The European Arbitration Review

2019

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The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

Germany

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Summary

In recent years, the public perception of arbitration in Germany has been shaped by the ongoing discussion about the future of investment arbitration. This debate has been sparked by the not yet decided case of ***Vattenfall AB and others v Federal Republic of Germany***, in which the Swedish-German electricity producer claims compensation in relation to the German government's decision to phase out nuclear energy.[1] The tribunal's recent rejection of Germany's jurisdictional objection in light of the judgment of the European Court of Justice (ECJ) in the ***Achmea*** case will certainly continue to fuel this debate.[2]

While the debate on investment arbitration has been very politicised, emotional and at times escaped reality, commercial arbitration remains unaffected and a preferred dispute resolution mechanism for cross-border disputes. Germany maintains an excellent reputation as a reliable place of arbitration, both in domestic and in international arbitrations.

The success of commercial arbitration in Germany is driven by the reliable and efficient legal framework, the continuing growth and innovation of German arbitral institutions, first and foremost the German Arbitration Institute, and the generally arbitration-friendly jurisprudence of the German courts.[3]

THE GERMAN ARBITRATION LAW

Germany is a member state of the New York Convention of 1958 and, in 1997, enacted an arbitration framework in the 10th Book of the German Code of Civil Procedure (sections 1025–1066 ZPO), which is closely modelled on the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law). With very few exceptions, arbitration practitioners from other jurisdictions will therefore find that the legal framework for arbitration in Germany is very much aligned with international standards.

Contrary to many other jurisdictions and article 1(1) Model Law, the German arbitration law does not differentiate between international and domestic arbitration proceedings. Pursuant to section 1025(1) ZPO, the applicability of the German arbitration law is governed by the territoriality principle, ie, it is determined by the seat of the arbitration. Notably, German law specifically provides that the seat of the arbitration and the venue of hearings do not have to be identical. Section 1043(2) ZPO foresees that the arbitral tribunal may hold hearings, examine witnesses or deliberate at any place it deems fit.

However, German arbitration law does differentiate between foreign and domestic awards, when it comes to annulment and enforcement. Awards are not per se enforceable in Germany, but require a court order declaring the award to be enforceable.[4] The enforcement of foreign arbitral awards is directly governed by the New York Convention. To this end, section 1061(1) ZPO declares the New York Convention directly applicable. The enforcement of domestic arbitral awards is governed by sections 1060 and 1059 ZPO, which are closely modelled after article V of the New York Convention. Small differences do exist, however. For example, violations of procedural rules only justify annulling the award if the procedural violation, at least potentially, affected the outcome of the arbitration (section 1059(2) No. 1(d) ZPO). Mere formalities without any possible effect on the outcome of the arbitration therefore do not suffice to annul an award. Annulment proceedings are only admissible against domestic awards.[5]

Jurisdiction for the enforcement or annulment of arbitral awards lies directly with the responsible courts of appeals. Germany currently has 24 courts of appeals. The competent court of appeals is either the court named in the arbitration agreement or at the seat of

arbitration.[6] In case of a foreign seat, the court of appeals at the seat of the party against whom enforcement is sought or at the location of the assets has jurisdiction.[7]

German arbitration law also contains some minor peculiarities when it comes to the validity of arbitration agreements. First of all, section 1059(2)(1)(a) ZPO specifically provides that the parties may choose the law applicable to the arbitration agreement and that otherwise the law at the seat applies. Most agreements will merely contain a general choice of law clause, but not a separate specific choice of law clause for the arbitration clause. In this situation, the German Federal Court of Justice (FCJ) confirmed that the choice of law for the main agreement would also apply to the arbitration clause.[8] Secondly, German law contains very few restrictions on arbitrability.[9] Thirdly, German law also adopts a liberal approach with regard to the form of arbitration agreements. Any form of written documentation of the arbitration agreement is sufficient.[10] Only in the case of arbitration agreements with consumers, does the agreement need to be contained in a separate and personally signed document, which must not include any additional agreements, ie, an arbitration clause included in the main contract would be invalid.[11] This is particularly relevant in the case of arbitration agreements for shareholder disputes in corporate statutes of publicly owned companies, where shareholders may be considered consumers.[12] Importantly, however, any formal defects in the arbitration agreement are waived, once the respective party engages on the substance of the arbitration.[13] Generally, German courts tend to enforce arbitration agreements, even if the clause is erroneous and refers, for example, to a non-existing arbitral institution.[14]

Under German law, arbitral tribunals decide on their own jurisdiction, but such decision is subject to full review by the state courts – ie, ultimate ***Kompetenz-Kompetenz*** does not rest with the arbitral tribunal.[15] Before an arbitral tribunal is constituted, parties may also seek a declaratory decision from the competent German court on the admissibility of arbitration.-[16] Once the arbitral tribunal is constituted, any jurisdictional objections must be made, at the latest, with the statement of defence.[17]

German arbitration law does not contain a specific rule providing for the confidentiality of arbitration (which should therefore be separately agreed, to the extent it is not included in the applicable arbitration rules, if any).

