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Arbitration in Germany

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A Practice note describing the key features of the arbitral process in Germany. It examines the national legal framework, which is largely based on the UNCITRAL Model Law and contained within sections 1025 to 1066 of the Code of Civil Procedure (Zivilprozessordnung) (ZPO). It provides an overview of the main arbitral institutions, including the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit) (DIS), and addresses critical jurisdictional issues and the law governing arbitration agreements. The guidance also covers the constitution and powers of the arbitral tribunal, the conduct of proceedings, and the supportive role of German state courts. Furthermore, the note discusses the formal requirements for arbitral awards, the grounds for challenging an award, and the procedures for enforcement. It also touches on the allocation of costs and recent proposals for the modernisation of German arbitration law, offering valuable insights for parties contemplating arbitration in this jurisdiction.

Scope of this note

Germany has established itself as an important arbitration seat in the world. A major factor in this development has been the implementation of the UNCITRAL Model Law. Another factor is the emergence of the German Arbitration Institute (DIS) as an internationally respected arbitral institution with about 180 new cases each year. Furthermore, the number of ad hoc proceedings seated in Germany is estimated to be about 1,000 each year.

This note describes the significant features of the arbitral process in Germany, including:

- The key arbitral institutions in Germany.
- Jurisdictional issues and the law regarding arbitration agreements.
- The arbitral tribunal, including appointments and challenges.
- The arbitral procedure, from commencing an arbitration to the tribunal's decision.
- Powers of state courts in support of arbitration.
- Awards, including challenges to and enforcement of awards.
- Costs.

For detailed guidance on enforcing arbitration awards in Germany, see Practice note, Enforcing arbitration awards in Germany.

Sources of German arbitration law

The law on arbitration is contained in sections 1025 to 1066 of the Code of Civil Procedure (*Zivilprozessordnung*) (ZPO) and applies to all arbitrations having their place of arbitration in Germany. Although the provisions follow the UNCITRAL Model Law to a large extent, they do not distinguish between domestic and international arbitration proceedings. It is only at the enforcement stage that domestic and foreign awards are treated differently.

There are several mandatory provisions in the ZPO:

- The parties must be treated equally and each party must be given a full opportunity to present its case (*section 1042(1), ZPO*).
- Counsel cannot be excluded from acting as authorised representatives (*section 1042(2), ZPO*).
- Any default of a party justified by that party to the arbitral tribunal's satisfaction must be disregarded (*section 1048(4), ZPO*).

- The arbitral tribunal may rule on its own competence (*section 1040(1), ZPO*).

In addition, there are several mandatory provisions relating to the right of recourse to the state courts (*sections 1034(2), 1037(3), 1040(3), and 1041(2) and (3), ZPO*). German case law only provides guidance on the interpretation of the ZPO. In the German civil court system, judges are not bound by precedent. However, in practice judges take into consideration previous decisions by other, in particular higher, German courts.

Arbitration-related matters are decided at the level of the Higher Regional Courts (*Oberlandesgerichte*) (*section 1062, ZPO*). The parties may also designate jurisdiction of a particular Higher Regional Court in the arbitration agreement (*section 1062(1), ZPO*). The local courts (*Amtsgerichte*) are responsible for providing assistance in taking evidence (*section 1062(4), ZPO*).

Reform of arbitration law

On 28 January 2026, the German Federal Ministry of Justice and Consumer Protection published an updated draft bill for an Act to modernize German arbitration law, which is currently under consultation. The draft bill takes up a planned reform of German arbitration law dating back to the previous legislative period and develops earlier drafts. The process began on 18 April 2023, when the German Ministry of Justice (MOJ) published a key issues paper on reform of German arbitration law (10th book of the Civil Code of Procedure) (see Legal update, German Ministry of Justice publishes key issues paper on reform of German arbitration law). On 1 February 2024, the MOJ published, for public consultation, a draft bill for the modernisation of German arbitration law (see Legal update, German Federal Ministry of Justice publishes draft bill for modernisation of arbitration law) and on 26 June 2024, the MOJ published an updated draft bill. Unfortunately, the bill was not passed during the legislative period ending in early 2025. The current draft bill's main items of reform include:

