.<sup>84</sup>
- 53** Stricter form requirements are imposed by § 1031 (5) ZPO where a consumer is involved. In that case, the arbitration agreement must be contained in a separate document which has been personally signed by the parties and which does not contain any other agreement, unless it is notarized. Electronic signature is allowed.<sup>85</sup>

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<sup>82</sup> See, for example, *OLG Hamburg* 14.05.1999, OLGR 2000, 19; see also *OLG Bremen* 10.01.2002, available at <www.dis-arb.de> where the arbitration clause contained in a bill of lading sent to the other party was considered to be included into the charter party.

<sup>83</sup> *BGH* 21.09.2005, SchiedsVZ 2005, 306; *OLG Hamburg* 07.08.2003, OLGR Hamburg 2004, 66.

<sup>84</sup> See, for a reference to arbitration contained in 'conflicting' general terms, *OLG Frankfurt* 26.06.2006, available at <www.dis-arb.de>; on the whole issue, see *Hanefeld/Wittinghofer*, Schiedsklauseln in Allgemeinen Geschäftsbedingungen, SchiedsVZ 2005, 217 *et seq.*

<sup>85</sup> See Part II, *Trittmann/Hanefeld*, § 1031 para. 11.

According to the prevailing view, arbitration agreements contained in articles of associations of companies or other legal persons and organizations do not have to meet the form requirements of § 1031 ZPO since they are considered to fall within the ambit of § 1066 ZPO.<sup>86</sup> Their inclusion into the relevant statutes or articles of association is therefore sufficient, even if the statute is not signed by all members and no exchange of documents or records has taken place.<sup>87</sup> **54**

Non-compliance with the form requirement will, in general, render the arbitration agreement invalid. Pursuant to § 1031 (6) ZPO, formal defects are cured where a party enters into the argument on the substance of the dispute in arbitral proceedings without challenging the formal validity of the agreement. A general challenge to the tribunal's jurisdiction is not sufficient to preserve the right of a party to rely on the formal invalidity of the arbitration agreement.<sup>88</sup> **55**

## 2. Agreements providing for Arbitration abroad

Different views exist as to the form requirements relevant for German courts when they have to decide on the formal validity of an arbitration agreement providing for a place of arbitration outside Germany.<sup>89</sup> § 1031 ZPO is not listed in § 1025 (2) ZPO as one of the provisions which are also applicable where the place of arbitration is abroad. It has been submitted, in particular at the pre-award stage, when the arbitration agreement is raised as a defence in court proceedings, that courts must refuse jurisdiction only when the arbitration agreement meets the form requirements of Article II NYC. As this would impose *de facto* higher form requirements for arbitration agreements in proceedings with a foreign place of arbitration, others support an extension of the scope of application of § 1031 ZPO to these cases. A third view, which has been followed by the Federal Court of Justice in proceedings to declare a foreign award enforceable under the New York Convention 1958, goes even further. According thereto, an arbitration agreement providing for arbitration abroad is formally valid if it conforms either to Article II NYC, § 1031 ZPO or the form requirements of the law determined by application of Article 11 Introductory Law to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch* – 'EGBGB') – the general conflict of laws provision for the form of contracts.<sup>90</sup> As a consequence of the **56**

<sup>86</sup> BGH 27.05.2004, SchiedsVZ 2004, 205 (207); Zöller-Geimer (2007), § 1066 para. 2; for the opposite view, see Schwab/Walter (2005), Chap. 32 para. 5.

<sup>87</sup> OLG Hamm 10.02.1999, RPS 2/1999, 10; a different question is whether parties who have not consented to a later amendment of the statute including an arbitration clause are bound by this clause; against the binding force BGH 03.04.2000, NJW 2000, 1713; for details see Part II, Haas, § 1066 paras 31 *et seq.*; see Part IV, Duve, Arbitration of Corporate Law Disputes in Germany, paras 91 *et seq.*

<sup>88</sup> BGH 29.06.2005, SchiedsVZ 2005, 259.

<sup>89</sup> See for a summary of the different views Epping (1999), pp. 59 *et seq.*

<sup>90</sup> BGH 21.09.2005, SchiedsVZ 2005, 306.

reference to Article 11 EGBGB, an arbitration agreement is also considered to be formally valid if it either meets the form requirements of the law governing the arbitration agreement or of the place where the agreement was concluded. Thus, if either law allows for oral arbitration agreements, they would have to be considered valid by German courts. In the light of this, the second view seems to be the best solution. It has the advantage of applying the same form requirement to all arbitration agreements in Germany, irrespective of the place of arbitration, which may not, in any event, be fixed at the time the arbitration agreement was concluded.

#### **D. Parties to the Agreement**

##### *I. No Restriction as to Parties – State Parties*

- 57** In principle, there are no restrictions as to which persons, natural or legal, may resort to arbitration. Unlike in other legal systems consumers may, in general, also submit to arbitration and are only protected by special form requirements. For certain financial service contracts, however, this right is limited by § 37h WpHG to the time after the dispute has arisen.
- 58** Neither is there any restriction for the state or state agencies to resort to arbitration, whether in domestic or international cases. Arbitration agreements entered into by state parties are thus valid and, in addition, considered to be a waiver of the defence of sovereign immunity from adjudication. Germany adheres to the doctrine of limited sovereign immunity, so that immunity applies to *acta de jure imperii* only, while it does not extend to *acta jure gestionis*, that is, to acts with a commercial background.<sup>91</sup>
- 59** The waiver contained in the arbitration agreement is not limited to the arbitral proceedings in a narrow sense as such but also extends to court proceedings related to the arbitration. This also applies to proceedings to have an award declared enforceable. The *exequatur* proceedings as such are not yet part of the execution proceedings, but belong to the ‘*Erkenntnisverfahren*’ i.e. the proceedings to determine the existence of a right or claims. Thus, state parties cannot invoke lack of jurisdiction if they have consented to arbitration nor does their potential immunity from execution play a role.<sup>92</sup>

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<sup>91</sup> See Part IV, *Escher/Nacimiento/Weissenborn*, Investment Arbitration and the Participation of State Parties in Germany, paras 51 *et seq.*

<sup>92</sup> See *KG Berlin* 16.02.2001, SchiedsVZ 2004, 88; *OLG Frankfurt* 08.07.1999, available at <[www.dis-arb.de](http://www.dis-arb.de)>; for questions of immunity from execution see section on execution below.

## 2. *Non signatory Parties*

Pursuant to the governing basic principle, an arbitration clause is binding only between the parties to it.<sup>93</sup> Third parties are considered to be bound only in exceptional circumstances, either on the basis of a special contractual agreement with one of the parties or as a party's successor by the operation of law.<sup>94</sup> Examples are legal succession such as inheritance,<sup>95</sup> assignment where the arbitration clause is held to be part of the right assigned, or accession to a contract.<sup>96</sup> The insolvency administrator and the executor of a will are also bound by an arbitration clause concluded by the insolvent company<sup>97</sup> or testator,<sup>98</sup> respectively. **60**

Beyond these cases, third parties are generally not considered to be bound by the arbitration agreement. This also applies to different members of a group of company which have their own legal personality. German law does not recognize any doctrine of 'groups of company' which goes beyond the normal rules of interpreting agreements.<sup>99</sup> **61**

Arbitration is based on the agreement of the parties and any compulsion and absence of consensus could be a basis for setting aside or for non-recognition of the award. It is therefore generally accepted that the rules providing for joinder of parties in court proceedings do not apply to arbitral proceedings.<sup>100</sup> **62**

## E. Effects of the Agreement

### 1. *Jurisdictional and contractual Effects*

The main effects of the arbitration agreement are that it confers jurisdiction on the arbitral tribunal and excludes the jurisdiction of state courts for the decision **63**

<sup>93</sup> For details see Part II, *Trittmann/Hanefeld*, § 1029 paras 36 *et seq.* and for corporate issues see Part IV, *Duve*, Arbitration of Corporate Law Disputes in Germany, paras 75 *et seq.*; *Kreindler/Schäfer/Wolff* (2006), para. 173; *OLG Düsseldorf* 19.05.2006, *SchiedsVZ* 2006, 332 *et seq.*

<sup>94</sup> *OLG Frankfurt* 31.07.2006, available at <www.dis-arb.de>.

<sup>95</sup> A case of general legal succession, see *BGH* 05.05.1977, *BGHZ* 68, 356 (359); *BayObLG*, *BayObLGZ* 1999, 255 (266 *seq.*).

<sup>96</sup> *BGH* 02.03.1978, *BGHZ* 71, 162 (165); *id.* 20.03.1980, *BGHZ* 77, 33 (35); *id.* 03.05.2000, *NJW* 2000, 2346; *id.* 02.10.1997, *NJW* 1998, 371.

<sup>97</sup> *BGH* 20.11.2003, available at <www.dis-arb.de>; *OLG Frankfurt* 31.07.2006, available at <www.dis-arb.de>.

<sup>98</sup> *Kreindler/Schäfer/Wolff* (2006), para. 175.

<sup>99</sup> *Busse*, Die Bindung Dritter an Schiedsverfahren, *SchiedsVZ* 2005, 118 (122); *id.*, (2005) *Int.A.L.R.* 95; *Massuras*, Dogmatische Strukturen der Mehrparteienschiedsgerichtsbarkeit, Frankfurt 1998, p. 257; *MünchKommZPO-Münch* (2001), § 1029 para. 29; *Sachs*, Erstreckung von Schiedsvereinbarungen auf Konzernunternehmen, *DIS-Materialien* 2001, p. 50.

<sup>100</sup> On the whole issue of participation of third parties see *Böckstiegel/Berger/Bredow* (eds), *Die Beteiligung Dritter am Schiedsverfahren*, Köln 2005.

on the merits. A state court must refuse jurisdiction and declare the court action as inadmissible if an arbitration agreement is invoked by the defendant, unless the arbitration agreement is null and void, inoperative or incapable of being performed (§ 1032 (1) ZPO). The objection may be raised until the beginning of the oral hearing on the merits, independent from time-limits set by the court for a submission of the statement of defence.<sup>101</sup> That even applies where the defendant has already submitted written pleadings on the merits without challenging the jurisdiction of the court.

- 64** Beyond these jurisdictional effects, the arbitration agreement also has contractual effects.<sup>102</sup> Each party is obliged to initiate arbitration for the settlement of disputes. A breach of this obligation may lead to a claim for damages covering the expenses incurred in state court proceedings.<sup>103</sup> Furthermore, the parties are obliged to participate in good faith in the arbitral proceedings which includes, in particular, the obligation to pay its share of an advance on costs. German courts have continuously held that this obligation can be enforced in summary proceedings on a ‘documents only basis’ before state courts.<sup>104</sup>

## 2. *The Interpretation of the Arbitration Agreement and the Admissibility of Summary Court Proceedings*

- 65** Arbitration agreements are generally interpreted broadly.<sup>105</sup> The courts assume that the parties did not want to submit different parts of the same dispute to different tribunals. Furthermore, German law does not distinguish between right and remedy in the same way as many common law systems. Thus, the arbitration clause in a contract in general also covers related actions in tort.<sup>106</sup>
- 66** The parties’ intention in concluding the arbitration is also decisive for the question as to whether the parties may rely on summary proceedings existing in state courts for the facilitated enforcement of claims which can be proven by documents, despite the arbitration agreement. Pursuant to §§ 592 *et seq.* ZPO in such summary proceedings only defences which can be proven by documents would be admissible at a preliminary stage while all other defences can only be

<sup>101</sup> *BGH* 10.05.2001, NJW 2001, 2176; for an English summary of the case see *Kröll*, German Federal Court of Justice: Missed Deadline Does not Bar Defendant From Invoking Existence of Arbitration Clause, (2002) 17(4) *Mealey’s IAR* 25 *et seq.*

<sup>102</sup> Controversial; against such contractual effects *Wagner* (1998), pp. 587 *seq.*

<sup>103</sup> *Sandrock*, Schiedsort in Deutschland, Gerichtskosten in den USA: Sind letztere hier erstattungsfähig?, *IDR* 2004, 106 (110).

<sup>104</sup> *AG Düsseldorf* 17.06.2003, *SchiedsVZ* 2003, 240; *LG Bielefeld* 21.10.2003, available at <www.dis-arb.de>; for an obligation to inform the other party about a change of address *OLG Dresden* 15.03.2006, *SchiedsVZ* 2006, 166.

<sup>105</sup> *OLG München* 13.10.2004, NJW 2005, 832; *OLG Düsseldorf* 27.02.2004, *SchiedsVZ* 2004, 161.

<sup>106</sup> *OLG Köln* 19.12.2001, available at <www.dis-arb.de>.

raised in the subsequent main proceedings. The prevailing view is that failing an agreement to the contrary the arbitration agreement also excludes such summary proceedings and its effects are not restricted to the stage of the main proceedings.<sup>107</sup>

While this applies for the normal summary proceedings on a ‘document only basis’, the arbitration agreement is generally not considered to exclude also the special summary court proceedings for payment claims under cheques or bills of exchange. As such modes of payment would lose much of their attractiveness without the summary proceedings for enforcement it is assumed that the parties by concluding an arbitration agreement did not want to renounce the right to make use of the summary enforcement procedure but merely wanted to refer the subsequent main proceedings, where all evidence is admissible, to arbitration.<sup>108</sup> This leads, however, to numerous procedural problems, in particular with regard to the preliminary judgment and how it can be set aside in the arbitral proceedings.<sup>109</sup>

### 3. Summary Proceedings for Recovery of Debt (*Mahnverfahren*)

An arbitration agreement does not prevent the parties from resorting to summary proceedings for the recovery of debt. Under German law, a creditor may file an application for a payment order (*Mahnbescheid*) with the local court. In particular, in regard to undisputed claims, such summary proceedings are a rapid and cost-efficient way for the creditor to either receive payment from the debtor or acquire an enforceable title.<sup>110</sup> If the debtor objects, the default summons and the entire proceedings are automatically transferred to the court having jurisdiction.<sup>111</sup> Only after the opening of proceedings may the party seeking arbitration ask the court to refer the parties to arbitration.<sup>112</sup> The party must make this application before the first court hearing on the merits of the dispute; otherwise, silence may be interpreted as a waiver of the arbitration agreement.<sup>113</sup>

<sup>107</sup> *BGH* 12.01.2006, *SchiedsVZ* 2006, 101; *OLG Celle* 25.08.2005, *SchiedsVZ* 2006, 52; for a different view see *OLG Bamberg* 19.05.2004, *OLGR* 2005, 79; see *Wolf*, ‘Summarische Verfahren’ im neuen *Schiedsverfahrensrecht*, *DB* 1999, 1101 (1104); for a detailed analysis see Part II, *Huber*, § 1032 para. 44.

