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Law and Practice

Contributed by Weil, Gotshal & Manges LLP

CONTENTS

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1. General

1.1 Prevalence of Arbitration

International arbitration is commonly accepted and used in Germany as a method of dispute resolution. Interest in international arbitration increases in cases with complex commercial disputes and in areas such as shipping (with the specialised court: German Maritime Arbitration Association) and M&A. Due to this broad acceptance, several standard forms exist and provide for a valid arbitration agreement.

1.2 Trends

Apart from the typical areas that are always relevant in arbitral proceedings in Germany, three areas exist that will most likely be of relevance to the landscape of arbitration in Germany during the next years: Brexit, digitalisation and third-party funding.

Brexit

Following the Brexit referendum in June 2016 (and given the actual withdrawal of the UK from the EU on 29 March 2019), its implications for the arbitral landscape are still unclear. The legal uncertainty created by Brexit and substantial loss of confidence is causing a particular negative impact on London as one of the capitals for arbitration. Despite the reassuring statements from London arbitration practitioners that the significance of London will not diminish, mere practical problems such as visa procurement indicate otherwise. Hence, various European cities – particularly Frankfurt – are ready to take over the leading role as the go-to place for arbitration.

Digitalisation

"Digitalisation" is not only a trend but also a topic that will heavily affect the legal framework of how things are handled in national courts as well as in arbitration proceedings. As for arbitration in Germany, the first real changes can be seen

in the German Institution for Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit e.V.*, "**DIS**") and its completely revised arbitration rules ("**DIS-SchO 2018**") that came into effect as of 1 March 2018. For example, pursuant to Article 4 DIS-SchO 2018 all submissions in arbitration proceedings shall be sent electronically. It is to be expected that digitalisation will continue to shape arbitration in the future.

Litigation Funding/Third-Party Funding
Third-party funding of arbitration is of particular interest to parties that would otherwise refrain from carrying out costly international arbitration due to budgetary constraints. Many follow-up questions, such as the impact of third-party funding on the arrangement of process cost security, must be assessed in the course of time. During the last few years, third-party funding has started to play a more prominent role in arbitration proceedings in Germany and it is likely that this trend will not only continue but will become more relevant in the future.

1.3 Key Industries
While arbitration has been the predominant method of dispute resolution in various M&A disputes for many years, the key industries for disputes in international arbitration in Germany are the energy and IT sectors. The number of disputes in those two sectors increased during the last year and will most likely be part of the core industries for international arbitration activity in the next years.

1.4 Arbitral Institutions
The leading institution for arbitration in Germany is the DIS, a registered association for the promotion of national and international arbitration. The rising significance of the DIS especially in international arbitration proceedings can be seen in the following statistics:

In 2017 a total of 160 arbitration proceedings were initiated with the DIS (in 2016: 172) with a total amount of EUR1,040,861,397 in dispute (in 2016: EUR1,031,476,140). 33% of the proceedings are held in English and 67% are held in German (in 2016: 26% English and 74% German). In 2017 a total of 44% of the proceedings involved at least one non-German party (in 2016: 32%).

The figures show a decent increase in international arbitration and it is to be expected that, due to several steps taken, like the revised DIS-SchO 2018 rules, and other influences such as Brexit, Germany's role as a place for international arbitration will expand.

In addition to the DIS as leading institution, several smaller and sometimes more specialised arbitration institutions in Germany exist, such as the German Maritime Arbitration Association in Hamburg. However, the DIS is by far the most significant institution.

2. Governing Law

2.1 Governing Law
Arbitration proceedings in Germany are regulated in the Tenth Book of the German Code of Civil Procedure (*Zivilprozessordnung*) ("**ZPO**") in Secs. 1025-1066 ZPO. The Tenth Book is largely a literal adaptation of the UNCITRAL Model Law on International Commercial Arbitration (" **UNCITRAL Model Law**") and covers international as well as national arbitration. Furthermore, unlike the UNCITRAL Model Law, the Tenth Book does not restrict disputes to solely "commercial" arbitration.

2.2 Changes to National Law
In the last year, no significant changes were implemented with respect to international arbitration in national arbitration law in Germany. Also, there is no pending legislation that may change the arbitration landscape in Germany.

Major changes were addressed in the last months and were implemented in the DIS rules. As of 1 March 2018, the revised DIS-SchO 2018 came into effect. The DIS-SchO 2018 applies to all DIS arbitration proceedings initiated on or after 1 March 2018. The new rules focus on the improvement of procedural efficiency (time/cost-efficiency, streamlining of deadlines), as well as increasing the transparency and integrity of arbitration. The DIS-SchO 2018 furthermore includes provisions on arbitrations with more than one contract and/or more than one party, joinder of additional parties and consolidation of arbitrations. The typical approach in Germany is to encourage amicable dispute resolution. The revised DIS-SchO 2018 will most likely have a positive effect on Germany as a place of arbitration due to the focus on the time- and cost-effectiveness of arbitration as well as the possibility to submit documents in digital form (with few exceptions).