- Arbitration agreements will no longer need to be concluded in writing; instead, they may also be concluded by other means of communication, in particular electronic communication.
- Specific rules on multi-party arbitrations to ensure an efficient constitution of the arbitral tribunal.
- Dissenting and concurring opinions with respect to arbitral awards are to be explicitly admissible.
- An additional ground for setting aside awards rendered in Germany, that will permit, for example, a set aside of awards procured by corruption or by a perversion of justice.
- Oral hearings are to be possible by video conference and arbitral awards may be issued in electronic form.
- Publication of arbitral awards will be permitted if the parties agree, with a view to increasing transparency.
- Concentration of award enforcement and set aside proceedings in the higher regional courts of the Commercial Court, where proceedings can be held in English.

To monitor further developments on the proposed reform of German arbitration law, see Practical Law Arbitration: What to expect: tracker: Germany: modernisation of arbitration law.

Key institutions

German Arbitration Institute (DIS)

The most prominent arbitration organisation is the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit) (DIS) whose establishment rules go as far back as 1920. The DIS, in its current form, is the result of a merger between the German Arbitration Committee and the German Arbitration Institute on 1 January 1992. The DIS has its main Secretariat in Cologne and an additional office in Berlin.

The DIS Arbitration Rules (DIS Rules) were first issued on 1 July 1998 and were revised in 2018, with the new Rules coming into force on 1 March 2018 (see Legal update, New DIS Rules come into force on 1 March 2018). The DIS Rules follow German arbitration law in all major aspects but are more detailed on certain issues. The 2018 Rules provide innovations dealing with efficiency of proceedings, cost effectiveness, multi-contract and multi-party arbitrations, and the transparency of the proceedings. They also include several annexes providing guidelines for expedited proceedings and for corporate law disputes and conflict management rules (see Legal update, New annexes to DIS Rules 2018 published). These annexes were previously available as supplemental rules. The DIS Rules are available in German and English (and other languages) on the DIS' official website.

All references to the "DIS Rules" in this note refer to the 2018 Rules.

In 2025, 193 new DIS arbitration proceedings were registered with a total amount in dispute of EUR4 billion.

For a step-by-step guide to arbitrating under the DIS Rules, see Practice note, Procedural steps in a DIS arbitration (2018 Rules).

International Chamber of Commerce (ICC)

The International Chamber of Commerce (ICC) is widely used. According to recent ICC statistics, German parties are one of the most frequent nationalities to be claimant or respondent in ICC arbitration proceedings. German cities are also a common choice for the place of an ICC arbitration.

Asian European Arbitration Centre (ASEAC)

The Asian European Arbitration Centre (ASEAC) was founded as the Chinese European Arbitration Centre (CEAC) in 2008 (see Legal update, New Chinese European Arbitration Centre opens in Hamburg). It rebranded as ASEAC in July 2023 to reflect a wider regional focus adopted by the institution. ASEAC is headquartered in Hamburg and focuses on the administration of commercial disputes between Asian, and in particular Chinese, and European parties. The revised ASEAC Arbitration Rules 2023 entered into force on 1 July 2023, replacing the previous version, issued in 2012 and known as the CEAC Hamburg Arbitration Rules. The ASEAC Arbitration Rules 2023 are based on the 2021 edition of the UNCITRAL Arbitration Rules. Information and materials are available on the ASEAC website.

Jurisdictional issues

German law recognises the concept of kompetenz-kompetenz. Therefore, the arbitral tribunal may rule on its own jurisdiction and on the existence and validity of the arbitration agreement (*section 1040(1), ZPO*). Any challenge to the arbitral tribunal's jurisdiction must be raised no later than the submission of the statement of defence (*section 1040(2), ZPO*).