<sup>108</sup> See *BGH* 28.10.1993, *NJW* 1994, 136; *Stein/Jonas-Schlosser* (2002), § 1032 para. 7.

<sup>109</sup> Pursuant to *Stein/Jonas-Schlosser* (2002), § 1029 para. 23, the arbitral tribunal is empowered to set aside the provisional judgment issued by the state court.

<sup>110</sup> *Baumbach/Lauterbach* (2007), *Grundz* § 688 paras 1 *et seq.*

<sup>111</sup> *Baumbach/Lauterbach* (2007), § 694 paras 1 *et seq.*

<sup>112</sup> *Stein/Jonas-Schlosser* (2002), § 1032 para. 7.

<sup>113</sup> *Zöller-Geimer* (2007), § 1032 para. 1.

## VI. THE ARBITRAL TRIBUNAL

**69** The possibility to tailor an arbitral tribunal in accordance with the specific needs and elements of the case, is generally considered to be one of the major advantages of arbitration. German arbitration law consequently allows for ample party autonomy in the composition of the arbitral tribunal. As a rule, the parties are free to agree on the numbers of arbitrators (§ 1034 (1) ZPO), their qualifications and the procedure for their appointment (§ 1035 (1) ZPO) as well as their challenge (§ 1037 (1) ZPO). German arbitration law imposes limitations only where it is necessary to ensure fair and equitable treatment of the parties.

### A. Appointment of Arbitrators

- 70** The parties are free to determine the number of arbitrators (§ 1034 (1) ZPO) and may in principle also agree on an even number of arbitrators or an umpire system. In the absence of an agreement by the parties, the number of arbitrators shall be three (§ 1034 (1) ZPO), which is also the number provided for in the DIS Rules (section 3 DIS Rules). Under the ZPO,<sup>114</sup> the parties are free to determine the procedure of appointment (§ 1035 ZPO). In the absence of an agreement on an appointment procedure or where the agreed procedure fails, § 1035 ZPO provides for a mechanism to ensure that the tribunal can be established and the parties' arbitration agreement enforced without further delay.<sup>115</sup>
- 71** The German arbitration law deviates from the equivalent provisions of the Model Law with regard to the relevant sphere of application. §§1034, 1035 ZPO are not only applicable in cases where the place of arbitration is in Germany but also where the place of arbitration has not yet been determined and at least one of the parties has its place of business or habitual residence in Germany.<sup>116</sup>
- 72** Given the importance of the composition of an arbitral tribunal German law traditionally puts great emphasize on an equal influence of the parties on the composition of the tribunal. While under the old law pursuant to § 1025 (2) ZPO pre-1998 an unequal influence on the composition of the tribunal could even lead to the invalidity of the arbitration agreement, the new law has supplemented the UNCITRAL Model Law by a provision to ensure equal treatment of the parties in the composition of the tribunal. Pursuant to § 1034 (2) ZPO a party may request the court to appoint the arbitrator in deviation from the nomination made,

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<sup>114</sup> For the appointment under DIS Rules see Part III, *Bredow/Mulder*, s. 12 paras 1 *et seq.*

<sup>115</sup> For details see Part II, *Nacimiento/Abt*, § 1035 paras 20 *et seq.*

<sup>116</sup> To ensure that a tribunal can be constituted, courts have interpreted their powers in this regard broadly, *BayObLG* 05.10.2004, *SchiedsVZ* 2004, 316 with note by *Wagner* as well as *Kröll* in (2005) *Int.A.L.R.* N-47.

or from the agreed nomination procedure, if the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal.<sup>117</sup> In this regard, it suffices that the requesting party has reason to believe that he is placed at a disadvantage because the arbitral tribunal may not be balanced due to the predominance of the other party.<sup>118</sup> The application must be filed within two weeks after obtaining knowledge of the composition of the arbitral tribunal (§ 1034 (2) ZPO). Where the party is represented by counsel, the time begins to run when counsel acquires this knowledge.<sup>119</sup>

German law does not require any specific qualifications for arbitrators. It requires, though, that the arbitrator be independent and impartial (§ 1037 ZPO). Neither is it required that the arbitrator be admitted to the bar. In practice, however, the parties increasingly tend to choose persons with a legal background as arbitrators. Section 2.2 DIS Rules even explicitly provides that a sole arbitrator or the chairman of the tribunal must be a lawyer, unless otherwise agreed by the parties. Furthermore, some of the arbitration rules of the specialized arbitration organizations, in particular in the commodity sector, require that the arbitrator must be on their list of arbitrators or be a member of that organization.<sup>120</sup> No restrictions apply as to the nationality or residence of arbitrators so that foreigners may be appointed without limitation. Judges and civil servants may also act as arbitrators. They are in practice, in particular in domestic cases, frequently appointed subject to the prior approval by the competent supervising authority. Such permission is generally granted to civil servants provided that the fulfilment of their duties is not impeded. As for judges, § 40 (1) German Law on Judges (*Deutsches Richtergesetz* – ‘DRiG’) imposes stricter requirements for active judges.<sup>121</sup> An authorization may not be lawfully given to an active judge who was not appointed by both parties as required by § 40 (1) sentence 2 DRiG.

<sup>117</sup> *OLG Celle* 04.11.1999, *OLGR* 2000, 57, ruled that the requirements of § 1034 (2) ZPO are not fulfilled if the arbitrator has been nominated by one party in the general terms and conditions that were part of the contract, see very critical comment by *Mankowski*, *Zur formularmäßigen Schiedsrichterbenennung*, *EWiR* 2000, 411 *et seq.*; *Kröll*, *Das neue deutsche Schiedsverfahrensrecht vor staatlichen Gerichten: Entwicklungslinien und Tendenzen 1998-2000*, *NJW* 2001, 1173 (1178); for details see Part II, *Nacimiento/Abt*, § 1034 paras 6 *et seq.*

<sup>118</sup> Critical issues arise in particular with regard to arbitration governed by the rules of associations (*Verbandsschiedsgerichtsbarkeit*), see in detail Part II, *Nacimiento/Abt*, § 1034 paras 13 *et seq.*; *LG Bonn* 03.11.1995, *NJW* 1996, 2168.

<sup>119</sup> *Stein/Jonas-Schlösser* (2002), § 1034 para. 7; for the irrelevance of the knowledge of secretary or other non-legal staff *OLG München* 07.08.2006, *SchiedsVZ* 2006, 286 = *GmbHR* 2006, 1269.

<sup>120</sup> See on that *BayObLG* 24.02.1999, *BayObLGZ* 1999, 55; *cf.* § 4 (2) Arbitration Rules Waren-Verein Hamburger Börse.

<sup>121</sup> As to the consequences of a missing authorization see *Nacimiento/Geimer*, *Eins zu Null für die Verbandsschiedsgerichtsbarkeit des Deutschen Fußballbundes*, *SchiedsVZ* 2003, 90; for details see Part II, *Nacimiento/Abt*, § 1035 paras 13 *et seq.*

Since active judges must act under all circumstances so as to preserve the confidence in their independence, such appointment must be based on a mutual agreement of both parties or derive from a neutral appointing authority.<sup>122</sup>

## B. Challenge and Dismissal of Arbitrators

- 74 Pursuant to § 1036 (2) ZPO, an arbitrator may be challenged either if ‘circumstances exist that give rise to justifiable doubts as to his impartiality or independence’ or ‘if he does not possess the qualifications agreed upon by the parties’. It is not, therefore, required that the arbitrator’s impartiality or lack of independence be established, but rather that sufficient objective grounds exist on which to base the concern that the arbitrator may lack the required impartiality and independence.<sup>123</sup> In determining whether such doubts exist, courts have taken the various grounds in § 41 ZPO regarding the exclusion of judges in court proceedings as a starting point and guideline.<sup>124</sup> Not surprisingly, substantial case law exists based on individual cases.<sup>125</sup> Confidence in an arbitrator often requires previous contacts with that person so that this provision is to be interpreted narrowly.<sup>126</sup> Irrespective of that, doubts as to the impartiality of an arbitrator exist in all cases where a close relative is involved<sup>127</sup> or where the arbitrator or an attorney of the law firm to which he belongs is acting at the same time as a lawyer for or against a party.<sup>128</sup> By contrast, previous activities may not be sufficient.<sup>129</sup> The same applies to joint memberships in professional organizations or clubs.<sup>130</sup> Abstract legal statements related to the issue in dispute and which have been published by the arbitrator prior to the arbitral proceedings are not

<sup>122</sup> See *KG Berlin* 06.05.2002, *SchiedsVZ* 2003, 185 *et seq.* with note by *Mecklenbrauck*; the court held that arbitral proceedings were inadmissible due to impossibility where the arbitration clause provided for an arbitral tribunal consisting of three judges and the parties were not able to find a mutual agreement on the choice of the arbitrators.

<sup>123</sup> *BGH* 18.04.1980, *BGHZ* 77, 70 (72); *OLG Naumburg* 19.12.2001, *SchiedsVZ* 2003, 134 *et seq.*

<sup>124</sup> However, § 41 ZPO does not apply directly, *OLG Karlsruhe* 04.07.2006, *SchiedsVZ* 2007, VIII.

<sup>125</sup> For details see Part II, *Nacimiento/Abt*, § 1036, generally paras 23 *et seq.* and especially 34 *et seq.*

<sup>126</sup> *OLG München* 05.07.2006, *BauR* 2006, 1799; for details see Part II, *Nacimiento/Abt*, § 1036 paras 26 *et seq.* and also para. 16.

<sup>127</sup> *OLG Frankfurt* 27.04.2006, *SchiedsVZ* 2006, 330 *et seq.*; by contrast the fact that one arbitrator was the godparent of an attorney in the law firm representing one of the parties does not suffice, see *OLG München* 05.07.2006, *BauR* 2006, 1799.

<sup>128</sup> See detailed reasoning of arbitral tribunal in the DIS proceedings DIS-SV-217/00, *SchiedsVZ* 2003, 94 *et seq.*

<sup>129</sup> *OLG Hamburg* 11.03.2003, *SchiedsVZ* 2003, 191; *cf.* *OLG Hamm* 22.07.2003, *MDR* 2004, 109 (irrelevant that person named as arbitrator in several arbitration clauses); *OLG Hamburg* 12.07.2005, *SchiedsVZ* 2006, 55 *et seq.*

<sup>130</sup> *OLG Naumburg* 19.12.2001, *SchiedsVZ* 2003, 134; *Mankowski*, Die Ablehnung von Schiedsrichtern, *SchiedsVZ* 2004, 304 (306); *Kröll*, Die Ablehnung eines Schiedsrichters nach deutschem Recht, *ZZP* 2003, 195 (204 *et seq.*).

sufficient unless the statements concern the specific matter in dispute.<sup>131</sup> Settlement proposals by an arbitrator are not considered as grounds for partiality of arbitrators. Rather, arbitrators have the right to encourage the parties to settle at any stage of the proceedings provided, however, that both parties agree to settlement negotiations.<sup>132</sup> The DIS Rules even explicitly provide in section 32 DIS Rules that the arbitral tribunal should seek to encourage an amicable settlement of the dispute, unless the parties have agreed otherwise. The specific manner in which a challenged arbitrator responds to the challenge by a party may constitute independent grounds for challenge.<sup>133</sup>

§ 1036 (1) ZPO establishes the arbitrator's duty to disclose any circumstances that might cause doubts as to his impartiality or independence. The aim of this procedure is to provide the parties with the opportunity to find out whether persons chosen as arbitrators are prepared and suitable to take up the function proposed. However, disclosure does not automatically mean that a ground for rejection exists.<sup>134</sup> Some courts, however, have severely enforced such obligation since they held it to be a pillar of arbitration.<sup>135</sup> **75**

Under § 1037 (1) ZPO, the procedure for challenges is to a large extent submitted to party autonomy. In the absence of an agreement by the parties, a challenge must be notified in writing and with reasons to the arbitral tribunal within two weeks after the constitution of the arbitral tribunal or any new circumstances in this regard became known to the party intending to challenge. The arbitral tribunal, including the challenged arbitrator,<sup>136</sup> shall decide on the challenge unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge. If, however, the arbitral tribunal decides to reject the challenge, the challenging party may, within one month after having received notice of the decision rejecting the challenge, request the state court having jurisdiction to decide on the challenge (§ 1037 (3) ZPO).<sup>137</sup> The challenge procedure under the DIS Rules (section 18.2 DIS Rules) is identical to that in **76**

<sup>131</sup> *Stein/Jonas-Schlösser*, § 1036 para. 25; Lachmann (2002), para. 608.

<sup>132</sup> *Raeschke-Kessler/Berger* (1999), paras 475 *et seq*; see also *OLG Frankfurt* 27.04.2006, *SchiedsVZ* 2006, 329.

<sup>133</sup> *OLG Bremen* 24.05.2006, (2006) *Int.A.L.R.* N-65 referring to disapproving comments by the challenged arbitrator vis-à-vis the challenging counsel.

<sup>134</sup> *Stein/Jonas-Schlösser* (2002), § 1036 paras 35 *et seq*.

<sup>135</sup> *OLG Karlsruhe* 14.07.2006, (2007) *Int.A.L.R.* N-36 German full text available at <www.dis-arb.de>.