3. Arbitration Agreement

3.1 Enforceability
Under German law an arbitration agreement must fulfil certain form requirements to be enforceable:

Firstly, an arbitration agreement may be an agreement independent from the main contract (agreement as to arbitration) but may also be an individual clause contained in the main agreement (arbitration clause) (Sec. 1029(2) ZPO).

Secondly, pursuant to German law, the arbitration agreement must either be in a document signed by the parties, or be part of the documented correspondence by the parties (Sec. 1031(1) ZPO).

Generally, if the form requirements are not met, the national courts will render the arbitration agreement invalid. Sec. 1031(6) ZPO, however, stipulates that any failure to comply with formal requirements shall be remedied by an appearance being made, in the hearing before the arbitral tribunal, on the merits of the case.

If a consumer is involved, stricter form requirements apply. The arbitration agreement must be signed by all parties to the agreement in their own hands in a separate contract to the main contract (Sec. 1031(5) ZPO). These requirements do not apply if a notary records the agreement.

3.2 Arbitrability

Generally, any disputes from the past as well as in the future regarding a specific legal relationship (contractual or non-contractual in nature) are arbitrable.

Regarding the fields of law, any claim involving property law (*vermögensrechtlicher Anspruch*) can be subject of an arbitration (Sec. 1030(1) ZPO). Legal disputes in the context of a tenancy relationship for residential space in Germany cannot be referred to arbitration (Sec. 1030(2) ZPO). Furthermore, there exist additional disputes that can only be adjudicated by state courts and are not "arbitrable". This includes, for example, certain types of family law (such as divorces and questions of descent), employment law (as defined in Sec. 4, 101-110 Labour Courts Law) and criminal law (except conciliation proceedings in private claims).

3.3 National Courts' Approach

If the requirements of an arbitration agreement, as outlined above, are met, German courts accept and enforce arbitration agreements. Under German law, it is possible to interpret the actual intent of the parties in cases where the wording of the arbitration might be unclear. Therefore, national courts are willing to submit a legal dispute to an arbitration tribunal, if the parties intended to enter into arbitration proceedings.

3.4 Validity

Under German law, an arbitration clause is to be treated as an agreement that is independent of the other provisions of the agreement, Sec. 1040(1) ZPO. This means that the arbitration agreement and the underlying contract are two separate and independent agreements and have to be treated as such.

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are generally free when selecting the arbitrators and can choose any person they deem fit to fulfil such role. They can agree on the number of arbitrators (Sec. 1034(1) ZPO), on a procedure for the appointment of the arbitrator(s) (Sec. 1035(1) ZPO), and on a procedure for the recusal of an arbitral judge (Sec. 1037(1) ZPO).

The parties are limited in their autonomy to the extent that each arbitrator has to be impartial and independent (Sec. 1036(2) ZPO). Additionally, according to Sec. 40 of the German Judiciary Act, a professional judge (*Berufsrichter*) can only become an arbitrator if he or she has been jointly commissioned by all parties and when he or she has the permission to do the part-time work.

4.2 Default Procedures

If the parties did not agree on the procedure to appoint the arbitral judge(s), one party can file a petition that the national court shall appoint the judge (Sec. 1035(3) ZPO).

In proceedings with three arbitral judges, each of the parties shall appoint one arbitral judge and those two arbitral judges shall in turn appoint the presiding arbitral judge. If the parties agree on a panel with three judges, and a party fails to appoint their judge, or the two arbitral judges are unable to agree on the presiding judge, the national court shall appoint the third arbitral judge upon a party having filed a corresponding petition.

4.3 Court Intervention

The court cannot intervene without the request of the party/parties to appoint an arbitrator as mentioned above and in cases where the parties cannot agree on an arbitrator.

4.4 Challenge and Removal of Arbitrators

In an arbitration proceeding, the party intending to recuse an arbitral judge must submit its reason and the intention to remove the arbitrator within two weeks following the knowledge of the circumstances according to which the arbitrator can be recused (Sec. 1036(2) ZPO). If the arbitrator and/or the other party do not consent, the arbitral tribunal makes a ruling on the recusal. If the arbitral tribunal decides that the arbitrator shall not be recused, the party requesting the recusal may file a petition within one month with the Higher Regional Court. However, the arbitral tribunal, including the arbitral judge, continue the proceedings until the Higher Regional Court reaches a decision (Sec. 1037(3) ZPO).