If the arbitral tribunal rules in favour of its own jurisdiction at this stage, any party can apply to the court to challenge the tribunal's decision. The challenge must be made within one month of receiving written notice of the arbitral tribunal's ruling on jurisdiction. This right to challenge the tribunal's decision before a court cannot be excluded in an arbitration agreement. Any such agreement will be partially invalid insofar as it excludes recourse to the courts on jurisdictional issues (*OLG Munich, Case Number 34 SchH 10/13*).

If a party does not object to the tribunal's jurisdiction in a timely manner, it will be precluded from raising this objection at a later time (*section 1027, ZPO*). Similarly, if a party fails to challenge the tribunal's decision on jurisdiction in time, it will lose the right to do so.

Arbitration agreements

Formal requirements

The arbitration agreement can be in the form of a separate agreement or as a clause in a contract (*section 1029(2), ZPO*). If the arbitration agreement is contained in a contract (arbitration clause), it may constitute a standard term and condition under section 305(1) of the German Civil Code (*Bürgerliches Gesetzbuch*) (BGB). The BGB rules on standard terms originate from Council Directive 93/13/EEC on unfair terms in consumer contracts. However, some provisions also apply to commercial contracts. If the arbitration clause is considered to be a standard term, it may be subject to a specific validity control, especially with regard to fairness of the arbitral tribunal's constitution and the arbitration proceedings. However, the German courts are sensible to the commercial practice of including arbitration clauses in standard terms and conditions. The Federal Court of Justice has held that this does not prejudice the other party (*Docket No III ZR 164/06*). In particular, the user of standard terms does not have to demonstrate a specific interest in including an arbitration clause in his standard terms. Even if the clause allows the user of standard terms to unilaterally designate the arbitrator, it remains valid since the other party maintains its right to request the state court to appoint an arbitrator according to section 1034(2)(1) of the ZPO. In case *Docket No I ZB 69/16* discussed in Legal update, German Federal Court of Justice on conclusion of arbitration agreement based on trade usage, it was held that an arbitration agreement is not deemed to be concluded by implication on the basis that it is common for participants of a particular trade or industry to use arbitration as a method of resolving disputes. It further held that in the shipping industry, an arbitration agreement contained in the general terms and conditions of a bill of lading will only be deemed to be concluded if the bill of lading is actually issued and sent to the other party.

The formal requirements for an enforceable arbitration agreement are:

- The arbitration agreement must be contained either in a document signed by the parties or in an exchange of letters, faxes, telegrams or other means of telecommunication that provide a record of the agreement.
- The form requirement is deemed to have been complied with, if the arbitration agreement is contained in a document transmitted from one party to the other party (or by a third party to both parties) and, if no objection was raised in good time, the contents of the document are considered to be part of the contract according to common usage (commercial letter of confirmation).
- The parties can also refer to an arbitration agreement contained in the standard terms and conditions of one of the parties.
- An arbitration agreement is also concluded by the issue of a bill of lading, if the latter contains an express reference to an arbitration clause in a charter party.
- Arbitration agreements to which a consumer is a party must be contained in a separate written document signed by the parties, in an electronic document that bears a digital signature or in a notarial deed. No agreements other than those referring to the arbitration proceedings can be contained in this document or electronic document (this does not apply to a notarial deed).

(Section *1031, ZPO*.)

Any non-compliance with the formal requirements is deemed to be waived if the other party makes submissions on the merits of the dispute without objecting to the form of the arbitration agreement.

If the main contract must be notarised, this has no effect on the question of the validity of the arbitration clause. As the Federal Court of Justice has held, there is no notarisation requirement for an arbitration clause, and for the arbitration rules it refers to, if even the main contract must be notarised (see *Docket No III ZB 83/13*, discussed in Legal update, German Federal Court of Justice on right to an oral hearing and notarisation requirement for arbitration clause and arbitral rules).