<sup>136</sup> It is irrelevant for the decision of the court if the challenged arbitrator nevertheless abstains from the decision on the challenge, see *OLG München* 06.02.2006; *OLG Hamm* 07.03.2002, *SchiedsVZ* 2003, 79.

<sup>137</sup> The court proceedings are admissible only if prior challenge proceedings have taken place before the arbitral tribunal, *OLG Dresden* 22.02.2001, BB 2001, Beilage No. 6, p. 18; *OLG München* 28.06.2006, available at <www.dis-arb.de>.

German law, while under other institutional rules it is the institution which decides on the challenge.

- 77 Under § 1038 (1) ZPO, an arbitrator can be dismissed from his office if it is legally or factually impossible for him to perform his functions as an arbitrator or he does not do so without undue delay.<sup>138</sup> If the arbitrator does not resign from office and the parties cannot agree to dismiss him, each party may apply to the state court having jurisdiction to decide on the termination of the mandate. Although the law does not provide for a specific time period, an application may be rejected if it is not brought within a reasonable time.<sup>139</sup>

### C. The Arbitrator's Contract

- 78 The arbitrator's contract is to be distinguished from the arbitration agreement and the appointment of the arbitrator.
- 79 The arbitrator's contract is a multilateral contract, binding the arbitrator, the party who has nominated him, as well as the other party or parties.<sup>140</sup> It is not subject to any form requirements<sup>141</sup> and deals with the respective obligations of the arbitrators and the parties vis-à-vis each other. Its legal nature is highly disputed, in any event there are only minor practical differences.<sup>142</sup> Under the prevailing opinion, the contract with the arbitrator is to be qualified as an agency contract (*Geschäftsbesorgungsvertrag*, § 675 BGB).<sup>143</sup>
- 80 In arbitral proceedings administered by an arbitration institution, it might not be necessary to enter into a separate arbitrator's agreement since the main aspects, first of all the costs, are governed by the institutional rules. It is of utmost importance, however, in *ad hoc* proceedings where the parties need to agree on the main aspects of the proceedings, including the financial side.
- 81 Consequently, the arbitrator's contract should contain clear provisions on the remuneration of the arbitrators. In the absence of applicable institutional fees, it is necessary to establish the mode of the arbitrator's remuneration.<sup>144</sup> The arbitrator's fees are usually paid at the beginning of the proceedings as an

<sup>138</sup> See examples in *OLG München* 23.10.2006, available at <www.dis-arb.de>.

<sup>139</sup> *Stein/Jonas-Schlosser* (2002), § 1038 para. 5.

<sup>140</sup> *Stein/Jonas-Schlosser* (2002), vor § 1025 para. 8; *MünchKommZPO-Münch* (2001), vor § 1034 para. 10.

<sup>141</sup> *MünchKommZPO-Münch* (2001), vor § 1034 para. 10; *Musielak-Voit* (2007), § 1035 para. 22.

<sup>142</sup> *Musielak-Voit* (2007), § 1035 para. 20; *Baumbach/Lauterbach* (2007), Anhang § 1035 para. 1.

<sup>143</sup> *Baumbach/Lauterbach* (2007), Anhang § 1035 para. 1; *Thomas/Putzo-Reichold* (2007), Vorbem § 1029 para. 8; *Stein/Jonas-Schlosser* (2002), vor § 1025 para. 7; cf. also *Musielak-Voit* (2007), § 1035 para. 20; different opinions expressed by *MünchKommZPO-Münch* (2001), vor § 1034 para. 5 (contract sui generis); *Schwab/Walter* (2005), Chap. 11 para. 9 (two-sided contract with material and procedural elements).

<sup>144</sup> See Part II, *Nacimiento/Abt*, Introduction to §§ 1034–1039, para. 27.

advance covering the whole of the expected fees and ancillary costs. The parties are jointly and severally liable for the arbitrator's fees.<sup>145</sup>

In return, the arbitrator is obliged to participate in the proceedings with his best efforts and to promote a rapid conclusion of the dispute in accordance with the arbitration agreement.<sup>146</sup> **82**

The arbitrator's contract may also serve to clarify certain issues such as the validity of the arbitration clause and the correct constitution of the arbitral tribunal. **83**

Also other important procedural issues may be regulated in the arbitrator's contract such as the place of hearings or agreements on the taking of evidence. **84**

The arbitrator's contract is terminated where he is replaced by the parties or resigns from office. If the arbitrator refuses to comply with his obligations and thereby resigns from his office without good cause, he loses his right to remuneration (§ 628 BGB) and may be liable for damages.<sup>147</sup> Generally, liability of arbitrators is limited to a breach of contract not related to the material or procedural accuracy of the decision. Thus, the arbitrator is not liable because of fault related to the decision, even in the case of gross negligence.<sup>148</sup> The arbitrator's contract may establish other grounds for liability in case of breach of contractual obligations deriving there from.<sup>149</sup> **85**

## VII. THE ARBITRAL PROCEDURE

### A. General Principles

Arbitral proceedings under German law are to a large extent governed by party autonomy. § 1042 (3) ZPO provides that the parties shall be free 'to determine the procedure themselves or by reference to a set of arbitration rules'. Such party autonomy is limited by few mandatory provisions contained in the 10<sup>th</sup> Book. The most important mandatory provision is § 1042 (1) ZPO, establishing that the parties shall be treated with equality and each party shall be given a full opportunity to present its case. The latter requires, in particular, that a party is informed in due time about the submission of the other side and the facts upon which the tribunal wants to rely, has sufficient time to present its own case and its **86**

<sup>145</sup> Schwab/Walter (2005), Chap. 12 para. 10; Thomas/Putzo-Reichold (2007), Vorbem § 1029 para. 10.

<sup>146</sup> Musielak-Voit (2007), § 1035 para. 23; Baumbach/Lauterbach (2007), Anhang § 1035 para. 5.

<sup>147</sup> Stein/Jonas-Schlosser (2002), vor § 1025 para. 15; MünchKommZPO-Münch (2001), vor § 1034 para. 16.

<sup>148</sup> Musielak-Voit (2007), § 1035 para. 25; Schwab/Walter (2005), Chap. 12 para. 9.

<sup>149</sup> Cf. Thomas/Putzo-Reichold (2007), Vorbem § 1029 para. 9; Stein/Jonas-Schlosser (2002), vor § 1025 para. 16.

submissions are taken into account by the tribunal when making its decision.<sup>150</sup> Furthermore, counsel may not be excluded from acting as authorized representative. Other mandatory provisions include the constitution of the arbitral tribunal and the parties' right under § 1040 (3) ZPO to request judicial review by a state court of an arbitral tribunal's decision to confirm its jurisdiction.

- 87** Apart from such restrictions, the parties may freely determine all other procedural rules, such as the commencement of the arbitral proceedings (§ 1044 ZPO), the language of the proceedings (§ 1045 ZPO), time-limits for the statements of claim and defence (§ 1046 ZPO), whether an oral hearing shall take place or the proceedings shall be on a documents only basis (§ 1047 ZPO), the effect of a default of one party (§ 1048 ZPO), and the appointment of experts (§ 1049 ZPO). In practice, such choice is often made by the submission of the parties to institutional arbitration or by a choice of at least the basic rules in the *ad hoc* arbitration agreement. In these cases, the tribunal is bound to follow the procedure agreed upon and any deviation may constitute a reason to challenge the award or to resist its enforcement.
- 88** In the absence of a specific agreement by the parties, the default rules contained in §§ 1044 *et seq.* ZPO provide for a basic structure. Within this structure, however, the actual conduct of the proceedings is largely left to the discretion of the arbitral tribunal.<sup>151</sup> While for some issues, such as e.g. the admissibility of amendments or supplements to claims or defences, the law expressly indicates which considerations should play a role, all other cases are to be decided within the discretion of the arbitral tribunal. It is common practice and advisable, in particular where parties from different legal backgrounds are involved, that the tribunal consults with the parties before taking any definitive decisions. In general all procedural decisions of a certain importance will be taken by the whole arbitral tribunal and if necessary by a majority vote. This does not exclude the possibility to empower the chairman to take procedural decisions of more weight alone.<sup>152</sup>

<sup>150</sup> *BayObLG* 15.12.1999, RPS 2/2000, 16; *OLG Hamburg* 18.11.2003, OLGR Hamburg 2004, 244; *OLG Köln* 03.06.2003, available at <[www.dis-arb.de](http://www.dis-arb.de)>; for details see Part II, *Sachs/Lörcher*, § 1042 paras 4 *et seq.* and *Kröll*, § 1061 paras 70 *et seq.*

<sup>151</sup> The DIS Rules follow the same basic structure but are a little bit more detailed and explicit on certain issues; for details see Part III.

<sup>152</sup> The German legislator considered it superfluous to explicitly regulate the chairman's prerogative as to these questions in the law, see Bill of the Arbitration Law Reform Act, BT-Drs. 13/5274, p. 54.

## B. Commencement and Conduct

Unless otherwise agreed by the parties, arbitral proceedings commence on the date a request for arbitration is received by the respondent (§ 1044 ZPO). Such request must contain the names of the parties, the issue in dispute and reproduce the arbitration agreement. Like most other institutional rules, section 4 DIS Rules provides that the proceedings commence on the date when the request is received by the Secretariat of the DIS. Such request must contain, in addition to the requirements under § 1044 ZPO, the nomination of an arbitrator or the request that a sole arbitrator be nominated. As of the commencement of proceedings, the running of limitation periods is suspended or interrupted.<sup>153</sup>

Subject to agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials.<sup>154</sup> A hearing must be held, however, if requested by one of the parties. Under the general rule of preclusion (§ 1027 ZPO), a party must object without undue delay to the tribunal's declared intention to proceed on a documents only basis.<sup>155</sup>

In the absence of agreement by the parties, the language of the proceedings is determined by the arbitral tribunal. The tribunal may also decide for more than one language, e.g. the decision for a language might be limited to the submission of documents or the hearing of witnesses.<sup>156</sup> It is, however, consistent jurisprudence of German courts that parties which have submitted to arbitration in a particular country, must be aware that the proceedings will be conducted in the language of this place of arbitration. If the party does not speak or understand the language, it is for the party to ensure the necessary translations.<sup>157</sup>

## C. Security for Costs

There is no specific provision under German arbitration law providing for security for costs. No unified practice is to be observed in Germany and the granting of security for costs may be rather the exception. Nevertheless, given the general discretion of arbitral tribunals to conduct the proceedings within the

<sup>153</sup> § 204 (1) No. 11 BGB.

<sup>154</sup> Thus written submissions also become part of the proceedings even if the parties have not explicitly referred to them in an oral hearing; cf. BGH, 23.02.2006, SchiedsVZ 2006, 161.

<sup>155</sup> *OLG Naumburg* 21.02.2002, NJW-RR 2003, 71.

<sup>156</sup> See *OLG Köln* 16.12.1992, Yearbook XXI (1996), 535 (539) (decided under the old law but still valid).

<sup>157</sup> *OLG Celle* 02.10.2001, available at <www.dis-arb.de>; cf. *BayObLG* 09.11.2004, available at <www.dis-arb.de> where the parties had however agreed on a certain language.

framework of the applicable rules, there is nothing to prevent the arbitral tribunal from granting such security upon reasoned request of a party.<sup>158</sup>

#### D. Evidence<sup>159</sup>

- 93** The taking of evidence is, like most other procedural issues, largely submitted to party autonomy. In particular, the parties are free to decide whether the facts of the case should be established in a continental-style or an Anglo-American style, whether there should be any restrictions as to the admissible evidence, how it should be weighed and what standard of proof the tribunal should apply. Instead of making these decisions directly, the parties may also submit the whole process to a particular set of rules such as the IBA Rules on Taking Evidence in International Arbitration. As they are specific, they would then prevail over other more general arbitration rules in relation to evidence.
- 94** In the absence of a decision by the parties and specific legal provisions, the arbitral tribunal has discretion to decide on the taking of evidence (§ 1042 (4) ZPO). It is not bound by the rules of evidence applicable in German state court proceedings. The arbitral tribunal, however, must respect the parties' right to a fair hearing and the opportunity to each to present its case.<sup>160</sup> § 1042 (4) ZPO and the few provisions in the German arbitration law dealing with evidentiary matters are obviously based on the assumption that the tribunal will adopt a more continental-style procedure of actively managing and conducting the evidentiary proceedings instead of observing passively the adversarial efforts of the parties.<sup>161</sup> This includes the decision on whether the evidence submitted is relevant for the outcome of the dispute and whether evidence is to be taken at all. That does not, however, allow the parties to remain inactive. They still have to

<sup>158</sup> *Stein/Jonas-Schlösser* (2002), § 1057 para. 17; *Karrer/Desax*, Security for Costs in International Arbitration, in: *Briner et al.* (eds), FS-Böckstiegel, 2001, p. 339 (344); on Austrian law see *Roth*, Tendenzen im internationalen Kostenrecht – erläutert am Beispiel des Entwurfs eines neuen österreichischen Schiedsverfahrensrechts, *SchiedsVZ* 2004, p. 65 (67); on Swiss law see *Berger*, Prozesskostensicherheit (cautio iudicatum solvi) im Schiedsverfahren, *ASA Bulletin* 2004, 4 *et seq.*; *Sandrock*, The Cautio Judicatum Solvi in Arbitration Proceedings or the Duty of an Alien Claimant to Provide Security for the Costs of the Defendant, *J.Int.Arb.* 1997, 17 *et seq.*; *Haase*, Das Erfordernis der Prozesskostensicherheit i.S.d. § 110 ZPO im schiedsgerichtlichen Verfahrens, *BB* 1995, 1252 *et seq.*

<sup>159</sup> For a detailed discussion see Part II, *Sachs/Lörcher*, § 1042 paras 30 *et seq.*

<sup>160</sup> *Cf. OLG Hamburg* 16.09.2004, available at <[www.dis-arb.de](http://www.dis-arb.de)>; in this respect confirmed by *BGH* 29.06.2005, *SchiedsVZ* 2005, 259.