If the arbitral judge is unable to perform the assigned tasks, or fails to do so, the parties can agree on the termination of the agreement with the arbitrator. If no agreement can be found (either between the parties and the arbitrator or between the parties), each party can file a petition with the court to obtain a decision as to the termination of the arbitral judge's appointment (Sec. 1038(1) ZPO).

Prior to the new DIS-SchO 2018, the regulations concerning the challenge and removal of arbitrators were similar to the national law, ie that the arbitral tribunal, and therefore the

challenged arbitrator, had to decide whether the concerns against the arbitrator were justified. Under the new rules (see Article 15 DIS-SchO 2018), the party has to file a request, the "**Challenge**", with the DIS. The DIS transmits the Challenge to the challenged arbitrator, the other arbitrators and the other party, and sets a time limit for comments, which will be circulated between the parties and the arbitrators. However, it is not the arbitral tribunal but the Arbitration Council (*DIS-Rat*) that decides upon the Challenge.

4.5 Arbitrator Requirements

The obligations under German law and the DIS-SchO as to arbitrators' independence, impartiality and/or disclosure of potential conflicts of interest are basically identical:

Under German law, an arbitrator has to be impartial and independent. He or she is obliged to disclose all circumstances that might give rise to doubts as to his or her impartiality, also after his or her appointment and – if he failed to do so – before the close of the arbitration proceedings (Sec. 1036(1) ZPO).

Article 9 DIS-SchO 2018 sets out the rules for the impartiality and independence of the arbitrators and their duties of disclosure. Therefore, every arbitrator shall be impartial and independent with the agreed qualifications and following the acceptance, the arbitrator shall sign a declaration confirming his impartiality, independence and qualifications. Additionally, the arbitrator is required to disclose any facts or circumstances that could give rise to doubts as to the arbitrator's impartiality and independence. This obligation is a continuing obligation throughout the appointment as arbitrator.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Generally, any claim involving property law (*vermögensrechtlicher Anspruch*) can be subject of an arbitration. Legal disputes in the context of a tenancy relationship for residential space in Germany cannot be referred to arbitration (Sec. 1030(2) ZPO). Furthermore, additional disputes are not "arbitrable" (see **3.2 Arbitrability**).

5.2 Challenges to Jurisdiction

Under German law, the tribunal has the authority to decide on its own competence, the so-called competence-competence. In this respect, the arbitral tribunal may decide on its own competence, and on the existence or validity of the arbitration agreement (Sec. 1040(1) ZPO). However, national courts may overturn such decision in a second step (see **5.3 Circumstances for Court Intervention**).

5.3 Circumstances for Court Intervention

There are two options whereby a national court can address issues of jurisdiction of an arbitral tribunal:

In cases in which a party challenged the jurisdiction of the arbitral tribunal and the arbitral tribunal confirmed its jurisdiction in the form of a preliminary ruling (*Zwischenentscheid*), the challenging party can seek a review of such decision by the Higher Regional Court within one month. The arbitration proceedings continue and an arbitration award may even be delivered (Sec. 1040(3) ZPO).

Furthermore, a party can file a request with the Higher Regional Court to determine the admissibility or inadmissibility of arbitration proceedings until the arbitral tribunal has been formed (Sec. 1032(2) ZPO).

5.4 Timing of Challenge

The party has several options to go to a national court, depending on how far the arbitral proceedings are advanced.

According to Sec. 1032(2) ZPO, a party can file a request with the Higher Regional Court to determine the admissibility or inadmissibility of arbitration proceedings before the arbitral tribunal has been formed.

In cases in which an arbitral tribunal has been formed, the arbitral tribunal firstly determines its own competence-competence, but in cases in which the arbitral tribunal confirmed its jurisdiction the challenging party can seek a review of such decision by the Higher Regional Court within one month (Sec. 1040(3) ZPO).

In any event, the objection that the arbitral court lacks jurisdiction must be raised no later than the submission of the statement of defence (Sec. 1040(2) ZPO). If the party that wishes to raise an objection fails to in a timely manner to do so, it is precluded from challenging such objection at a later point in time.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

The national courts will review the questions of admissibility and jurisdiction after one party has filed a request with the Higher Regional Court. The court will review all facts and legal submissions made in order to assess whether the arbitration tribunal has jurisdiction.

After an award has been rendered and a petition for reversal has been filed, such award may be reversed, among other reasons, when the court determines that the subject matter of the dispute is not eligible for arbitration under German law.