If the arbitration agreement refers to institutional arbitration rules, these rules will generally apply in the version that is in force at the time the arbitration proceedings are initiated. However, the Federal Court of Justice has held that revised rules cannot, with retroactive applicability, expand the group of potential claimants or respondents entitled to bring a claim under that agreement. Therefore, the court denied a subsequent right of third parties to initiate arbitration based on revised institutional arbitration rules (see *Docket No. I ZB 52/17*, discussed in Legal update, Revised arbitration rules will not always apply to existing arbitration agreement (German Federal Court of Justice)).

Substantive requirements

A valid arbitration agreement must make clear that certain or all disputes between the parties arising out of a defined legal relationship will be finally settled by an arbitral tribunal to the exclusion of the state courts. General statutory provisions regarding the validity of a contract (such as incapacity to contract) also apply to an arbitration agreement.

The general approach of the German courts is to interpret arbitration agreements with a view to upholding their validity. For example, in a decision of the Higher Regional Court of Dresden, the court held that an arbitration agreement referring to the rules of the "International Chamber of Commerce in Dresden" should be interpreted to mean the arbitration rules of the ICC in Paris with a place of arbitration in Dresden (see *Docket No 11 SchH 4/08*, discussed in Legal update, Higher Regional Court of Dresden on the interpretation of an arbitration agreement).

Separability

An arbitration agreement is independent of, and separable from, the underlying contract, irrespective of whether it is contained in the contract or in a separate agreement (*section 1040(1)2, ZPO*). The main effect of separability is that the arbitration agreement will not automatically be affected by the invalidity of the main contract. Therefore, a challenge to, or rescission or termination of the underlying contract has no bearing on the validity of the arbitration agreement. However, an arbitration agreement can be terminated upon agreement of both parties and may be rescinded in the case of fraud or similar circumstances.

In Docket No I ZB 48/24, the German Federal Court of Justice (BGH) upheld an arbitration agreement, despite the fact that the contract containing it provided for a potentially invalid procedural rule (prohibiting parties from relying on the strict German law on General Terms and Conditions). The BGH held that, despite having initiated the arbitration itself, the applicant was entitled to apply to the court for a declaration that the arbitration was inadmissible under section 1032(2), ZPO (see Court proceedings brought in breach of a valid

arbitration agreement). However, that application was rejected and the BGH emphasised that the validity of an arbitration agreement must be determined separately from the validity of other provisions in the contract, such as agreed procedural rules. Therefore, even if certain procedural provisions are potentially invalid, this does not invalidate the arbitration agreement itself. The court's role on an application for inadmissibility is limited to assessing the validity of the arbitration agreement. Assuming it is valid, issues as to any agreed procedural rules or choice of law provisions are matters for the tribunal (see Legal update, German court upholds arbitration clause despite potentially invalid procedural rule in host contract (German Federal Court of Justice)).

For detailed discussion about the principle of separability, see Practice note, Separability of arbitration agreements in international arbitration.

Extension to non-signatories

An arbitration agreement generally only binds the signatories of the agreement. An arbitral award generally only binds the parties to the arbitration. However, in cases of assignment, agency, succession and insolvency, the assignee, principal, successor and insolvency administrator (respectively) are bound by the arbitration agreement and any arbitral award. For example, in a decision of the Federal Court of Justice, the court extended the effects of an arbitration clause that was concluded by the (later insolvent) company to the insolvency administrator (*Docket No III ZB 24/03*). The Higher Regional Court of Munich has held that a corporation's director will be bound by an arbitration clause contained in a share purchase agreement only if he or she was personally involved in the process of concluding the agreement and the agreement can be interpreted in such a way that the parties intended to specifically bind the director to the arbitration clause (see *Docket No 7 U 1365/18*, discussed in Legal update, German court considers whether directors bound by arbitration agreements concluded by them on behalf of corporations (Higher Regional Court of Munich)).