THE NEW 2018 DIS ARBITRATION RULES

The predominant arbitration institution in Germany is the German Arbitration Institute (DIS). It administers arbitration and other alternative dispute resolution proceedings under a variety of rules. In addition, its yearly spring and fall conferences are also a hub of the vibrant German arbitration practitioner community.

In spring 2018, the DIS released the new DIS Arbitration Rules, which include a number of important innovations in comparison to the previous 1998 DIS Arbitration Rules. The new rules were developed over a period of 18 months in a structured process, which collected input and feedback from nearly 300 arbitration practitioners, organised into three committees. The 'consolidation committee', which functioned as a 'sounding board' for the drafting committee, also included representatives from major corporations and took a keen interest in contributing to the development of modern and efficient arbitration rules.

The new DIS Arbitration Rules are available in German and English and include guidelines for:

- increasing procedural efficiency (annex 3);

- supplementary rules for expedited proceedings (annex 4);
- supplementary rules for corporate disputes (annex 5); and
- dispute management rules (annex 6).

They continue to embrace a 'civil law touch' to arbitration while at the same time adopting accepted international standards that had not been part of the old rules. The major changes are outlined below.

Electronic Communication

Article 4.1 now provides for electronic communication of all submissions apart from the initial request for arbitration. It also requires that the DIS be included in all communications, which was not the practice under the old rules, and is a prerequisite for the more active role the DIS takes under the new rules.

Streamlined Initiation Of The Arbitration

The process for the initiation of the arbitration and constitution of the arbitral tribunal has been revised and streamlined. Under the old rules, following the initiation of the arbitration with the statement of claim, the time limit for the respondent's statement of defence was set by the arbitral tribunal after its constitution. This practice could lead to significant delays; usually it took two to three months to constitute an arbitral tribunal. Under article 7 of the new rules, the respondent now must file an initial response including a nomination of its co-arbitrator within 21 days (article 7.1) and submit a statement of defence within 45 days, both from the time of the receipt of the request for arbitration (article 7.2). The DIS or, after its constitution, the arbitral tribunal, may extend the deadline for the statement of defence (article 7.3; see also article 4.9, which now generally allows the DIS to extend all deadlines apart from those set by the arbitral tribunal). Counterclaims, if any, shall be submitted together with the statement of defence (article 7.5). The revised process is intended to allow for the 'front-loading' of the arbitration process and should result in the arbitral tribunal receiving an initial set of submissions at the time of its constitution or shortly thereafter.

Constitution Of The Arbitral Tribunal

Article 10 now allows the parties to agree that the arbitral tribunal constitutes any uneven number of arbitrators. Absent any such agreement, three arbitrators remain the default rule (article 10.2). However, any party may request that the newly established Arbitration Council decides that a sole arbitrator shall be appointed instead of a three-member tribunal. This change should help reduce costs and be useful, in particular, in smaller cases. In order to profit from this mechanism in appropriate cases, parties should consider leaving the number of arbitrators in the arbitration agreement open, in particular, if they expect the possibility of smaller claims. The new arbitration rules also no longer require, by default, that the president of the arbitral tribunal or sole arbitrator be a qualified lawyer.[18] The time limit for the joint nomination of the president by the co-arbitrators has been shortened from 30 to 21 days (article 12.2). In case of a sole arbitrator, the new DIS Arbitration Rules do not contain any default time limit, but instead provide for the DIS to set a deadline (article 11).

Multiparty And Multi-contract Arbitrations

A significant change is the introduction of a set of provisions on multiparty and multi-contract arbitrations as well as on the consolidation and joinder of proceedings.