5.6 Breach of Arbitration Agreement

If a plaintiff brings a lawsuit before the national courts in Germany, the opposing party has to ask for dismissal of that claim prior to the hearing on the merits of the case commencing, based on the existence of an arbitration agreement and, hence, the lack of jurisdiction (Sec. 1032(1) ZPO). The court will review the question of its jurisdiction prior to going into the merits of the case and will decide upon the question of the validity of the arbitration agreement.

5.7 Third Parties

Third parties cannot become part of arbitration proceedings without their explicit consent and the compliance with the formalities and legal requirements according to Secs. 1029(2) and 1031(1) ZPO, ie an agreement must exist in written form (see **3.1 Enforceability**). However, it is possible that parties enter into an arbitration agreement to the benefit of a third party, ie that the third party has the right to decide whether proceedings can be validly initiated before an arbitral tribunal or solely before national courts.

The DIS-SchO 2018 introduced multiparty arbitration and multi-contract arbitration (Article 17-19 DIS-SchO 2018). It is now easier to join third parties to arbitration proceedings in order to conclude efficiently legal disputes within a singleproceeding rather than multiple proceedings.

6. Preliminary and Interim Relief

6.1 Types of Relief

According to German law, a party can go to either the arbitral tribunal (Sec. 1041(1) ZPO) or to national courts (Sec. 1033 ZPO) to request preliminary measures or measures of temporary relief. This includes attachment measures (*Arrest*), measures of protection (*Sicherungsverfügung*), measures of arrangement (*Regelungsverfügung*) or even measures of performance (*Leistungsverfügung*). While national courts are limited to those measures, which are provided for by German law, an arbitral tribunal's possibilities are broader, as the arbitral tribunal may order such preliminary or interim relief measures as it deems fit with a view to the subject matter of the dispute, even if they are not known in German courts (eg *Mareva* injunctions/freezing orders).

6.2 Role of Courts

The national courts play a significant role in the context of interim relief:

Firstly, each party may – despite an arbitration agreement – turn to the national court and file a petition for interim measures. This petition can be filed before and even after the arbitration proceedings have commenced (Sec. 1033 ZPO).

Secondly, in those cases in which the arbitral tribunal granted preliminary or interim relief measures, the national court may – upon request by one party – declare such measures enforceable according to Sec. 1041(2) ZPO. In particular, this enables the national court to refuse the enforceability of the interim relief measure as granted by the arbitral tribunal in the event that such preliminary measure is disproportionate. The national courts are even able to reverse or modify an interim relief measure by the arbitral tribunal (Sec. 1041 (3) ZPO).

In many cases, it is preferable to file the request for an interim relief measure before the national court instead of before the arbitral tribunal. On the one hand, a party may seek interim relief measure prior to the forming of the arbitral tribunal and, on the other hand, the decision of the arbitral court is subject to the national court's scrutiny, which will delay the process.

6.3 Security for Costs

National courts as well as arbitral tribunals may order security for costs in connection with such measures they "deem fit" with a view to the subject matter (Sec. 1041(1) ZPO). The security for costs can be a (pre-)condition for an internal order or an external enforcement.

7. Procedure

7.1 Governing Rules

Secs. 1042-1050 ZPO contain the basic procedural provisions of arbitration proceedings in Germany.

The most significant mandatory rules are stipulated in Sec. 1042(1) and (2) ZPO: the right of the parties to be treated equally as well as the right to be heard and to be represented by an attorney.

Limited only by these general rules, most of the procedural steps can be determined/modified by the parties. This includes, inter alia, the commencement of the proceedings (Sec. 1044 ZPO), the language to be used (Sec. 1045 ZPO), the time limit for the presentation of the request and underlying facts as well as the reply (Sec. 1046) and what consequences arise in the case of failure by a party to comply with procedural rules (Sec. 1048 ZPO). The parties may also agree on the procedure of taking evidence, eg whether an oral hearing shall be held or not (Sec. 1047 ZPO) and the appointment of experts by the arbitral tribunal (Sec. 1049 ZPO).

7.2 Procedural Steps

Due to the nature of arbitration proceedings conducted in Germany, there are only a few procedural steps that are required by law. As outlined in **7.1 Governing Rules**, this in-

cludes the right of the parties to be treated equally, the right to be heard and the right to be represented by an attorney.

Otherwise, the organisation of arbitration proceedings is mainly subject to the parties' autonomy. In a case where the parties have not entered into a deviating agreement regarding the particular procedural steps, the arbitral tribunal has to comply with Sec. 1044 et seq. ZPO, which contain various provisions for a basic structure of the proceedings, i.e. the arbitral proceedings commence on the date on which a request for arbitration is received by the respondent; within the period agreed by the parties or determined by the arbitral tribunal, the claimant must complete its statement of claim and the respondent must serve its statement of defence.