Unlike in certain other jurisdictions, such as France, the "group of companies doctrine" has not been adopted in German case law. This has been explicitly confirmed by the Federal Court of Justice in *Docket No III ZR 371/12*. However, the court also held that where the group of companies doctrine is applicable under a foreign law, this does not necessarily violate German public policy. On the facts of this case, the arbitration clause was to be extended to a patent owner who signed an arbitration agreement in a license agreement on behalf of a holding company, and to a company of which he was the sole shareholder. The Federal Court of Justice indicated that German public policy would not be violated (see Legal update, German Federal Court of Justice on group of companies doctrine).

A third party can only be joined in an arbitration if both of the following conditions are satisfied:

- All parties and the arbitral tribunal agree to the joinder.
- The third party agrees to be joined in the proceedings.

This also means that a third party cannot be forced to join an arbitration (unless there is, for example, an existing multi-party arbitration agreement).

Under the DIS Rules, multi-contract and multi-party arbitrations are provided for in detail. Claims arising out of more than one contract can be dealt with in one arbitration, provided that all parties agree. If there is more than one arbitration agreement, the arbitration agreements need to be compatible. Disputes on whether the parties have agreed or the arbitration agreements are compatible are decided by the arbitral tribunal (*section 17, DIS Rules*).

Claims between more than two parties can be arbitrated in one arbitration, if there is an arbitration agreement that binds all of the parties to have their claims decided in a single arbitration, or if all of the parties have so agreed in a different manner. Disputes on this question are decided by the arbitral tribunal. If a multi-party situation arises after an arbitration has been initiated, several arbitrations can be consolidated if all parties agree, and additional parties can be joined up to the appointment of any arbitrator (*sections 18, 8.1, 19.1, DIS Rules*).

On 15 March 2024, the DIS became the first arbitral institution to offer parties to an arbitration under its rules a set of supplementary rules for issuing third-party notices. The DIS also published a detailed practice note on the application of these supplementary rules, together with model clauses for parties wishing to agree to their use (see Legal update, DIS publishes Supplementary Rules for Third-Party Notices (DIS-TPNR)).

For detailed discussion about multi-party arbitration, see Practice notes, Multi-party and multi-contract issues in arbitration and Drafting multi-party and multi-contract arbitration clauses.

Arbitrability

German arbitration law has adopted a liberal and expansive view of arbitrable disputes. Generally, any claim involving an economic interest is arbitrable. Claims not involving an economic interest are arbitrable to the extent that the parties could conclude a settlement on the issue in dispute (*section 1030(1), ZPO*). Examples of disputes that are not arbitrable include questions involving criminal law and most family law matters.

Tort claims are arbitrable if they arise out of facts under a contract containing an arbitration clause. In this context, the Higher Regional Court of Munich confirmed that the question of arbitrability is to be decided by German law only if the place of arbitration is in Germany. Any foreign law is irrelevant to this question (see *Docket No 34 SchH 18/13*, discussed in Legal update Higher Regional Court of Munich on arbitrability of tort claims under German law).

Cartel damages claims have also been held to be arbitrable if a cartel damages claim is brought on the basis of a contract that is subject to an arbitration agreement (see Regional Court of Dortmund (*Docket No 8 O 30/16 (Kart)*), discussed in Legal update, Are cartel damages claims arbitrable?).

So-called intra-company disputes are also arbitrable. However, this was controversial for applications to set aside corporate resolutions adopted by a majority of shareholders in a German limited liability company. According to a decision of the Federal Court of Justice, an arbitration clause for such disputes must fulfil the following four minimum requirements:

- The arbitration clause must be included in the articles of association or in a separate agreement agreed upon by all shareholders.
- All shareholders must be made aware of the arbitration proceedings and must be given an opportunity to join.
- All shareholders must be able to participate in the selection and appointment of the arbitrator insofar as the arbitrator is not appointed by a neutral entity.
- All applications for the setting aside of corporate resolutions relating to the same matter in dispute must be put before one arbitral tribunal.

(Docket No II ZR 255/08.)

This also applies to intra-company disputes concerning the setting aside of a resolution adopted in a general partners' meeting of a German limited partnership (see *Docket No I ZB 23/16*, discussed in Legal update, German Federal Court of Justice revisits arbitrability of intracompany disputes).