<sup>161</sup> See *Knoblach*, Sachverhaltsermittlung in der internationalen Wirtschaftsschiedsgerichtsbarkeit, Berlin 2003, p. 82.

discharge the burden of introducing all the facts and circumstances relevant to the case into the proceedings. They must offer the pertinent means of evidence.<sup>162</sup>

There are, in general, no restrictions as to the admissibility of evidence. 95 However, problems as to the admissibility of specific evidence may arise where the evidence was obtained in violation of the right to privacy or any other fundamental right. In these cases, arbitral tribunals should assess whether the protected right prevails over a party's right to present its case with all means available.<sup>163</sup>

In the absence of any specific agreement of the parties, the arbitral tribunal, in 96 exercising its general procedural discretion, also determines how the hearing of witnesses is conducted. This covers questions as to whether cross-examination will be allowed or whether written witness statements shall be provided before the hearing. The same applies in relation to other written evidence. The arbitral tribunal has no power to compel witnesses or parties to appear and cannot administer oath. It may only draw negative inferences from the non-appearance of a witness or apply to the court for assistance in taking evidence. Concerning the production of documents, arbitrators are not bound by the restrictions existing in court proceedings for such requests to produce documents directed to the other party. By contrast, tribunals may, and also do in practice, allow for much broader requests for documents, which may come close to a limited version of an English style discovery.

In principle, the tribunal may also rely on its own knowledge in determining the 97 relevant facts. German courts have consistently held that in the light of the fact that arbitrators are chosen for their expertise, the restrictions on the use of private knowledge in court proceedings do not apply to arbitration.<sup>164</sup> However, the tribunal must ensure that the right to a fair hearing is not violated. Thus, it should inform the parties that it wants to rely on its own knowledge and give them the chance to respond.<sup>165</sup>

Unless the parties have agreed otherwise, the arbitral tribunal has the power, 98 pursuant to § 1049 (1) ZPO, to appoint independent experts on specific issues to be determined by it. No prior consent of the parties is necessary for such an

<sup>162</sup> *OLG Naumburg* 21.05.2004, available at <www.dis-arb.de>; *OLG Hamburg* 31.07.2003, *OLGR Hamburg* 2004, 97; see also under the old law *OLG Köln* 16.12.1996, *Yearbook XXI* (1996), 535 (540).

<sup>163</sup> See *OLG Bremen* 10.11.2005, (2007) *Int.A.L.R.* N-18, where the setting aside of an award allegedly based on unauthorized video taping was refused since the tribunal's solution was only in part based on this evidence.

<sup>164</sup> *BGH* 12.12.1963, *NJW* 1964, 593 (595).

<sup>165</sup> *BGH* 08.10.1959, *BGHZ* 31, 43 (46); *id.* 03.07.1975, *BGHZ* 65, 59 (63); *id.* 11.11.1982, *BGHZ* 85, 288 (291), *id.* 29.09.1983, *WM* 1983, 1207 (1208).

appointment.<sup>166</sup> After delivery of the expert's written or oral report, the parties will usually have the opportunity to put questions to him, challenge his findings or to present expert witnesses themselves in order to testify on the points at issue. In acknowledgement of the importance of the expert's determinations, the expert appointed by the tribunal is subject to the same requirements as an arbitrator concerning his independence and impartiality.<sup>167</sup>

### **E. Record of oral Hearing**

- 99** There is no typical 'German-style' recording of a hearing. It is not, however, uncommon that the chairman dictates a summary of the oral witness testimony or the parties' pleadings and has it approved by the parties during the hearing. The type of record is one of the issues that should be agreed among the parties and the arbitral tribunal as soon as feasible. Information on court reporters may be obtained from the DIS. Generally, very few court reporters are available in Germany, in particular if the record is to be made in a language other than English.

### **F. Default Proceedings<sup>168</sup>**

- 100** German arbitration law provides for different measures for counteracting delaying tactics and obstruction. On the rare occasion of a claimant's failure to submit a statement of claim after having initiated arbitral proceedings, the arbitral tribunal must terminate the proceedings (§ 1048 ZPO). This is done by an order without *res judicata* effect. The proceedings may be continued where respondent fails to submit its statement of defence (§1048 (2) ZPO), any party fails to appear at an oral hearing or to produce documentary evidence by a set time-limit (§ 1048 (3) ZPO). A further measure to react to delay is provided by § 1046 (2) ZPO where late supplements or amendments may be considered as inadmissible. § 1048 (4) ZPO, however, grants the parties the possibility to justify any delay to the tribunal's satisfaction.

### **G. Representation and legal Assistance**

- 101** As far as the representation in arbitral proceedings is concerned, German law contains only a single but mandatory provision. Pursuant to § 1042 (2) ZPO, counsel may not be excluded from acting as authorized representative. Agreements to the contrary, even when concluded after the dispute has arisen are

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<sup>166</sup> *OLG Koblenz* 19.02.2004, available at <www.dis-arb.de>.

<sup>167</sup> § 1049 (3) ZPO; *OLG Koblenz* 19.02.2004, available at <www.dis-arb.de>.

<sup>168</sup> For a detailed discussion see Part II, *Sachs/Lörcher*, § 1048 paras 1 *et seq.*

not valid and cannot be enforced. This does not, however, imply that a party must be represented by counsel in arbitral proceedings. Parties are free to represent themselves in the proceedings or to be represented by non-lawyers.<sup>169</sup> The latter may, however, be excluded by the tribunal or an agreement of the parties, since the prohibition of § 1042 (2) ZPO extends only to counsel. There is no requirement that counsel be admitted to the local bar. The parties may, therefore, be represented by foreign or German counsel. In principle, a power of attorney is required, although, in practice, proof thereof is only required if doubts arise in this respect. The same principles apply to proceedings on the basis of the DIS Rules.

### VIII. INTERIM RELIEF AND INTERIM MEASURES OF PROTECTION<sup>170</sup>

German arbitration law provides for concurrent jurisdiction of arbitral tribunals and courts for granting interim relief. This is meant to ensure that in all cases an effective protection can be obtained. Accordingly, in the absence of agreements to the contrary, an application for interim relief may now be made to both the state court and the arbitral tribunal. An arbitration agreement does not, in and of itself, exclude the possibility that a state court may issue interim relief either prior to or during the arbitration, on the application of one of the parties, concerning the subject matter of the arbitration. The same holds true for arbitrations under the DIS Rules. Possible conflicts between interim relief ordered by a state court and similar orders by a private arbitral tribunal are resolved by § 1041 (2), § 1062 (1) No. 3 ZPO, which provide that the competent Higher Regional Court can admit execution of interim orders issued by an arbitral tribunal, unless the same party<sup>171</sup> has already applied for such relief to a Local Court (*Amtsgericht* – ‘AG’) or Regional Court (*Landgericht* – ‘LG’).

In practice, the majority of applications are probably still filed with the state courts.<sup>172</sup> In particular, when the tribunal has not yet been constituted, when it is likely that the measure will have to be enforced or *ex parte* proceedings are

<sup>169</sup> For the need for legal representation in the arbitration-related supportive or supervisory court proceedings see *BGH* 27.03.2002, IHR 2003, 43.

<sup>170</sup> For a detailed discussion see Part II, *Kreindler/Schäfer*, § 1033 as well as § 1041.

<sup>171</sup> *Stein/Jonas-Schlosser* (2002), § 1041 para. 15.

<sup>172</sup> *OLG München* 26.10.2000, NJW-RR 2001, 711: The court ruled accordingly that at least until the constitution of the arbitral tribunal, the state courts are competent for granting interim measures of protection since at this stage most arbitral tribunals will not be in the position to grant interim relief. Further court orders in regard to interim relief are *OLG Jena* 24.11.1999, BB 2000, Beilage No. 12, p. 22 and *OLG Koblenz* 15.07.1998, MDR 1999, 502.

needed, state courts are, in general, the more appropriate forum.<sup>173</sup> However, they may only grant interim relief if the procedural requirements of the relevant provisions of the ZPO are met, i.e. the court has jurisdiction<sup>174</sup> and the normal prerequisites for interim relief are fulfilled. Thus the applicant must show that he has a substantive claim against the defendant and that his case is urgent. The standard of proof to be applied is preponderance of evidence and the measures may be granted *ex parte*. Concerning the type of measures to be granted, courts are limited to those type of attachment measures (*Arrest*) or interim injunctions (*einstweilige Verfügung*) which are provided for in §§ 916 *et seq.* ZPO.

- 104** The arbitral tribunal, by contrast, may, according to § 1041 ZPO, order such interim or preventive measures as it considers necessary in respect of the subject matter of the dispute, unless that power is excluded by the parties. This includes pre-award attachment orders<sup>175</sup> as well as orders as to what should happen to perishable goods, orders to give security in the form of a bank guarantee or orders not to dispose of the property in dispute.<sup>176</sup> Where the measures ordered are not known in German courts, such as English-style freezing injunctions, they will not be enforced by the courts but will be converted into measures in line with the German provisions for their enforcement. In exceptional cases, where effective legal protection cannot be granted otherwise, the tribunal may also order what is requested in the main proceedings as an interim measure on a preliminary basis.<sup>177</sup>
- 105** In case the interim measure proves to have been unjustified from the outset, the party who obtained its enforcement is liable to the other party for damages (§ 1041 (4) ZPO).

<sup>173</sup> See *OLG München* 26.10.2000, NJW-RR 2001, 711.

<sup>174</sup> See *OLG Köln* 12.04.2002, GRUR-RR 2002, 309; *OLG Nürnberg* 30.11.2004, SchiedsVZ 2005, 50 (international jurisdiction refused since decision on place of arbitration was considered to be a forum selection clause in favour of the courts at that place); on this issue *cf. Kröll*, Internationale Zuständigkeit deutscher Gerichte für einstweiligen Rechtsschutz bei ausländischem Schiedsort, IHR 2005, 142.

<sup>175</sup> Prevailing view in deviation from the situation under the old law; see Bill of the Arbitration Law Reform Act, BT-Drs. 13/5274, p. 45; *Thüringisches OLG* 24.11.1999, BB 2000, Beilage No. 12, p. 22; *Bandel* (2000), p. 138.

<sup>176</sup> On the various types of interim relief see *Bandel* (2000), pp. 131 *et seq.*; *Leitzen*, Die Anordnung vorläufiger oder sichernder Maßnahmen durch Schiedsgerichte nach § 1041 ZPO, Köln 2002, pp. 37 *et seq.*; *Stein/Jonas-Schlosser* (2002), § 1041 paras 3 *et seq.*; *Schwab/Walter* (2005), Chap. 17a paras 6 *et seq.*

<sup>177</sup> *OLG Frankfurt* 05.04.2001, NJW-RR 2001, 1078; *Bandel* (2000), pp. 189 *et seq.*; *Leitzen*, Die Anordnung vorläufiger oder sichernder Maßnahmen durch Schiedsgerichte nach § 1041 ZPO, Köln 2002, pp. 58 *et seq.*; *Schroth*, Einstweiliger Rechtsschutz im deutschen Schiedsverfahren, SchiedsVZ 2003, 102 (103).

## IX. THE ARBITRAL AWARD

Pursuant to § 1056 (1) ZPO, arbitral proceedings are terminated either by a final award or by an order of the arbitral tribunal. The form of an order is generally used when the proceedings are terminated without a decision on the claims submitted. In all other cases, the proceedings should be terminated by a final award. **106**

### A. Types of Award

In addition to final awards, the tribunal may also render partial and interim awards.<sup>178</sup> Partial awards may be rendered where separate claims or parts of the claim can be decided finally so as to focus the proceedings on the issues in dispute where a final decision is not yet possible. Being final awards, they must meet the formal requirements of § 1054 ZPO so that they are subject to separate challenge proceedings under § 1059 ZPO and may be enforced against the debtor under §§ 1060, 1061 ZPO. **107**

Interim awards, by contrast, do not dispose of certain parts of the dispute. They rather concern particular issues of a procedural or substantive matter, which are usually relevant to the dispute as a whole, such as the applicable law. As interim awards do not contain a final decision on at least parts of the dispute, different views exist as to their legal nature and the formal requirements for such awards. Generally, separate challenge or enforcement proceedings may not be initiated for such awards.<sup>179</sup> Decisions as to the applicable law or whether a claim is statute barred may be rendered in the form of an interim award or a partial award if the answer is positive, while interim measures of protection by the tribunal usually take the form of an order. The legal nature of the tribunal's decision on jurisdiction is discussed controversially. In the light of the wording of § 1040 (3) ZPO (*Zwischenentscheid*) the prevailing view is that it is not an interim award but a preliminary ruling which may be challenged in the procedure provided for in § 1040 (3) ZPO.<sup>180</sup> **108**

<sup>178</sup> On the different types of awards see *Schwab/Walter* (2005), Chap. 18 paras 6 *et seq.*; *Stein/Jonas-Schlosser* (2002), § 1055 paras 15 *et seq.*

<sup>179</sup> See *Zöller-Geimer* (2007), § 1054 para. 3 (formal requirements of § 1054 ZPO not applicable and no challenge in the sense of § 1059 ZPO possible); but see *Stein/Jonas-Schlosser* (2002), § 1054 para. 3 (§ 1054 ZPO applicable); *cf. Weigand-Wagner* (2002), Germany, para. 316 (no challenge and enforcement procedure).

<sup>180</sup> *Musielak-Voit* (2007), § 1054 para. 2; *MünchKomm-Münch* (2001), § 1056 para. 6; for a different and better view see *Stein/Jonas-Schlosser* (2002), § 1054 para. 3; *Weigand-Wagner* (2002), Germany, para. 316.