Any other procedural steps (e.g. oral hearing, hearing of experts) are – in the absence of a party agreement – subject to the sole discretion of the arbitral tribunal.

7.3 Powers and Duties of Arbitrators

The arbitral tribunal may – subject to any party agreement and mandatory rules – determine the procedural rules at its sole discretion (Sec. 1042(4) ZPO). The decision of the arbitral tribunal for a specific procedural regulation may even combine procedural rules from civil law and common law and – in consultation with the parties – be amended during the procedure.

The specific duties of an arbitrator are implied pursuant to Secs. 1035(5) and 1036 ZPO: an arbitrator must act impartially and independently and has – throughout the entire proceedings – to disclose all circumstances which might give rise to doubts in respect thereof. In addition, the arbitrator is required to maintain discretion with regard to the proceedings against any uninvolved third parties.

7.4 Legal Representatives

There are no special qualifications required to act as legal representatives before an arbitral tribunal in Germany. However, German arbitration law stipulates that (domestic as well as foreign) attorneys may not be prohibited from acting as legal representatives before an arbitral tribunal throughout the entire proceedings (Sec. 1042(2) ZPO).

Additionally, the parties themselves are allowed to agree on a restriction as regards the choice of the legal representative to several requirements, on the basis of certain generic characteristics (eg specialist lawyer, specific language skills), as long as the restrictions do not violate mandatory legal provisions and do not result in an imbalance between the parties.

8. Evidence

8.1 Collection and Submission of Evidence

Generally, the parties are free to agree upon the procedural rules of the arbitration including the taking of evidence. In cases in which the parties did not agree upon specific rules, the arbitral tribunal will determine them at its sole discretion (Sec. 1042(4) ZPO). This also includes the authority to decide on the admissibility of the taking of evidence.

The general rules of the ZPO do not apply; hence, every procedure can be determined by the arbitral tribunal. German civil procedure is not familiar with discovery and/or disclosure as a tool to bring evidence into a dispute. Nonetheless, very often the arbitral tribunal – especially in international arbitration – decide to follow the IBA Guidelines on Taking of Evidence in International Arbitration. One of the consequences of the "German approach" is that the collection and submission of written evidence is less expensive than in countries with a full-disclosure approach.

When documentary evidence is submitted, the arbitral tribunal will often use the "Redfern Schedule", according to which the parties request the disclosure of certain information/documents along with detailed reason why such request should be granted. The opposing party has the opportunity to respond to the request in the same document. If the parties cannot agree upon the disclosure of the requested documents, the arbitral tribunal will rule on each request and add a column with the decisions in the schedule.

Another tool often used in international arbitration in Germany is the submission of witness statements, especially in the form of affidavits. Affidavits are usually submitted in the written legal briefs of the parties. The ZPO in litigation does not provide for the submission of affidavits (with the exception of preliminary injunctions, in which affidavits (*eidesstattliche Versicherungen*) are basically mandatory), but will hear the witnesses in person to question them.

With the increased participation of international parties, cross-examination of witnesses has become more and more common and is widely accepted in Germany.

8.2 Rules of Evidence

There are no rules of evidence that apply specifically to arbitral proceedings seated in Germany. The arbitral tribunal generally chooses the German procedural rules if no explicit other agreements are in place.

However, in most arbitration proceedings with an international context, especially with international parties, the arbitral tribunal decides together with the consent of both parties to follow the IBA Guidelines on Taking of Evidence in International Arbitration.

8.3 Powers of Compulsion

The arbitral tribunal has the power to request the attendance of witnesses and/or experts. However, since the arbitral tribunal lacks any coercive force and has no power over the attendance of the participants it can request the assistance of national courts (Sec. 1050 ZPO). The right to request assistance can also be exercised by a party of the arbitration as long as the arbitral tribunal has approved such an approach (Sec. 1050 ZPO).

The national court will review the petition and will support the arbitral tribunal, unless it deems it to be inadmissible, in accordance with its procedural rules as applying to the taking of evidence: for example, it is not possible for a national court in Germany to order the discovery of documents, since there is no legal basis for such a request in the German procedural law; hence, the national court can administer an oath, the questioning of a witness who did not appear or the questioning of a party outside of Germany through mutual judicial assistance.

Generally, the tribunal will discuss availability with all participants to the arbitration to find a suitable time for everyone. If a party refuses to produce the requested documents or if the requested witness does not appear in front of the arbitral tribunal to give its witness statement, the tribunal may draw adverse inferences for the party that is responsible for the production of the documents and/or the appearance of the witness.