However, if the arbitration clause explicitly excludes shareholder resolution disputes and only extends to disputes arising between the shareholders or between the corporation and its shareholders in connection with the articles of incorporation (meaning that the dispute is limited to the interpretation of these articles of incorporation), these requirements need not be fulfilled (see *Docket No I ZB 3/14*, discussed in Legal update, German Federal Court of Justice on validity of arbitration clause for corporate law disputes and right to be heard).

The DIS Rules in Annex 5 contain Supplementary Rules for Corporate Law Disputes, which comply with the requirements of the Federal Court of Justice.

Asymmetric arbitration clauses

Asymmetric arbitration clauses (also referred to as unilateral option clauses) are generally permissible. However, these types of arbitration clauses must be very carefully drafted. There is case law holding that two contractual provisions, one containing an arbitration agreement and the other determining a "place of jurisdiction", do not contradict each other. Rather, both provisions are upheld by interpreting them in a way that leaves each of them with its own independent scope of application. The choice-of-venue clause only sets a place, but does not determine the competence of the state courts to decide disputes arising out of the contractual relationship (see *Docket No. 26 SchH 3/19*, discussed in Legal update, No contradiction between arbitration agreement and "place of jurisdiction" clause (Higher Regional Court of Frankfurt).

Arbitral tribunal

Number of arbitrators

The parties are free to determine the number of arbitrators. Failing agreement, the number of arbitrators is three (*section 1034(1), ZPO*).

Necessary qualifications

Generally, any person who has the capacity to enter into a contract can act as arbitrator. Active judges and other civil servants require approval from their respective supervisory authorities before they can accept appointments. However, the Federal Court of Justice has held that the authorisation only

affects the relationship between the active judge/arbitrator and the supervisory authority, and not the relationship between the arbitrator and the parties to the arbitration. Therefore, lack of such authorisation is no reason to set aside an award (see *Docket No I ZB 99/14*, discussed in Legal update, German Federal Court of Justice on active judge as arbitrator). Sections 1035(5) and 1036(2) of the ZPO imply that arbitrators must be independent and impartial. Otherwise, the parties are free to agree to any qualifications.

An arbitrator is subject to challenge if he or she does not possess the qualifications agreed by the parties (*section 1036(2), ZPO; sections 9(1), 15 DIS Rules*).

Termination of mandate

An arbitrator's mandate terminates on his own withdrawal (upon confirmation of the DIS Arbitration Council) or by agreement of the parties, if he becomes unable to perform his functions, does not perform his functions within a reasonable period of time, or for other reasons fails to act (*section 1038, ZPO*; *section 19, DIS Rules*). If the arbitrator does not withdraw or the parties cannot agree on his termination, any party can request the state court to decide on the termination of the mandate (*section 1038(1), ZPO*). However, it appears that the courts will only terminate an arbitrator's mandate in exceptional circumstances. In a decision of the Higher Regional Court of Munich, the court refused to terminate the sole arbitrator's mandate where the arbitration had been ongoing for eight years and subject to delay by the arbitrator, the parties and an expert witness (see *Docket No 34 SchH 06/10*, discussed in Legal update, Higher Regional Court of Munich clarifies criteria for termination of arbitrator's mandate).

Appointment of arbitrators

In an arbitration with three arbitrators, each party appoints one arbitrator, and these two party-appointed arbitrators appoint the third arbitrator, who acts as chairperson of the arbitral tribunal *(section 1035(3), ZPO*). The state court will make an appointment at a party's request if either of the following occurs:

- A party fails to appoint an arbitrator within one month of receiving a request to do so from the other party.
- If the two arbitrators fail to agree on the third arbitrator within one month of their appointment.

(Section 1035(3), (4) ZPO; section 13, DIS Rules (21 days))

In order to expedite the proceedings, the DIS Rules provide that the respondent's party-appointed arbitrator and the presiding arbitrator are to be nominated within 21 days (instead of formerly 30 days, sections 7.1, 12.2, DIS Rules).