## B. Making of the Award

- 109** German law does not provide a time-limit for making of the award. The prevailing view is that such time-limits have more disadvantages than advantages in practice and German courts have been reluctant to refuse the enforcement of awards on the ground that time-limits have expired.<sup>181</sup> In tribunals with more than one arbitrator and unless otherwise agreed by the parties, decisions are, in general, taken by a majority (§ 1059 (1) ZPO). Pursuant to § 1052 (2) ZPO, where an arbitrator refuses to take part in the decision, the other arbitrators may decide without him provided that the parties have been informed beforehand. Any violation of this obligation to inform may render the award unenforceable.<sup>182</sup> The admissibility of a dissenting vote is not explicitly regulated in the 10<sup>th</sup> Book. In the light of the confidentiality of the deliberations between the arbitrators, a strong part of the German literature considers dissenting opinions not to be permitted at least in domestic arbitrations, unless the parties have agreed otherwise.<sup>183</sup> The better view, which also finds some support in the legislative materials, is that dissenting opinions are permissible unless they are explicitly excluded.<sup>184</sup>

## C. Form and Delivery of the Award

- 110** According to § 1054 ZPO, the award must be made in writing and signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated.<sup>185</sup> The award must state the reasons upon which it is based, unless the parties have agreed that no reasons need to be given or the award is an award on agreed terms. The award shall state its date and the place of arbitration. It shall be deemed to have been made on that date and that place, even if, in fact, for reasons of convenience the arbitrators have signed the award at another place. Where the date or even the place of arbitration are not stated, the award is not null and void. It is then for the

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<sup>181</sup> *BayObLG* 23.09.2004 (award enforced since defendant could not prove that expiry of time-limit had influence on outcome of the case – issue treated as one of an incorrect procedure); *cf. BGH* 14.04.1988, BGHZ 104, 178 (182 *et seq.*) stating that time-limits should in general be interpreted that their expiry does not automatically terminate the mandate of the tribunal but only gives the right to remove arbitrators.

<sup>182</sup> *OLG Saarbrücken* 29.10.2002, *SchiedsVZ* 2003, 92 (93).

<sup>183</sup> *Schütze* (1999), para. 204; *Lachmann* (2002), para. 452; *cf. Peltzer* (2000), pp. 67 *et seq.* (critical and suggesting a different solution *de lege ferenda*).

<sup>184</sup> *Weigand-Wagner* (2002), Germany, para. 331.

<sup>185</sup> *OLG Köln* 24.04.2006, available at <[www.dis-arb.de](http://www.dis-arb.de)>.

courts to determine where the place of arbitration was, if necessary in setting aside or enforcement proceedings.<sup>186</sup>

German law no longer requires that arbitral awards must be registered or deposited with a court to become effective. Pursuant to 1054 (4) ZPO, a copy of the award signed by the arbitrators shall be delivered to each party. In general, service is effected in such a manner, e.g. by courier or registered mail with return receipt, that evidence of the delivery and its date is available. **111**

#### **D. The Law applicable to the Decision on the Merits**

The law applicable to the merits of a dispute is governed by § 1051 ZPO which provides for a special conflict of laws provision.<sup>187</sup> **112**

In general, tribunals shall decide according to rules of law.<sup>188</sup> A decision *ex aequo et bono* or as *amiables compositeurs* is subject to the explicit authorization of the parties (§ 1051 (3) ZPO). In that regard, a joint request to the tribunal to submit proposals for a possible settlement does not suffice to assume that the parties have given such authorization.<sup>189</sup> In addition, § 1051 (4) ZPO expressly provides for the duty of the arbitral tribunal to decide in accordance with the terms of the contract and to take into account the usages of the trade applicable to the specific transaction. **113**

§ 1051 (1) ZPO is based on party autonomy and thus accepts a choice of rules of law by the parties. § 1051 (1) ZPO clarifies that such choice refers to the substantive law and not to conflict of laws rules, unless the parties have explicitly agreed otherwise. The use of the modern term ‘rules of law’ (*Rechtsvorschriften*) in § 1051 (1) ZPO indicates that it is not limited to the exclusive applicability of national laws and may also extend to such sets of rules as the UNIDROIT Principles of International Commercial Contracts.<sup>190</sup> **114**

In the absence of a choice of law by the parties, German arbitration law deviates from the Model Law in so far as it contains a more direct conflict of laws provision providing for the application of the law of the state with which the subject matter of the proceedings has the closest connections (§ 1051 **115**

<sup>186</sup> *OLG Düsseldorf* 23.02.2000, *EWiR* 2000, 795 with note by *Kröll*, (2001) *Int.A.L.R.* N-25; *OLG München* 22.06.2005, *SchiedsVZ* 2005, 308.

<sup>187</sup> See for details Part II, *Friedrich*, § 1051; see also *Handorn*, *Das Sonderkollisionsrecht der deutschen internationalen Schiedsgerichtsbarkeit*, Tübingen 2005.

<sup>188</sup> *Wagner*, *Rechtswahlfreiheit im Schiedsverfahren*, in: *Gottwald/Roth* (eds), *FS-Schumann*, 2002, pp. 535 *et seq.*

<sup>189</sup> *OLG München* 22.06.2005, *SchiedsVZ* 2005, 308 which even held that the form requirements of § 1031 ZPO also extend to such an agreement.

<sup>190</sup> Bill of the Arbitration Law Reform Act, *BT-Drs.* 13/5274, p. 22 (52); *cf. Lepschy*, § 1051 ZPO – *Das anwendbare materielle Recht in internationalen Schiedsverfahren*, Frankfurt am Main 2003, pp. 103 *et seq.*

(2) ZPO).<sup>191</sup> The rather general and internationally well-known ‘closest connection standard’ is based on Article 4 (1) of the European Convention on the Law Applicable to Contractual Obligations of 19 June 1980.<sup>192</sup> In determining with which law the closest connection exists, the presumptions in Article 4 European Convention are not directly applicable but may nevertheless play an important role.<sup>193</sup> The law applicable will, therefore, often be the law of the country where the party which fulfils the characteristic obligation is located.

### E. The Decision on Costs

- 116** Unlike the UNCITRAL Model Law, German arbitration law contains, in § 1057 ZPO, a separate provision dealing with decisions on costs. In the absence of an agreement by the parties, the arbitral tribunal awards the costs of the arbitral proceedings, including the costs incurred by the parties necessary for the proper pursuit of their claim or defence, by means of an arbitral award (§ 1057 (1) ZPO). This also applies where the tribunal refuses jurisdiction.<sup>194</sup> In most cases, tribunals will allocate the costs in accordance with the principle of ‘costs follow the event’. The quota of success under German law is primarily determined in relation to the amount claimed in the proceedings and not – as in other legal systems – purely on whether a claim exists in principle. Where the costs of the arbitration have already been determined, the tribunal shall also decide in the final award on the amount to be borne by each party. If the costs have not been fixed or if they can only be fixed once the arbitral proceedings have been terminated, the final decision on costs must be made in a separate award (§ 1057 (2) ZPO).
- 117** It is a generally accepted practice in Germany that the costs of legal assistance are reimbursed to the winning party. § 1057 (1) ZPO explicitly lists the costs ‘incurred by the parties necessary for the proper pursuit of their claim or defences’ as a type of costs to be allocated between the parties. A comparable provision can be found in section 35.1 DIS Rules. The specific allocation lies within the discretion of the arbitral tribunal and often follows the ratio of success

<sup>191</sup> The practical effects of the deviation are limited. While under the Model Law the tribunal may freely determine the applicable conflict of laws rules, such conflict of laws rules frequently also apply the ‘closest connection standard’.

<sup>192</sup> For the discussions relating to the relevance of the Rome Convention also for arbitral proceedings see *Weigand-Wagner* (2002), Germany, paras 351 *et seq.*; *Kronke*, Internationales Schiedsverfahren nach der Reform, RIW 1998, 267 (262 *seq.*).

<sup>193</sup> *Musielak-Voit* (2007), § 1051 para. 6; *cf. Lepschy*, § 1051 ZPO – Das anwendbare materielle Recht in internationalen Schiedsverfahren, Frankfurt am Main 2003, pp. 173 *et seq.*

<sup>194</sup> *BGH* 06.06.2002, NJW 2002, 3031 (3032 *et seq.*) = *SchiedsVZ* 2003, 39 (40); *Kröll*, Recourse against Negative Decisions on Jurisdiction, *Arb.Int.* 2004, 55 (69); for a different view *Musielak-Voit* (2007), § 1057 para. 2.

in the merits. Reimbursement, however, may be refused by the arbitral tribunal where legal costs are considered to be out of proportion to the dispute and higher than the fees due under the Lawyers Fees Act (*Rechtsanwaltsvergütungsgesetz* – ‘RVG’).<sup>195</sup>

#### **F. Correction and Interpretation of the Award and additional Awards**

At the request of a party, the arbitral tribunal may interpret the award or correct any errors in computation, any clerical or typographical errors or any errors of a similar nature (§ 1058 ZPO). The list makes it clear that the correction competence of the tribunal is limited to minor mistakes and should not affect the actual substance of the award.<sup>196</sup> In general, the parties should be heard before the tribunal proceeds to a correction or interpretation.<sup>197</sup> **118**

Pursuant to § 1058 (1) No. 3 ZPO, at the request of a party, the tribunal also has the power, to make an additional award as to claims submitted in the arbitral proceedings but omitted in the award. The request must be submitted within one month after the receipt of the award and the arbitrators then have two months to make the additional award. There is no power for the tribunal to render such an additional award upon its own initiative. **119**

### **X. GERMAN STATE COURTS AND ARBITRATION**

#### **A. General Principles**

Notwithstanding the fact that the existence of an arbitration agreement excludes the jurisdiction of the courts for the action on the merits (§ 1032 ZPO), courts have important supportive and supervisory functions for the arbitral proceedings. They are enumerated in the arbitration law.<sup>198</sup> In principle, § 1026 ZPO excludes any ‘inherent powers’ by clearly stating that courts may not intervene in the arbitral proceedings unless explicitly provided for in the 10<sup>th</sup> Book. Such explicit provisions are largely listed in § 1062 (1) Nos 1–4 ZPO. Notwithstanding its excessively broad wording § 1062 ZPO does not grant additional powers to the courts but merely regulates which courts have jurisdiction for the various tasks entrusted to the courts by other provisions in the 10<sup>th</sup> Book. **120**

<sup>195</sup> For a more detailed discussion see *Lachmann* (2002), paras 1084 *et seq.*

<sup>196</sup> *OLG Stuttgart* 20.12.2001, *OLGR Stuttgart* 2002, 166; in practice, missing formal requirements such as the statement of the place of arbitration are usually remedied in proceedings under § 1058 ZPO.

<sup>197</sup> *OLG Karlsruhe* 29.11.2002, available at <www.dis-arb.de>.

<sup>198</sup> For details see Part II, *Schroeder*, Introduction to §§ 1062–1065 paras 2 *et seq.*

- 121** The rule of limited intervention is interpreted strictly at least in relation to supervisory powers. Courts have, in general, refrained from intervening in the arbitration process without an explicit empowerment. By contrast, in relation to the supportive powers, some courts have favoured a broad interpretation of their powers.<sup>199</sup>
- 122** Pursuant to § 1063 ZPO, the court proceedings are terminated by an order of the court. While it is necessary to give the other side a chance to comment on issues, an oral hearing is not, in general, necessary. Although the court must terminate its proceedings in the form of an order pursuant to § 1063 ZPO, the provisions of the ZPO preceding the 10<sup>th</sup> Book have to be applied despite the fact that some of them are designed for the termination of proceedings by judgment. In particular, the general rules for the admissibility of court proceedings apply. These include the capacity to be a party in legal proceedings, standing to sue, absence of *res judicata* effect and legitimate interest to sue.<sup>200</sup>

### **B. Supervisory Function of the Courts**

- 123** The few supervisory powers granted to the courts are intended to provide the constitutionally required protection of the parties in the arbitration process.<sup>201</sup> They are meant to ensure that the required consent to arbitration exists, that the minimum requirements of a fair trial are maintained and that the parties are treated equally. The supervision thus concentrates on the composition of the tribunal (challenge of an arbitrator, § 1037 ZPO, equal influence on composition, § 1034 (2) ZPO, and termination of an arbitrator's appointment, § 1038 ZPO), the judicial review of an arbitral tribunal's decision on its jurisdiction (§ 1040 (3) ZPO and the arbitral process (§ 1059 (2) No. 1 (b)–(d) ZPO). By contrast, the substantive outcome of the proceedings is, in principle, beyond the control of the court. There will be no review of the merits of an award.<sup>202</sup>

### **C. Supportive Functions of the Courts**

- 124** The various supportive functions provided for in the German arbitration law are primarily intended to remedy the two 'deficiencies' of arbitration: the lack of coercive powers and the non-existence of a readily available tribunal.<sup>203</sup>

<sup>199</sup> *BayObLG* 05.10.2004, *SchiedsVZ* 2004, 316 with note by *Wagner* = (2005) *Int.A.L.R.* N-47 (appointment of arbitrator for proceedings with place of arbitration in Japan which was however not determined in detail).

<sup>200</sup> For details see Part II, *Schroeder*, Introduction to §§ 1062–1065 paras 16 *et seq.*

<sup>201</sup> For details see Part II, *Schroeder*, Introduction to §§ 1062–1065 paras 2 *et seq.*

<sup>202</sup> For details see Part II, *Kröll/Kraft*, § 1059 para. 2.