The DIS-SchO 2018 allows the arbitral tribunal to appoint experts, examine other witnesses than those called by the parties and order the parties to produce documents/data, to establish the facts of the case that are relevant and material to make a decision (Article 28 DIS-SchO 2018). The arbitral tribunal is not limited to the evidence offered by the parties.

9. Confidentiality

9.1 Extent of Confidentiality

The statutory arbitration rules do not address the question of confidentiality neither for the arbitrators nor for the parties. However, the parties can agree on a confidentiality clause. Generally, the parties expect that the arbitration proceedings are confidential and will agree on a corresponding clause, because one of the benefits of an arbitration instead of national courts (where proceedings are generally public) is the confidentiality.

According to Article 44 DIS-SchO 2018, any person somehow involved in the arbitration proceeding is bound to treat the arbitration confidential and is not allowed to disclose any information at all, even including the existence of the arbitration and the names of the parties, unless agreed otherwise between the parties.

10. The Award

10.1 Legal Requirements

According to Sec. 1054 ZPO, the following requirements concerning the form and content of an award must be fulfilled: (i) the award must be in writing; (ii) the award must be signed by the judge/judges or, where not all judges sign the award, the majority of the judges must sign and a reason must been given why not all arbitrators signed the award; (iii) the reasons for the award must been given, unless otherwise agreed between the parties; (iv) the date and place of arbitration must be set out in the award; and (v) a signed award must be transmitted to each party.

Sec. 1054 ZPO is relevant for all cases in which Germany is the place of arbitration. If the arbitral award does not comply with the legal requirements, a petition for a declaration of enforceability of an arbitration award will be denied or the declaration of enforceability of an arbitration award will be rescinded.

10.2 Types of Remedies

There are no explicit limits on the types of remedies that an arbitral tribunal may award. Usually, the remedies to be awarded by an arbitral tribunal are basically identical to the various options of judgments rendered by ordinary courts. The typical example of a type of remedy that it not enforceable in Germany are awards that render punitive damages. German arbitration law does not provide for any punitive or exemplary damages in general, because is contrary to *ordre public* in German. Nonetheless, even if an arbitral tribunal renders an award that also includes punitive damages, merely the award in that respect would not be enforceable, whereas the other remedies can still be enforced.

10.3 Recovering Interest and Legal Costs

Generally, parties can and will agree upon a procedure for the recovery of legal costs and interest payments if any. In cases in which the parties did not agree on the costs, it is upon the arbitral tribunal to decide on the share of the costs that the parties have to bear (Sec. 1057(1) ZPO). This includes all costs that accrued due to the filing of the arbitration as well as the defence costs against such a claim plus the fees for the arbitrator(s) and potential witnesses and/or experts, travel costs, etc.

It is the tribunal's discretion to assess the costs. However, the circumstances of the individual case must be taken into account when doing so. In most of the cases, the arbitral tribunal will render a decision similar to Sec. 91 German Civil Code (*Bürgerliches Gesetzbuch* ("BGB"), i.e. the party that

loses the dispute will bear the costs of the dispute, including the costs for the other party.

From the procedural perspective, the arbitral tribunal can either rule on the costs in the arbitration proceedings on the merits or in a separate award (Sec. 1057(2) ZPO).

As regards interest, the ZPO does not regulate the tribunal's power to award this. However, whether interest is to be awarded depends on substantive law. According to Sec. 188 BGB, money debt must bear interest during the time of default, which is five percentage points above the basic rate of interest when consumers are involved and nine percentage points above the basic rate of interest when consumers are not involved.

The DIS also revised the articles the recovery of costs in the DIS-SchO 2018. Firstly, Article 32 DIS-SchO 2018 defines costs of the arbitration (fees and expenses of the arbitrators and experts appointed by the arbitral tribunal; reasonable costs of the parties including legal fees, fees of experts and expenses of any witnesses; administrative fees). The arbitral tribunal decides on the allocation of the costs, with the exception of their own fees and expenses and the administrative fees (Article 33.1 DIS-SchO 2018). The arbitral tribunal is free in making its decision on the costs but must take into account the circumstances of the case (Article 33.3 DIS-SchO 2018). This includes not only the outcome of the arbitration but also how efficiently the parties conducted the arbitration proceeding (Article 33.3 DIS-SchO 2018). The reason behind these cost sanctions is the intention of the DIS to make its arbitrations more efficient, transparent and flexible.

11. Review of an Award

11.1 Grounds for Appeal

An arbitral award in Germany is final and not appealable. Otherwise, the proceedings before an arbitral tribunal would constitute a lower instance to the ordinary court proceedings. If parties want an opportunity to appeal the award, they have to mutually agree on such proceeding. The parties may also agree on the manner in which and at what time the appeal should be filed and to what extent the appellate court shall review the award. The agreed competence may be limited solely to legal questions but may also include a second review of the facts. In the absence of a conflicting agreement, withdrawal of the appeal and waiver of the appeal are permitted without restrictions.