If the parties in their arbitration agreement have not provided for the number of arbitrators, each party can submit a request to the DIS that the arbitral tribunal be comprised of a sole arbitrator. As a default rule, if no such request is submitted or the request is denied, the arbitral tribunal will be comprised of three arbitrators (*section 10, DIS Rules*).

If the parties have agreed to have their dispute decided by a sole arbitrator, but have failed to agree on an appointment procedure, the court will appoint the sole arbitrator at a party's request (*section 1035(3), ZPO*; cf. *section 11, DIS Rules*, appointment by the DIS Appointing Committee).

The general rule that the parties must be treated equally (*section 1042(1), ZPO*) applies in particular to the appointment of arbitrators. If the arbitration agreement favours one party over the other in relation to the composition of the arbitral tribunal, the disadvantaged party may request the court to appoint the arbitrator or arbitrators (*section 1034(2), ZPO*). If the arbitration agreement contains an inappropriate or unfeasible clause for appointing the arbitrator, the Higher Regional Court of Munich has held that the arbitration agreement remains valid and the arbitrator is to be appointed according to the relevant statutory provisions (see *Docket No 34 SchH 11/14*, discussed in Legal update, Higher Regional Court of Munich on validity of arbitration agreement containing inappropriate or unfeasible clause for appointing the arbitrator).

While the controversial question of whether section 1034(2) of the ZPO also applies to multi-party situations has not been finally settled yet, a prevailing opinion favours its application in such situations in response to the *Dutco* decision (of the French Cour de Cassation). For example:

- In a decision of the Higher Regional Court of Frankfurt am Main, the court held that section 1034(2) of the ZPO also applied to multi-party situations and that if the parties did not request the court to nominate the arbitrators, they were precluded from raising an objection against the unequal composition of the arbitral tribunal (*Docket No 26 Sch 13/05*).

- In a decision of the Higher Regional Court of Berlin regarding a multi-party situation where several parties on one side could not agree on one arbitrator, the court appointed both party-nominated arbitrators according to section 1034(2) of the ZPO (*Docket No 20 SchH 4/07*).

If the DIS Rules apply, the DIS Appointing Committee has discretion after consulting with the parties to either appoint both party-nominated arbitrators, or to only appoint the arbitrator for the several parties on one side who cannot agree on one arbitrator, and upholding the arbitrator nomination of the other side (*section 20.3, DIS Rules*).

Before accepting appointment, a potential arbitrator must disclose any circumstances likely to give rise to doubts as to his impartiality or independence. The duty to disclose continues after appointment and throughout the proceedings (*section 1036(1), ZPO*).

Challenges to arbitrators

The appointment of an arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence (*section 1036(2), ZPO; sections 15.1, 91, DIS Rules*). An arbitrator must disclose any circumstances likely to give rise to doubts as to his impartiality or independence as soon as he becomes aware of them. The IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) are beginning to be used as guidance by the German arbitral community and courts in determining what constitutes grounds for justifiable doubts. For example, in a decision of the Higher Regional Court of Frankfurt am Main, the court examined an alleged violation of the IBA Guidelines in its ruling on an arbitrator challenge (*Docket No 26 Sch 8/07*).

Unless otherwise agreed by the parties (including by reference to any applicable arbitral rules), a party intending to challenge an arbitrator must submit the reasons for the challenge in writing to the arbitral tribunal, within two weeks of becoming aware of either:

- The arbitral tribunal's constitution.
- Any circumstances giving rise to justifiable doubts as to his impartiality or independence.

(*Section 1037(2), ZPO.*)

Unless the challenged arbitrator withdraws or the other party agrees with the challenge, the arbitral tribunal will decide on the challenge. If the challenge is unsuccessful, the challenging party can request the court to decide on the challenge within one month after receiving notice of the decision rejecting the challenge (*section 1037(3), ZPO*). The parties can agree on a different time limit.