Multiple Contracts

Claims arising from multiple contracts may be arbitrated in one proceeding if the parties have agreed so (article 17.1). If such claims are based on multiple arbitration agreements, the arbitration agreements must be compatible with each other (article 17.2), eg, not stipulate different seats or numbers of arbitrators. If the later requirement is in dispute the compatibility is decided by the arbitral tribunal, unless the DIS finds that it cannot constitute an arbitral tribunal at all, in which case the proceedings are terminated (article 42.4(ii)). Parties expecting multi-contract scenarios should therefore make sure that the arbitration clauses in all contracts are compatible with each other and explicitly stipulate that multi-contract arbitrations should be possible.

Multiparty Arbitrations

Similarly, claims involving more than two parties may be arbitrated in one proceeding if the arbitration agreements for all parties stipulate so, or if the parties have otherwise agreed so (article 18.1). If this is in dispute, in particular absent an express agreement, the arbitral tribunal decides on the admissibility of multiparty proceedings. Again, parties expecting such circumstances should provide for an express agreement in their arbitration clauses to avoid any uncertainties.

Joinder

Article 19.1 now also allows the joinder of an additional party, but only before the appointment of the first arbitrator.

Consolidation

Finally, article 8.1 allows for the consolidation of several arbitrations into one proceeding if all parties agree to it. In this case, the DIS may (but does not have to) consolidate the later arbitrations into the first proceeding, unless the parties agreed differently.

Interim Relief

Article 25.1 now explicitly provides for the authority of the arbitral tribunal to grant interim relief. While the introduction of an emergency arbitrator mechanism was discussed intensively during the revision process, the revised rules ultimately do not contain such a mechanism.

Case Management

The new rules also introduce and further regulate a mandatory case management conference. Pursuant to article 27.1, a first case management conference must be held within 21 days after the constitution of the arbitral tribunal. During this conference, the tribunal must discuss with the parties whether:

- the rules for expedited proceeding set out in annex 4 shall apply;
- whether any measures from a catalogue of measures to increase the efficiency of the proceedings set out in annex 3 shall apply; and
- whether a resolution of the dispute in mediation proceedings is possible (article 27.4).

In the first or a later case management conference, the arbitral tribunal should also discuss whether experts should be employed and, if so, how to efficiently conduct the expert procedure (article 27.7). During or following the first case management conference, the

arbitral tribunal is supposed to issue its first procedural order and a procedural timetable (article 27.5).

Measures For Increasing Procedural Efficiency

Annex 3 suggests that the parties and the tribunal consider and adopt, as appropriate, the following measures for increasing procedural efficiency:

- limiting the length or the number of submissions;
- conducting only one oral hearing;
- dividing the proceedings into multiple phases;
- rendering partial awards or procedural orders on specific issues;
- limiting document production;
- providing the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto; and
- making use of information technology.

Expedited Proceedings

Under application of the procedure for expedited proceedings in annex 4, the final award shall be made no later than six months after the initial case management conference (article, 1 annex 4), each party may only file one further submission after the request for arbitration and initial answer (article 3, annex 4) and the arbitral tribunal shall only hold one oral hearing, which may be dispensed with if all parties so agree (article, 4 annex 4).

Encouraging Settlements

The 'civil law touch' remains notable in article 26, which encourages the arbitral tribunal to facilitate an amicable settlement of the arbitration at every stage of the proceedings, unless any party objects to this. The later limitation is new and intended to alleviate potential concerns of international parties not used to tribunals actively engaging in settlement discussions.

Costs Of The Arbitration

The administration of the arbitrators' fees and expenses and the costs of the arbitration underwent significant changes in order to relieve the arbitral tribunal from having to administer advances on costs and, in particular, setting its fees itself. The new DIS Arbitration Rules maintain the principle of determining the arbitrators' fees relative to the amount in dispute. While the amount in dispute is initially determined by the arbitral tribunal (article 36.2), any party may challenge the tribunal's determination within 14 days and request that the Arbitration Council review it (article 36.3). The Arbitration Council also may reduce the arbitrators' fees in case the draft award is delivered late, eg, after the default time limit of three months after the hearing or last submission (article 37). Similarly, the arbitral tribunal may take into account the efficient conduct of the proceedings by the parties in its decision on the allocation of costs (article 33.3).

Introduction Of Limited Scrutiny

Article 37 introduces a limited scrutiny of the draft award by the DIS. While the DIS had not reviewed draft awards under the old rules, it now reviews them for formal errors and may also

suggest other modifications on a non-mandatory basis to the arbitral tribunal (article 39.3). There was broad agreement during the revision process, however, that the newly introduced limited review should not reach the level of scrutiny exercised by other arbitral institutions, in particular the International Chamber of Commerce.