However, since one of the reasons to choose arbitration proceedings rather than national court proceedings is that there is only one instance and therefore, the time between the initiation of the proceedings and the final award is less than national court proceedings, it is very rare that parties agree on an appeal process in Germany.

The ZPO lacks specific requirements for the appeal, but nonetheless, Sec. 1025 et seq. ZPO are applicable to the procedure of the arbitral appeal. If the parties agreed on the appeal of the award, the award of the first instance cannot be declared provisionally enforceable, even if the parties agreed on such procedure. The declaration of enforceability may only be granted to the final arbitral award.

If the parties agreed on arbitration proceedings, but one of the parties does not file an appeal, the party is prevented from bringing forward those arguments that should have been raised in the appeal in the petition for a reversal according to Sec. 1059 ZPO. The reason is that an agreement of a possible appeal is usually interpreted in a way that all unclaimed defects are precluded with regard to a petition for reversal of an arbitration award.

Pursuant to Sec. 1058 ZPO, the parties may file a petition to correct, interpret and amend the arbitration award. This, however, does not qualify as an "appeal" but rather gives the parties an opportunity to file a request that the arbitral tribunal correct computing errors, spelling mistakes and similar errors or rather clarifies an ambiguous or incomplete award.

Another question is whether an award is enforceable or is to be set aside. This proceeding to declare an award unenforceable or to set the award aside does not constitute an appeal, but is another measure to defend oneself against an unfavourable award (see **11.3 Standard of Judicial Review**).

11.2 Excluding/Expanding the Scope of Appeal

The reasons according to which a petition of reversal is successful are enumerated in Sec. 1059(2) ZPO and exhaustive, ie the list cannot be expanded and also the reasons (or one of the reasons) cannot be excluded.

11.3 Standard of Judicial Review

The ordinary court is not bound by the findings of the arbitral tribunal. The available published decisions by ordinary court indicate that the ordinary courts made additional findings. However, this does not lead to the conclusion that the ordinary courts are otherwise bound by the findings of the arbitral tribunals.

Under no circumstances is the ordinary court bound by any legal opinion/decision made by the arbitral tribunal. The ordinary court is free in its decision. However, in the case of allegations that are not contradicted/challenged before the arbitral tribunal, the ordinary court is bound by these allegations and cannot consider adverse statements of the other party, if the party failed to address such aspects in the arbitration proceedings. An exception is made in cases in

which *ordre public* interests are violated. The ordinary court's own findings may also be made in favour of maintaining the award.

The sole statutory legal remedy against a domestic arbitration award is a petition for reversal pursuant to Sec. 1059(1) ZPO. The petitioner must reasonably assert at least one of the four reasons:

The first reason is that one of the parties could not conclude an arbitration agreement due to the laws that are relevant to such party personally, or that the arbitration agreement is invalid.

The second reason is the lack of proper notification of the arbitral judge/the arbitration proceedings or the petitioner's inability to bring forward his or her defence.

The third reason is that the arbitration award concerns a dispute that is not within the scope of the agreement between the parties, or that the award contains decisions that are above and beyond the limits of the arbitration agreement. Furthermore, only a partly reversal of the award is possible for such matters which do not fall within the scope of the arbitration agreement.

The fourth reason is that the formation of the arbitral tribunal or the arbitration proceedings did not comply with statutory provisions or with an admissible agreement between the parties, and that it is to be assumed that this affected the arbitration award.

The reasons provided for in Sec. 1059(2) ZPO only state an opportunity for the ordinary court itself to determine if a reversal of the arbitration award should take place.

A petition for reversal may only be filed by a party which is burdened due to the procedural effects of the arbitral award (ie the losing party). The petition has to be filed within three months following the receipt of the award (Sec. 1059(3) ZPO). Jurisdiction lies with the ordinary courts according to Sec. 1062(1) ZPO. The competent court for the petition for reversal is either the Higher Regional Court agreed between the parties in the arbitration agreement or, if no such agreement exists, the Higher Regional Court in the district the arbitration proceedings took place. The ordinary court may only order the reversal of the entire award or the dismissal of the petition. It is not entitled to amend the arbitral award in any way.

According to Sec. 1059(5) ZPO, in cases of doubt, the consequence of the reversal of the arbitration award is that the arbitration agreement once again will enter into force concerning the subject matter of the dispute.