<sup>203</sup> For details see Part II, *Schroeder*, Introduction to §§ 1062–1065 paras 2 *et seq.*

One of the most important supportive functions of state courts in arbitral proceedings relates to the constitution of the arbitral tribunal. In the absence of an agreement by the parties or where the agreed procedure of appointment fails, the arbitrator or the presiding arbitrator is appointed upon request of a party by the competent OLG.<sup>204</sup> **125**

Given the absence of compulsory powers of an arbitral tribunal over the parties to the arbitration, much less over third parties, state courts may support arbitrations and act on behalf of the arbitral tribunal where the latter is not empowered to act. This applies with regard to the taking of evidence where witnesses or experts are not willing to appear voluntarily before the arbitral tribunal or where an oath is to be taken.<sup>205</sup> It further encompasses enforcement of interim measures ordered by an arbitral tribunal if they are not complied with voluntarily.<sup>206</sup> Furthermore courts may themselves grant at any time interim relief where requested by a party.<sup>207</sup> **126**

In addition, pursuant to § 1032 (2) ZPO parties may seek the support of the court to determine before the tribunal has been appointed whether or not arbitral proceedings are admissible. This last power, as well as some of the other supportive powers of the courts, such as the support in taking of evidence, are not limited to arbitral proceedings having their place of arbitration in Germany but may also be granted to parties of ‘foreign’ arbitral proceedings.<sup>208</sup> **127**

Before or after an arbitral tribunal is constituted, parties may apply to the state courts for interim measures (§ 1033 ZPO).<sup>209</sup> **128**

#### **D. Autonomous Procedure for the Taking of Evidence (*selbstständiges Beweisverfahren*)**

German procedural law provides for the possibility to initiate autonomous proceedings for the taking of evidence (§§ 485 *et seq.* ZPO) both in addition to pending court proceedings or before any proceedings have been initiated. Where no proceedings are pending, an expert may be requested to evaluate certain issues, such as the status or value of things or damage. Where an arbitral tribunal **129**

<sup>204</sup> For details see Part II, *Nacimiento/Abt*, § 1035 paras 32 *seq.*

<sup>205</sup> For details see Part II, *Sachs/Lörcher*, § 1050 paras 4 *et seq.*

<sup>206</sup> For details see Part II, *Schroeder*, Introduction to §§ 1062–1065 paras 9 *et seq.*

<sup>207</sup> See Part II, *Kreindler/Schäfer*, § 1033.

<sup>208</sup> See for example *OLG Frankfurt* 24.10.2006, available at <[www.dis-arb.de](http://www.dis-arb.de)> (determination of admissibility of Belgian proceedings); *OLG Oldenburg* 20.06.2005, *SchiedsVZ* 2006, 223.

<sup>209</sup> See Part II, *Kreindler/Schäfer*, § 1033 para. 11.

has been constituted, it may conduct such autonomous procedure upon request.<sup>210</sup> Otherwise, jurisdiction lies with the locally competent state court.<sup>211</sup>

## XI. RECOURSE AGAINST AWARDS

### A. General Principles

- 130** Under the principle of party autonomy which governs the arbitral proceedings in the proper sense, the parties are free to agree on a second arbitral instance. While that is rarely done in a separate agreement, the arbitration rules of a number of specialized arbitration institution, in particular in the area of commodity arbitration, provide for such a second arbitral instance.<sup>212</sup> In most cases, they allow for a true appeal in the sense of a full review on the merits of the first tribunal's decision. In general, the decision of the first tribunal only constitutes an enforceable award when it has either been confirmed by the second instance or the time for an appeal has expired.
- 131** Under the principle of party autonomy it is also possible to make the binding force of an award dependent on the fact that no court proceedings on the same dispute are initiated within a certain time.<sup>213</sup>
- 132** By contrast, German arbitration law does not allow for an appeal to the courts against awards. While the law does not expressly say so, this follows from § 1059 ZPO, which states that
- 'recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections 2 and 3 of this section'*
- 133** which do not allow for a review on the merits. The only ground for setting aside where the content of the award may, at least indirectly become relevant, is public policy. Furthermore, it follows *inter alia* from § 1026 ZPO, which excludes any court intervention not explicitly provided for in the 10<sup>th</sup> Book, that the parties may not agree on an appeal to the courts. While party autonomy governs the arbitral proceedings as such, that does not apply for the state courts proceedings in supervision of arbitration. Consequently, parties may not extend the grounds

<sup>210</sup> Kreindler/Schäfer/Wolf (2006), para. 766.

<sup>211</sup> For application in the construction sector, see Part IV, *Benedict*, Construction Arbitration in Germany, para. 57.

<sup>212</sup> See for example §§ 28 *et seq.* Arbitration Rules Waren-Verein Hamburger Börse; *cf.* *OLG Hamburg* 04.09.1998, NJW-RR 2000, 806.

<sup>213</sup> *BGH* 01.03.2007, available at <[www.dis-arb.de](http://www.dis-arb.de)>; overruling *OLG Frankfurt*, 20.12.2005, available at <[www.dis-arb.de](http://www.dis-arb.de)>.

for a potential setting aside of the award. Where they do so, the question arises whether they have at all opted for arbitration, which, according to the German understanding, requires a final and binding decision by the tribunal instead of the state courts.<sup>214</sup>

## **B. The Setting Aside Proceedings pursuant to § 1059 ZPO<sup>215</sup>**

### *1. General Principles*

Setting aside proceedings in German law are largely governed by the same rules as under the Model Law. § 1059 ZPO is a nearly literal adoption of Article 34 ML with some minor amendments which clarify issues left open in the Model Law. Only subsection 5, which deals with the effects of the setting aside on the arbitration agreement, has no equivalent in the Model Law. It provides that, in the absence of indications to the contrary, the arbitration agreement becomes operative again after the award has been set aside. The setting aside proceedings are only available against domestic awards, i.e. awards resulting from proceedings with a place of arbitration in Germany.<sup>216</sup> **134**

The right to bring an action for setting aside cannot be validly excluded before the dispute has arisen. While under the old law it was possible to grant the tribunal a binding *Kompetenz-Kompetenz* and thereby at least *de facto* exclude reliance on those grounds relating to the tribunal's jurisdiction, that is no longer possible.<sup>217</sup> **135**

### *2. Grounds for Setting aside*

The grounds for setting aside are conclusively enumerated in § 1059 (2) ZPO. They are largely identical to those grounds under which the enforcement of a domestic or foreign award can be refused. Since a *révision au fond* is not permitted, neither an error in law nor an error in fact is, as such, a ground for setting aside the award. **136**

A distinction is made between grounds which are only considered if the 'applicant shows sufficient cause' and those which have to be considered *ex officio*. That, however, only affects the burden of pleading<sup>218</sup> and not the burden **137**

<sup>214</sup> *OLG Naumburg* 20.05.2005, SchiedsVZ 2006, 103 (clause providing for arbitration with the possibility of a court review considered to be a conciliation agreement).

<sup>215</sup> For a more detailed analysis see Part II, *Kröll/Kraft*, § 1059.

<sup>216</sup> *OLG Düsseldorf* 23.02.2000, EWiR 2000, 795 with note by *Kröll*, (2001) Int.A.L.R. N-25.

<sup>217</sup> *BGH* 13.01.2005, SchiedsVZ 2005, 95 = NJW 2005, 1125.

<sup>218</sup> Courts have on occasion imposed strict requirements as to the specificity of the pleadings and have required an explicit reference to a particular ground, considering the mere pleading of the facts to be insufficient; see *BGH* 02.11.2000, ZIP 2000, 2270 (2271); *OLG Hamburg* 14.05.1999, OLGR 2000, 19 *et seq.*; *Ehricke*, Die

of proof. The latter rests with the applicant for all grounds, including those to be considered *ex officio*.<sup>219</sup>

- 138** Those grounds which have to be pleaded by the parties either relate to the tribunal's jurisdiction (No. 1 (a) lack of a valid arbitration agreement and (c) excess of jurisdiction) or the conduct of the proceedings (No. 1 (b) violation of special emanations of the right to be heard and (d) incorrect proceedings or incorrectly composed tribunal). For the latter types of grounds relating to the conduct of the proceedings it is furthermore required that the incorrectness has affected the outcome of the proceedings to avoid that minor mistakes without any influence on the award lead to its setting aside.
- 139** The grounds to be taken into account by the courts *ex officio* are the lack of arbitrability of the dispute and the violation of public policy. In connection with the latter, the courts are limited to verifying whether the result is compatible with the fundamental principles of the German legal system.<sup>220</sup> Even severe misapplications of the law will only constitute a violation of public policy where they lead to completely arbitrary decisions, which are so contrary to the fundamental principles of law that they would seriously damage confidence in dispute resolution by arbitration. Procedural public policy may be violated where a party's right to be heard has not been respected.<sup>221</sup>
- 140** Courts have, in general, applied the various grounds in a restrictive manner. In particular, in relation to the often alleged violation of the right to be heard, the courts have imposed strict standards. There is, in general, a presumption that even where certain issues are not explicitly mentioned in the reasoning of the award, they have been taken into consideration by the tribunal.<sup>222</sup> Furthermore, the applicant has to state in detail how the procedural defect has affected the award.<sup>223</sup>
- 141** In addition, reliance on the various grounds mentioned in § 1059 (2) No. 1 ZPO may be excluded where a party has participated in the arbitral proceedings without complaining without undue delay.<sup>224</sup> The same applies where a party has

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Beschleunigung der Finalität von Schiedssprüchen nach dem neuen deutschen Schiedsverfahrensrecht, ZZP 2000, 453 (457).

<sup>219</sup> *OLG Düsseldorf* 21.07.2004, IPRspr 2004, 443.

<sup>220</sup> *BGH* 15.07.1999, BGHZ 142, 204 (206) = NJW 2000, 2974.

<sup>221</sup> Found to exist in *OLG Hamburg* 16.09.2004, available at <www.dis-arb.de> (award rendered before expiry of deadline up to which party could comment on crucial witness statement).

<sup>222</sup> *OLG Hamburg* 18.11.2003, OLGR Hamburg, 244; *id.* 31.07.2003, OLG Hamburg 2004, 97.

<sup>223</sup> *OLG Celle* 19.02.2004, OLGR Celle 2004, 396; *OLG Karlsruhe* 29.11.2002, available at <www.dis-arb.de> (public policy defence).

<sup>224</sup> E.g. *BGH* 29.06.2005, SchiedsVZ 2005, 259 (260) holding that challenges to the tribunal's jurisdiction are limited to the particular ground raised and do not prevent preclusion in relation to other grounds.

not made use of existing remedies during the arbitral proceedings, in particular its right to have a preliminary ruling of the tribunal review by the courts.

### 3. Procedure

§ 1059 ZPO provides for separate and autonomous setting aside proceedings which may be initiated outside any *exequatur* proceedings. The grounds for setting aside may, however, also be invoked as defences in proceedings to have an award declared enforceable. If successful, they will also lead to the setting aside of the award (only for domestic awards). Thus, once enforcement proceedings have been initiated, both actions will be combined and there will, in general, no longer be a need for separate challenge proceedings.<sup>225</sup> **142**

Pursuant to § 1059 (3) ZPO and in line with Article 34 (3) ML, actions for setting aside must be brought within three months after the applicant has received the award. After that period, no setting aside proceedings may be initiated, not even for a violation of public policy. However, public policy and the non-arbitrability of a dispute may, despite the expiry of the time-limit, still be raised as a defence in proceedings to have the award declared enforceable. When successful, they may lead to a setting aside of the award within the framework of the enforcement proceedings. No application for setting aside the award may be made once the award has been declared enforceable by a German court. **143**

### 4. Other Means of Recourse

§ 1059 (1) ZPO clearly provides that setting aside proceedings are the only means of recourse available. Where setting aside proceedings have been initiated, the court may, pursuant to § 1059 (4) ZPO, set aside the award and remit the case to the tribunal where appropriate. In deviation from the Model Law, remittance is possible only after the award has been set aside. Otherwise its *res judicata* effect would prevent any new decision on the matter. **144**

In exceptional cases, where the award has been obtained by deceit or fraud, a party may have a claim for damages under substantive law according to § 826 BGB for wilful harm caused.<sup>226</sup> As this claim is directed at making good the harm caused by the deceit, namely the rendering of an award, it will result in its annulment and thereby *de facto* have the same effect as an action for setting aside. **145**

<sup>225</sup> BayObLG 16.01.2004, SchiedsVZ 2004, 163 (164); cf. OLG Naumburg 21.05.2004, (2006) Int.A.L.R. N-61.

<sup>226</sup> BGH 02.11.2000, WM 2001, 104 with note by Kröll, WUB 2001, 351; English summary (2002) Int.A.L.R. N-12; for details see Part II, Kröll/Kraft, § 1059 paras 98 seq.

## XII. RECOGNITION AND ENFORCEMENT OF AWARDS

### A. General Principles

- 146** In deviation from the Model Law, German arbitration law provides for different legal regimes for the enforcement of domestic and foreign arbitral awards, respectively. The ‘nationality’ of an award is linked to the place of arbitration, thus awards resulting from proceedings with their place of arbitration in Germany are considered as domestic awards while awards resulting from proceedings with a foreign place of arbitration are classified as foreign awards.<sup>227</sup> The practical relevance is, however, limited since the grounds to refuse enforcement under both regimes are virtually identical and the procedure is largely governed by the same provisions.
- 147** An award as such does not constitute an enforceable title until it has been declared to be enforceable. The functional jurisdiction for such a declaration of enforceability lies, pursuant to § 1062 (1) No. 4 ZPO, with the Higher Regional Court while the local jurisdiction lies either with the Higher Regional Court chosen by the parties or that with jurisdiction for the place of arbitration.<sup>228</sup> In contrast to setting aside proceedings, no time-limit applies for initiating proceedings to obtain a declaration of enforceability. In fact, in relation to domestic awards, the initiation of proceedings after the expiry of the three month time period for the initiation of setting aside proceedings will even lead to the exclusion to all defences but public policy and the lack of objective arbitrability.

### B. Domestic Awards

- 148** In the presence of one of the grounds for setting aside listed under § 1059 (2) ZPO, an application for a declaration of enforceability shall be refused and the award set aside. These grounds are the invalidity of the arbitration agreement, violations of the right to be heard and to fairly present one’s case, the tribunal exceeding its jurisdiction, incorrect constitution of the tribunal or incorrect arbitral proceedings, violation of public policy and the non-arbitrability of the dispute. However, pursuant to § 1060 (2) sentences 2 and 3 ZPO, which constitute an addition to the Model Law, a party may be prevented from relying on such grounds for setting aside in either of the two following situations. If, at the time when the application for a declaration of enforceability is served, a request for setting aside based on such grounds has been finally rejected or if the three months time-limit for initiating setting aside proceedings has expired. Even

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<sup>227</sup> For the reasons for different regimes see Part II, *Kröll*, Introduction §§ 1060, 1061 paras 6 *et seq.*

<sup>228</sup> For details on the court proceedings see *infra* Part II, *Becker/Schartl*, § 1062 paras 16 *et seq.*

after the expiry of the deadline, however, the grounds of violation of public policy and arbitrability of the dispute may be submitted and must be examined *ex officio*.