Challenge Of An Arbitrator

The decision on challenges of arbitrators is shifted from the arbitral tribunal to the new Arbitration Council (article 15.4). This is another example of strengthening the independence of the arbitral process and improving the public perception of arbitration. Parties should note the short time limit for challenges in article 15.2 of 14 days from the time of first obtaining knowledge of the facts and circumstances giving rise to the challenge is rather short.[19] The Arbitration Council may also remove arbitrators it considers unfit to fulfil their office (article 16.2).

Incorporation Of Alternative Dispute Resolution Methods

Should the parties resolve their dispute by means of an alternative DIS dispute resolution mechanism (mediation, conciliation, adjudication or expert determination), the resulting decision or settlement may be recorded in an arbitral award on agreed terms (article 41.2). This mechanism strengthens these alternative dispute resolution mechanisms by ensuring the enforceability of their outcome.

Confidentiality

In line with international practice, the DIS rules now allow the publication of the award, if all parties consent to it (articles 44.1, 44.3).[20]

CONCLUSION

Overall, the new DIS Arbitration Rules constitute a significant change and improvement from the old arbitration rules, which were very closely modelled on the ad hoc arbitration procedure prescribed in the ZPO. The new rules adopt a much more international approach and incorporate provisions and well-established concepts, which will be familiar to international arbitration practitioners from other jurisdictions. The DIS itself takes a more proactive approach under the new rules, allowing for more flexibility and increasing the efficiency and speed of proceedings. In particular, the DIS also took over the administration of the arbitrators' fees and expenses – a change that has been welcomed by the arbitrator community and aims to improve the public perception of arbitration. As a consequence of its new role, the DIS had to grow its case management team and develop new practices. The success of the new rules will also depend on the DIS's continuing efforts to implement the goals of the rules revision process in daily case management. The new, modern and efficient rules certainly provide the foundation for further developing arbitration in Germany and for attracting more international users to considering DIS arbitration.

Notes

[1] ECJ, *Vattenfall AB and others v Federal Republic of Germany*, Case C-284/16, Judgment, 6 March 2018; *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12.

[2] *Slowakische Republik v Achmea BV*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018.

[3] The caseload at the German Arbitration Institute continues to steadily grow from an average of 117 new arbitrations in 2005–2010 to 146 new arbitrations per year in 2010–2015 and, most recently, an average of 157 new arbitrations per year in the last three years (2015–2017) (www.disarb.org/en/39/content/statistik-id72; last accessed 6 September 2018).

Sections 1060(1), 1061(2) ZPO.
[4] This follows from section 1059(2)(1)(a) ZPO, which stipulates that arbitration agreements must be valid under German law if the parties have not agreed a different law. Consequently, section 1059 ZPO assumes that the seat of arbitration is in Germany. See also Wilske/Markert, Beck Online Commentary on the ZPO, 29th ed., 1 July 2018, Section 1059, paragraphs 9–10.
[5] Section 1062(1) ZPO.
[6] Section 1062(2) ZPO.
[7] FCJ, Case No. XI ZR 349/08, Judgment, 8 June 2018, paragraph 30.
[8] Disputes about permanent housing rental agreements are not arbitrable (section 1030(2) ZPO).
[9] Section 1031(1) ZPO.
[10] Section 1031(5) ZPO.
[11] Voit, Musielak/Voit, Commentary on the ZPO, 15th ed. 2018, Section 1031, paragraph 9.
[12] Section 1031(6) ZPO.
[13] The Berlin Court of Appeals enforced an arbitration agreement, which referred to the 'German Chamber of Commerce'. However, there is no 'German Chamber of Commerce', but only a number of regional chambers. The court interpreted this clause to refer to the German Arbitration Institute, Kammergericht, Case No. 20 SchH/12, Order, 3 September 2012, published in German Arb. J. 2012, 337.
[14] Section 1040(1) and (3) ZPO; FCJ, Case No III ZR 265/03, Judgment, 13 January 2015, published in *German Arbitration Journal* 2012, 95, at p 96.
[15] Section 1032(2) ZPO.
[16] Section 1040(2) ZPO.
[17] Such requirement was contained in article 2.2 of the 1998 DIS Arbitration Rules.
[18] Article 14 of the ICC Arbitration Rules, for example, provides for a time limit of 30 days.
[19] Under article 42 of the 1998 DIS Arbitration Rules the consent of the DIS was required in addition to the consent of all parties.
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