The above-mentioned proceeding solely applies to arbitration awards rendered in Germany. A party cannot file a petition for the reversal of a foreign arbitration awards. The legal remedy against a foreign arbitration award is codified in Secs. 1061-1065 ZPO concerning the recognition and enforcement of foreign arbitration awards.

12. Enforcement of an Award

12.1 New York Convention

Germany signed "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards" ("New York Convention") in 1958, and ratified the New York Convention on 30 June 1961. In Germany, the New York Convention entered into force on 28 September 1961. An initial reservation regarding reciprocity (Article 1(3) New York Convention) was withdrawn in the course of a reform of German arbitration law in 1998. Thus, ordinary German courts will also enforce awards rendered in a state which is not a party to the New York Convention.

Furthermore, Germany has ratified bilateral agreements promoting and protecting investments with nearly 140 states and numerous multilateral international conventions relating to arbitration (eg the European Convention on International Commercial Arbitration and the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States), which often include further provisions regarding the enforcement of arbitral awards. However, most countries have already ratified the New York Convention, which substantially reduces the practical relevance of any similar enforcement conventions in Germany.

12.2 Enforcement Procedure

According to German arbitration law, there are different procedures regarding the enforcement of an award in Germany for a domestic award (resulting from a place of jurisdiction in Germany) and a foreign award (resulting from arbitral proceedings outside of Germany).

Domestic awards are automatically binding between the parties, unless they are set aside. Pursuant to Sec. 1055 ZPO, an arbitration award which was rendered in Germany has the effect of a final and binding judgment issued by an ordinary court. Such a domestic award must – before a compulsory enforcement can take place – initially be declared enforceable by an ordinary court. According to German provisions for compulsory enforcement, it is apparent that the relevant title for execution proceedings will in fact not be the award itself but rather the declaration of enforceability by an ordinary court.

The compulsory enforcement proceedings will only take place if the arbitration award has been declared enforceable by an ordinary court (Sec. 1060(1) ZPO). The petition for a declaration of enforceability is to be denied – while simultaneously reversing the arbitration award – if one of the grounds for reversal designated in Sec. 1059(2) applies (see **11.1 Grounds for Appeal**). Such grounds for reversal, however, shall not be taken into account insofar as a corresponding petition for reversal was already declined in a final and binding judgment or if such a petition is precluded according to Sec. 1059(3) ZPO (Sec. 1060(2) ZPO).

The recognition and enforcement of foreign arbitration awards is governed by the New York Convention (Sec. 1061(1) ZPO). Foreign awards, however – despite not requiring any special recognition proceedings – will only be recognised if no grounds exist to deny their enforcement. In practice, the different regimes for domestic and foreign awards differ only slightly due to the fact that the grounds to justify the refusal of recognition under the New York Convention are largely identical to the grounds for revocation according to Sec. 1059(2) ZPO. Both German arbitration law and the New York Convention base their grounds for refusal of recognition on the UNCITRAL Model Law.

The jurisdiction for the declaration of enforceability of the arbitration award (or the reversal of the declaration of enforceability) lies with the Higher Regional Court – unless the parties chose otherwise – in the district in which the venue of the arbitration proceedings is located (Sec. 1062(1) ZPO). If the place of jurisdiction is outside of Germany, the Higher Regional Court has jurisdiction in which the respondent is located/registered. As a formal requirement, the petitioner has to submit to the ordinary court the award or a copy thereof (Sec. 1064(1) ZPO).

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Generally, the enforceability of an award is granted in the form of an order. While the opposing party shall be given the opportunity to comment on the petition before a decision is taken, an oral hearing is only necessary if a petition for reversal of the award is filed or grounds for setting the award aside in the sense of Sec. 1059(2) ZPO are to be considered. That is the case if the party opposing the application has either invoked one of the grounds in Sec. 1059(2) ZPO or facts have been submitted or are known to the courts which could justify a violation of *ordre public* or the non-arbitrability of the dispute in the sense of Sec. 1059(2) ZPO.

According to Sec. 1063(3) ZPO, the presiding judge of the ordinary court may even – without hearing the opposing party first – order that an award is enforceable on a provisional basis.

Each party may file a complaint against the declaration of enforceability of the arbitration award, or the reversal of the declaration of enforceability (Sec. 1065 ZPO).

12.3 Approach of the Courts

Generally, German courts are considered to have a recognition-friendly approach. In a decision in January 2014, the German Federal Court of Justice held that, different from what the wording of Sec. 1059(2) No. 2.b ZPO would suggest, the recognition and enforcement of an arbitral award only violates public policy (*ordre public*) if it leads to a result which is "manifestly" incompatible with essential principles of German law. In general, the standard of review for foreign arbitration awards tends to be less stringent than that for domestic arbitration awards.