### C. Foreign Arbitral Awards

Foreign arbitral awards may be enforced in Germany either on the basis of international instruments, in particular the New York Convention 1958, or under the autonomous national enforcement regime for foreign awards as set out in §§ 1061 *et seq.* ZPO. Unlike under the old law, where the national regime contained its own list of grounds for refusal, deviating from those of the New York Convention 1958, the national enforcement regime largely consists of a reference to the New York Convention 1958. As a consequence the New York Convention 1958 may in principle become applicable by virtue of its public international law character or as part of the national enforcement regime. In the latter case, however, the requirements as to the documentation accompanying an application for enforcement are much lower. **149**

#### 1. Enforcement under international Instruments

Germany has ratified numerous multilateral international conventions in the field of arbitration, in particular the New York Convention 1958 and the European Convention. Furthermore, Germany has concluded more than 100 bilateral treaties a great number of which include provisions which might be relevant for the enforcement of foreign arbitral awards.<sup>229</sup> Pursuant to § 1061 (1) ZPO the national rules on the recognition and enforcement, according to which the issue is governed by the New York Convention 1958, leave ‘the application of provisions of other state treaties on recognition and enforcement of arbitral awards ... unaffected’. Consequently, the provisions of such international instrument must be applied *ex officio* by the German judges, where they are more favourable than the national law.<sup>230</sup> **150**

In practice, that is rarely the case since the bilateral treaties themselves often only provide that recognition and enforcement shall be governed by the New York Convention 1958. Bilateral treaties, however, may be relevant for the enforcement of settlements concluded during arbitral proceedings but not recorded in the form of an award on agreed terms. Some of the bilateral treaties still allow for the enforcement of such settlements, while under the autonomous **151**

<sup>229</sup> A complete list can be found on the DIS website at <www.dis-arb.de>; for a list of the various BIT see annex.

<sup>230</sup> *BGH* 25.09.2003, SchiedsVZ 2003, 281 with note by *Kröll*; *BGH* 21.09.2005, SchiedsVZ 2005, 306.

regime that is no longer possible.<sup>231</sup> Furthermore, a number of the bilateral treaties further limit the possible grounds to refuse the recognition of the award to public policy and a lack of jurisdiction of the tribunal. Thus, even awards rendered in proceedings which do not conform to the agreed procedure may be enforced under such treaties.<sup>232</sup>

### 2. Enforcement under the national Regime for Recognition and Enforcement

- 152** It follows from § 1061 ZPO and the reference to the New York Convention 1958 contained therein, that on the basis of Article III NYC, all foreign awards will be recognized and enforced in Germany unless the other party can prove that one of the grounds for refusal enumerated in Article V NYC exists. In that rare case, the court declares that the award is not recognized in Germany. It has, however, no competence to set the award aside.
- 153** Pursuant to § 1064 (3) ZPO, the facilitated form requirements for the exequatur of domestic awards also apply to foreign awards.<sup>233</sup> Thus, it is not necessary to submit a copy of the arbitration agreement and certification of copies may be made by counsel.
- 154** The court's decision declaring the award enforceable is provisionally enforceable. Thus, a possible recourse in the form of an appeal on a point of law to the Federal Court of Justice does not *ipso jure* prevent enforcement. Any declaration of enforceability may be revoked when the award has been set aside in its country of origin (§ 1061 (3) ZPO).

### 3. Grounds to refuse Enforcement

- 155** The reasons for denying enforcement are nearly identical to the grounds for the setting aside of domestic awards discussed above and are largely interpreted in the same way. Some specific issues, however, in applying Article V NYC are worth mentioning.
- 156** It is controversial to what extent a party, which has not made use of existing remedies at the place of arbitration, is precluded from relying on such defects in exequatur proceedings in Germany. The prevailing view, however, appears to be that reliance on defects may be precluded if a party could have obtained effective

<sup>231</sup> *BayObLG* 05.07.2004, *BayObLGR* 2004, 381 (enforcement of a settlement under the Bilateral Treaty with Austria).

<sup>232</sup> *BGH* 23.02.2006, *SchiedsVZ* 2006, 161 (164) = *IHR* 2006, 125 = (2006) *Int.A.L.R.* N-59; (German-Soviet Treaty of 25.04.1958 – Art. 8 (3) = *BGBI.* 1959 II, 221 *et seq.* = *Geimer/Schütze* (2005), *Internationaler Rechtsverkehr*, Vol. IV, No. 745, pp. 3 *seq.*

<sup>233</sup> *BGH* 25.09.2003, *SchiedsVZ* 2003, 281.

protection at the place of arbitration, had it made use of the remedies there.<sup>234</sup> The existence of such remedies will at least make it harder for a party to argue that enforcement of the award would be contrary to public policy.

With regard to the absence of a valid arbitration agreement, (Article V (1) (a) NYC), the prevailing view in Germany is that the applicant bears the burden of proof for showing that an arbitration agreement was entered into,<sup>235</sup> while the defendant must prove the alleged invalidity of the agreement. Another particularity applies with regard to the form requirements for an arbitration agreement. The Federal Court of Justice has recently adopted a very enforcement friendly attitude, so that it is no longer required that the underlying arbitration agreement meets the comparably strict form requirement of Article II NYC. Rather, in the light of Article VII NYC it is also considered to be sufficient if the arbitration agreement either meets the form requirements of § 1031 ZPO or that of the law determined according to the ordinary conflict of laws rules for agreements,<sup>236</sup> Article 11 EGBGB. The latter in turn provides that an agreement will be formally valid if it meets either the form requirements of the law to which the parties have submitted it or that of the place where it was entered into.

The violation of rules of public policy is always a ground for refusing enforcement of the award (§ 1061 ZPO and Article V (2)(b) NYC). The applicable German case law of the Federal Court of Justice generally applies a very narrow interpretation of public policy and, in relation to foreign awards, the even more restrictive standard of international public policy is used.<sup>237</sup> As a result, courts have enforced foreign awards which would have been considered to violate national public policy in relation, for example, to their reasoning.<sup>238</sup> Violation of procedural public policy is excluded if remedies at the place of

<sup>234</sup> *OLG Karlsruhe* 27.03.2006, *SchiedsVZ* 2006, 281 (282) with note by *Gruber* and by *Kröll*, *IPRax* 2007, 430; *OLG Stuttgart* 14.10.2003, (2005) *Int.A.L.R.* N-48; for details see Part II, *Kröll*, § 1061 paras 49 *seq.*

<sup>235</sup> *OLG Brandenburg* 13.06.2002, *IPRax* 2003, 349; *OLG Schleswig* 30.03.2000, *RIW* 2000, 706 (707); *OLG Rostock* 22.11.2001, *IPRax* 2002, 401 (403); *BayObLG* 12.12.2002, *NJW-RR* 2003, 719; *OLG Celle*, 04.09.2003, available at <www.dis-arb.de>; *Stein/Jonas-Schlosser* (2002), Anhang § 1061 para. 74; critical *Kröll/Wenzel*, Art. VII New York Convention and the Need to Produce an Arbitration Agreement, (2004) 19(4) *Mealey's IAR* 27.

<sup>236</sup> *BGH* 21.09.2005, *SchiedsVZ* 2005, 306 (307); for different views see *OLG Schleswig* 30.03.2000, *RIW* 2000, 706 (form requirement of Art. II NYC); *OLG Dresden* 13.01.1999 (form requirement of § 1031 ZPO).

<sup>237</sup> *BGH* 15.05.1986, *NJW* 1986, 3027 (3028); *id.* 16.09.1993, *BGHZ* 123, 268 (270) = *NJW* 1993, 3269; *id.* 23.02.2006; *OLG Hamburg* 04.11.1998, *RPS* 1/1999, 16; *OLG Brandenburg* 02.09.1999, *RPS* 1/2001, 21; *id.*, 11.05.2000; against such a distinction *Schwab/Walter* (2005), Chap. 30 para. 21 according to whom the definition of the domestic *ordre public* is already much wider than in other countries so that there is no need to distinguish between the *ordre public national* and the *ordre public international*.

<sup>238</sup> *OLG Bremen* 30.09.1999, *RPS* 2/2000, 18 (20); for an English summary see (2001) *Int.A.L.R.* N-26.

arbitration provide reasonable protection.<sup>239</sup> A violation of international public policy, however, exists where the award was obtained by fraud<sup>240</sup> or where a party was never informed about the arbitral proceedings because service was based on a fiction.<sup>241</sup>

### XIII. MULTI-PARTY ARBITRATIONS

- 159** The German arbitration law does not contain specific provisions dealing with multi-party situations, though multi-party arbitrations are a standard occurrence in German arbitration practice.<sup>242</sup> They are either dealt with by the applicable arbitration rules, which sometimes contain specific rules, or by the application of the general rules of the German arbitration law.<sup>243</sup>
- 160** The problem of multi-party arbitrations must be considered when drafting *ad hoc* arbitration agreements, and particularly the issue of the choice of arbitrators,<sup>244</sup> since the equality of the parties is an element of international public policy.<sup>245</sup> A breach of this principle would be a ground for setting aside the award,<sup>246</sup> or a ground for not recognizing a foreign award.<sup>247</sup> Under the DIS Rules, all parties on one side must agree to the choice of arbitrator; otherwise, the arbitrator for both sides will be chosen by the DIS. Although this has not, so far, been the subject of a judgment of the highest courts, it is generally held that such a solution would be upheld by the Federal Court of Justice.
- 161** The organization of such multiparty proceedings is left to the arbitral tribunal and the discretion granted by the German Arbitration law usually allows to find appropriate solutions for the particular situation. The tribunal only has to ensure that all parties are treated equal and get a fair chance of presenting their case.

<sup>239</sup> *BGH* 01.02.2001, RPS 1/2001, 14; cf. *Kröll*, Party pursuing bias claim against arbitrator must do so at place of arbitration German Federal Court of Justice rules, (2002) 17(8) *Mealey's IAR* 34.

<sup>240</sup> *BayObLG* 06.11.2003, IDR 2004, 48.

<sup>241</sup> *BayObLG* 16.03.2000, RPS 2/2000, 15; in the case the requirements for such service fiction were not met.

<sup>242</sup> For details see Part II, *Nacimiento/Abt*, § 1035 paras 34 *et seq.*

<sup>243</sup> *OLG Frankfurt* 24.11.2005, *SchiedsVZ* 2006, 219 *et seq.*

<sup>244</sup> *Sociétés BKMI et Siemens c. Société Dutco Construction*, *Rev.Arb.* 1992, 470 = *BB* 1992, Beilage No. 15, p. 27.

<sup>245</sup> Cf. *Berger*, The German arbitration law of 1998 – first experiences, in: *Briner et al.* (eds.), *FS-Böckstiegel*, 2001, p. 31 (39).

<sup>246</sup> § 1059 (2) No. 2 (b) *ZPO*.

<sup>247</sup> Art. V (2)(b) *NYC*.

#### XIV. INSOLVENCY OF A PARTY

The insolvency of a party does not in itself affect the arbitral proceedings. The arbitration agreement remains binding and the insolvency of one party neither prevents the initiation of arbitral proceedings nor the termination of existing proceedings.<sup>248</sup> Rather, the insolvency administrator is considered to be bound by the arbitration clause. He thus steps in on behalf of the insolvent party and takes up the proceedings where they stand.<sup>249</sup> For reasons of fairness, the arbitral tribunal should allow the insolvency administrator sufficient time to adequately prepare the further proceedings. Where the insolvent party, however, even lacks the necessary funds to participate in the arbitral proceedings, the arbitration agreement may – pursuant to the controversial view held by the Federal Court of Justice – become inoperable.<sup>250</sup> **162**

By contrast, state court proceedings are interrupted pursuant to § 240 ZPO until either the insolvency administrator takes up the court proceedings or the insolvency proceedings are terminated. This applies also to the court proceedings in support of arbitral proceedings.<sup>251</sup> **163**

Where insolvency occurred after the award has been issued, a court is not prevented from declaring the award enforceable.<sup>252</sup> Insolvency proceedings bar only execution, not any preceding acts such as the declaration of enforceability. **164**

<sup>248</sup> Raeschke-Kessler/Berger (1999), paras 689 et seq.

<sup>249</sup> *BGH* 19.07.2004, SchiedsVZ 2004, 259 (260); *Flöther*, Schiedsverfahren und Schiedsabrede unter den Bedingungen der Insolvenz, *DZWiR* 2001, 89 (93).

<sup>250</sup> *BGH* 14.09.2000, *Yearbook XXVII* (2002), 265 = *CLOUT* 404; *Wagner*, Impecunious Parties and Arbitration Agreements, *SchiedsVZ* 2003, 206; *cf.* *DIS* (ed.), *Financial Capacity of the Parties – A Condition for the Validity of Arbitration Agreements?*, Frankfurt am Main 2004; *Kröll*, *Arbitration and Insolvency Proceedings – Selected Problems*, in: *Mistelis/Lew* (eds), *Pervasive Problems in International Arbitration*, Alphen aan den Rijn 2006, pp. 357 et seq.

<sup>251</sup> *BGH* 21.11.1966, *KTS* 1966, p. 246; *Weigand-Wagner* (2002), Germany, para. 205; *Raeschke-Kessler/Berger* (1999), para. 695.

<sup>252</sup> *OLG Dresden* 25.09.1998, available at <www.dis-arb.de>; *OLG Brandenburg* 02.09.1999, *BB* 2001, Beilage No. 6, p. 21.

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This valuable publication provides the first full, detailed commentary in English on the German arbitration law, as well as on the rules of the German Institute of Arbitration (DIS). With its clear, detailed discussion of the many issues that can arise in the course of commercial arbitral proceedings, Arbitration in Germany offers comprehensive guidance to all parties either planning to arbitrate in Germany or which are already involved in arbitral proceedings or arbitration-related court proceedings in Germany. In addition, the book will be an invaluable resource for understanding the Model Law in any of the many jurisdictions that have adopted that law.

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## Table of Contents

Forewords	i
Preface	v
Summary Table of Contents	ix
Table of Contents	xi
List of Contributing Authors	xxi
List of Abbreviations	xxvii
<b>PART I – GERMANY AS A PLACE FOR INTERNATIONAL AND DOMESTIC ARBITRATIONS – GENERAL OVERVIEW</b>	<b>1</b>
<b>PART II – COMMENTARY ON THE GERMAN ARBITRATION LAW (10<sup>TH</sup> BOOK OF THE GERMAN CODE OF CIVIL PROCEDURE)</b>	<b>63</b>
<b>PART III – COMMENTARY ON THE ARBITRATION RULES OF THE GERMAN INSTITUTION OF ARBITRATION (DIS RULES)</b>	<b>655</b>

<b>PART IV – SELECTED AREAS AND ISSUES OF ARBITRATION IN GERMANY</b>	807
<b>ANNEXES</b>	1085

## Table of Contents

Forewords	i
Preface	v
Summary Table of Contents	ix
Table of Contents	xi
List of Contributing Authors	xxi
List of Abbreviations	xxvii
<b>PART I – GERMANY AS A PLACE FOR INTERNATIONAL AND DOMESTIC ARBITRATIONS – GENERAL OVERVIEW</b>	<b>1</b>
GERMANY AS A PLACE FOR INTERNATIONAL AND DOMESTIC ARBITRATIONS – GENERAL OVERVIEW <i>Karl-Heinz Böckstiegel / Stefan Kröll / Patricia Nacimiento</i>	3
<b>PART II – COMMENTARY ON THE GERMAN ARBITRATION LAW (10<sup>TH</sup> BOOK OF THE GERMAN CODE OF CIVIL PROCEDURE)</b>	<b>63</b>

---

CHAPTER I – GENERAL PROVISIONS	65
§ 1025 – Scope of Application <i>Gerhard Wagner</i>	65
§ 1026 – Extent of Court Intervention <i>Gerhard Wagner</i>	81
§ 1027 – Loss of Right to Object <i>Gerhard Wagner</i>	85
§ 1028 – Receipt of Written Communications in Case of Unknown Whereabouts <i>Gerhard Wagner</i>	91
CHAPTER II – ARBITRATION AGREEMENT	94
§ 1029 – Definition <i>Rolf Trittmann / Inka Hanefeld</i>	94
§ 1030 – Arbitrability <i>Rolf Trittmann / Inka Hanefeld</i>	112
§ 1031 – Form of Arbitration Agreement <i>Rolf Trittmann / Inka Hanefeld</i>	126
§ 1032 – Arbitration Agreement and Substantive Claim Before Court <i>Peter Huber</i>	139
§ 1033 – Arbitration Agreement and Interim Measures by Court <i>Richard Kreindler / Jan Schäfer</i>	157
CHAPTER III – CONSTITUTION OF ARBITRAL TRIBUNAL	169
Introduction to §§ 1034–1039 <i>Patricia Nacimiento / Amelie Abt</i>	169
§ 1034 – Composition of Arbitral Tribunal <i>Patricia Nacimiento / Amelie Abt</i>	179
§ 1035 – Appointment of Arbitrators <i>Patricia Nacimiento / Amelie Abt</i>	190
§ 1036 – Challenge of an Arbitrator <i>Patricia Nacimiento / Amelie Abt</i>	207
§ 1037 – Challenge Procedure <i>Patricia Nacimiento / Amelie Abt</i>	224

---

§ 1038 – Failure or Impossibility to Act <i>Patricia Nacimiento / Amelie Abt</i>	234
§ 1039 – Appointment of Substitute Arbitrator <i>Patricia Nacimiento / Amelie Abt</i>	241
CHAPTER IV – JURISDICTION OF ARBITRAL TRIBUNAL	248
§ 1040 – Competence of Arbitral Tribunal to Rule on its Jurisdiction <i>Peter Huber</i>	248
§ 1041 – Interim Measures of Protection <i>Richard Kreindler / Jan Schäfer</i>	262
CHAPTER V – CONDUCT OF ARBITRAL PROCEEDINGS	275
Introduction to §§ 1042–1050 <i>Klaus Sachs / Torsten Lörcher</i>	275
§ 1042 – General Rules of Procedure <i>Klaus Sachs / Torsten Lörcher</i>	277
§ 1043 – Place of Arbitration <i>Klaus Sachs / Torsten Lörcher</i>	289
§ 1044 – Commencement of Arbitral Proceedings <i>Klaus Sachs / Torsten Lörcher</i>	302
§ 1045 – Language of Proceedings <i>Klaus Sachs / Torsten Lörcher</i>	307
§ 1046 – Statements of Claim and Defence <i>Klaus Sachs / Torsten Lörcher</i>	311
§ 1047 – Oral Hearings and Written Proceedings <i>Klaus Sachs / Torsten Lörcher</i>	318
§ 1048 – Default of a Party <i>Klaus Sachs / Torsten Lörcher</i>	329
§ 1049 – Expert Appointed by Arbitral Tribunal <i>Klaus Sachs / Torsten Lörcher</i>	335
§ 1050 – Court Assistance in Taking Evidence and other Judicial Acts <i>Klaus Sachs / Torsten Lörcher</i>	341

CHAPTER VI – MAKING OF AWARD AND TERMINATION OF PROCEEDINGS	346
§ 1051 – Rules Applicable to Substance of Dispute <i>Bettina Friedrich</i>	346
§ 1052 – Decision Making by Panel of Arbitrators <i>Fabian von Schlabrendorff / Anke Sessler</i>	363
§ 1053 – Settlement <i>Fabian von Schlabrendorff / Anke Sessler</i>	371
§ 1054 – Form and Contents of Award <i>Fabian von Schlabrendorff / Anke Sessler</i>	387
§ 1055 – Effect of the Arbitral Award <i>Fabian von Schlabrendorff / Anke Sessler</i>	397
§ 1056 – Termination of Proceedings <i>Fabian von Schlabrendorff / Anke Sessler</i>	410
§ 1057 – Decision on Costs <i>Fabian von Schlabrendorff / Anke Sessler</i>	416
§ 1058 – Correction and Interpretation of Award; Additional Award <i>Fabian von Schlabrendorff / Anke Sessler</i>	432
 CHAPTER VII – RECOURSE AGAINST AWARD	 436
§ 1059 – Application for Setting Aside <i>Stefan Kröll / Peter Kraft</i>	436
 CHAPTER VIII – RECOGNITION AND ENFORCEMENT OF AWARDS	 479
Introduction to §§ 1060–1061 <i>Stefan Kröll</i>	479
§ 1060 – Domestic Awards <i>Stefan Kröll</i>	488
§ 1061 – Foreign Awards <i>Stefan Kröll</i>	506

---

CHAPTER IX – COURT PROCEEDINGS	573
Introduction to §§ 1062–1065 <i>Hans-Patrick Schroeder</i>	573
§ 1062 – Competence <i>Hartmut Becker / Reinhard Scharl</i>	595
§ 1063 – General Provisions <i>Hartmut Becker / Reinhard Scharl</i>	603
§ 1064 – Particularities Regarding the Enforcement of Awards <i>Hartmut Becker / Reinhard Scharl</i>	613
§ 1065 – Legal Remedies <i>Hartmut Becker / Reinhard Scharl</i>	615
CHAPTER X – ARBITRAL TRIBUNALS NOT ESTABLISHED BY AGREEMENT	618
§ 1066 Mutatis Mutandis Application of the Provisions of the Tenth Book <i>Ulrich Haas</i>	618
<b>PART III – COMMENTARY ON THE ARBITRATION RULES OF THE GERMAN INSTITUTION OF ARBITRATION (DIS RULES)</b>	655
Introduction <i>Jens Bredow / Isabel Mulder</i>	657
Section 1 – Scope of Application <i>Jens Bredow / Isabel Mulder</i>	664
Section 2 – Selection of Arbitrators <i>Siegfried Elsing</i>	670
Section 3 – Number of Arbitrators <i>Siegfried Elsing</i>	673
Section 4 – Requisite Copies of Written Pleadings and Attachments <i>Jens Bredow / Isabel Mulder</i>	676
Section 5 – Delivery of Written Communications <i>Jens Bredow / Isabel Mulder</i>	679
Section 6 – Commencement of Arbitral Proceedings <i>Siegfried Elsing</i>	684

Section 7 – Costs upon Commencement of Proceedings <i>Jens Bredow / Isabel Mulder</i>	688
Section 8 – Delivery of Statement of Claim to Respondent <i>Jens Bredow / Isabel Mulder</i>	691
Section 9 – Statement of Defence <i>Siegfried Elsing</i>	693
Section 10 – Counterclaim <i>Siegfried Elsing</i>	695
Section 11 – Costs of Filing Counterclaim <i>Jens Bredow / Isabel Mulder</i>	698
Section 12 – Arbitral Tribunal with Three Arbitrators <i>Jens Bredow / Isabel Mulder</i>	700
Section 13 – Multiple Parties on Claimant or Respondent Side <i>Jens Bredow / Isabel Mulder</i>	705
Section 14 – Sole Arbitrator <i>Klaus-Peter Berger</i>	709
Section 15 – Impartiality and Independence <i>Klaus-Peter Berger</i>	712
Section 16 – Acceptance of Mandate as Arbitrator <i>Klaus-Peter Berger</i>	714
Section 17 – Confirmation of Arbitrators <i>Jens Bredow / Isabel Mulder</i>	717
Section 18 – Challenge of Arbitrator <i>Jens Bredow / Isabel Mulder</i>	720
Section 19 – Default of an Arbitrator <i>Jens Bredow / Isabel Mulder</i>	725
Section 20 – Interim Measures of Protection <i>Siegfried Elsing</i>	728
Section 21 – Place of Arbitration <i>Jörg Risse</i>	732
Section 22 – Language of Proceedings <i>Jörg Risse</i>	737
Section 23 – Applicable Law <i>Jörg Risse</i>	740

---

Section 24 – Rules of Procedure <i>Jörg Risse</i>	744
Section 25 – Advance on Costs of Arbitral Tribunal <i>Jörg Risse</i>	748
Section 26 – Due Process <i>Jörg Risse</i>	751
Section 27 – Establishing the Facts <i>Jörg Risse</i>	755
Section 28 – Oral Hearing <i>Jörg Risse</i>	758
Section 29 – Records of Oral Proceedings <i>Jörg Risse</i>	760
Section 30 – Default of a Party <i>Jörg Risse</i>	762
Section 31 – Closing of Proceedings <i>Jörg Risse</i>	765
Section 32 – Settlement <i>Siegfried Elsing</i>	767
Section 33 – Rendering of the Arbitral Award <i>Siegfried Elsing</i>	770
Section 34 – Arbitral Award <i>Siegfried Elsing</i>	773
Section 35 – Decision on Costs <i>Jens Bredow / Isabel Mulder</i>	776
Section 36 – Delivery of the Arbitral Award <i>Jens Bredow / Isabel Mulder</i>	782
Section 37 – Interpretation and Correction of Arbitral Award <i>Siegfried Elsing</i>	785
Section 38 – Effect of Arbitral Award <i>Siegfried Elsing</i>	787
Section 39 – Termination of Arbitral Proceedings <i>Siegfried Elsing</i>	789
Section 40 – Costs of Arbitral Proceedings <i>Jens Bredow / Isabel Mulder</i>	792

Section 41 – Loss of Right to Object <i>Jens Bredow / Isabel Mulder</i>	800
Section 42 – Publication of the Arbitral Award <i>Jens Bredow / Isabel Mulder</i>	802
Section 43 – Confidentiality <i>Jens Bredow / Isabel Mulder</i>	803
Section 44 – Exclusion of Liability <i>Jens Bredow / Isabel Mulder</i>	805
<b>PART IV – SELECTED AREAS AND ISSUES OF ARBITRATION IN GERMANY</b>	807
AD HOC ARBITRATION IN GERMANY <i>Stephan Wilske</i>	809
ICC ARBITRATION IN GERMANY <i>Detlev Kühner</i>	837
TRADE ARBITRATION IN GERMANY <i>Rainer Karstaedt</i>	863
MARITIME ARBITRATION IN GERMANY <i>Jan Wölper</i>	889
CONSTRUCTION ARBITRATION IN GERMANY <i>Christoph Benedict</i>	899
ARBITRATION OF BANKING AND FINANCE DISPUTES IN GERMANY <i>Norbert Horn</i>	919
ARBITRATION OF INSURANCE DISPUTES IN GERMANY <i>Hubertus Labes</i>	933
ARBITRATION OF INTELLECTUAL PROPERTY LAW DISPUTES IN GERMANY <i>Erik Schäfer</i>	953

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ARBITRATION OF CORPORATE LAW DISPUTES IN GERMANY <i>Christian Duve</i>	975
INVESTMENT ARBITRATION AND THE PARTICIPATION OF STATE PARTIES IN GERMANY <i>Alfred Escher / Patricia Nacimiento / Christoph Weissenborn</i>	1013
ENFORCEMENT OF DECISIONS DECLARING AWARDS ENFORCEABLE IN GERMANY <i>Stefan Rützel / Claudia Krapfl</i>	1061
<b>ANNEXES</b>	1085
<i>Annex I: Synopsis on the UNCITRAL Model Law and the German Arbitration Law</i>	1087
<i>Annex II: German Arbitration Law prior to 1 January 1998</i>	1115
<i>Annex III: Model Applications</i>	1123
<i>Annex IV: Bilateral Investment Treaties BITs concluded by the Federal Republic of Germany BITs (as of 12 February 2007)</i>	1153
<i>Annex V: German Model Treaty on the Encouragement and Reciprocal Protection of Investments (2005)</i>	1173
<i>Annex VI: List of Arbitration Related German Court Decisions published in English</i>	1185
Bibliography	1195
Index	1207