While the request to the court is pending, the tribunal (including the challenged arbitrator) may continue the arbitral proceedings and make an award (*section 1037(3), ZPO*). If the challenge of the arbitrator is confirmed after the award has been rendered, the Federal Court of Justice has held that the award must then be set aside, because it must always be assumed that the illegitimate composition of the arbitral tribunal directly affects the outcome of the proceedings since the arbitrators are implicitly required to deliberate the case before making an award (see *Docket No I ZB 23/14*, discussed in Legal update, German Federal Court of Justice on setting aside an award unanimously made by arbitral tribunal including one arbitrator who was later successfully challenged). In this particular case, the other two arbitrators had stated in the setting aside proceedings that they would render an award with the same content if asked to rehear the case. The court found this to raise serious doubts about their impartiality.

In a decision of the Higher Regional Court of Frankfurt am Main, the court declared an arbitral award enforceable despite the respondent's arguments that the arbitrator had not been impartial (*Docket No 26 Sch 12/09*). The court found that the challenge of an arbitrator based on the contents of the arbitral award may only be successful in a very severe and explicit case of prejudice. In that regard, procedural errors and errors in findings of fact and law may only justify a concern of prejudice if they occur in an exceptional quantity and severity, which the court did not find in that case.

The Higher Regional Court of Munich has held that:

- Section 1036(2), ZPO, dealing with impartiality of an arbitrator, is to be interpreted according to the rules applicable to challenges to a judge. Interestingly in this context, the Federal Court of Justice recused a judge on grounds of bias on the basis of a friendship between the judge's spouse and a party to the proceedings, and this may also be relevant for arbitrators (see Legal update, German Federal Court of Justice recuses judge on grounds of bias on basis of friendship between spouse and party to case).
- The objective view of whether there are circumstances that give rise to doubts as to impartiality is decisive, and not the subjective view of the challenging party.
- The purpose of the challenge proceedings is not to review whether an arbitral tribunal has made

procedural errors, or to review the legal reasoning or application of the law by the arbitral tribunal.

- Errors in the management of the proceedings, in fact-finding or in the application of the law, will only amount to circumstances that give rise to doubts as to impartiality in special circumstances, such as if they occur often and with a certain severity that suggest partial or arbitrary conduct on the part of the arbitral tribunal.

(See *Docket No 34 SchH 13/16*, discussed in Legal update, Higher Regional Court of Munich on challenge to impartiality of an arbitral tribunal.)

For detailed discussion about challenging arbitrators, see Practice note, Challenges to arbitrators: an overview.

Liability of arbitrators

Although the ZPO is silent on the nature of the contractual relationship between parties and arbitrators, it is generally accepted that the arbitrator's contract is a service contract.

In general, arbitrators are not liable for acts in connection with deciding the dispute. However, arbitrators have a duty to act neutrally and may be liable for negligence, unless this is excluded in the arbitrator's contract or according to the institutional rules applicable (such as section 45.1 of the DIS Rules). An arbitrator's liability for intentional wrongdoing or intentional breach of duty cannot be limited or excluded in advance.

Arbitrators' duties and procedural powers

The main duties of the arbitral tribunal are to treat the parties equally and to grant them the right to be heard (*section 1042(1), ZPO*). In consequence, the arbitral tribunal must keep all of the parties informed, in a timely and proper manner, about the conduct of the proceedings, as well as the opponent's pleadings and submissions (*section 1047(2)-(3), ZPO*). It must also give the parties an opportunity to comment on all relevant facts and points of law. The duty of equal treatment becomes especially important when the arbitral tribunal sets time periods for the parties' submissions and determines the extent and manner of taking evidence.

The arbitral tribunal has wide discretion with regard to the conduct of the proceedings. Unless otherwise agreed by the parties, and subject to the mandatory provisions of the ZPO, the arbitral tribunal is free to determine the procedural rules at its sole discretion (*section 1042(4)1, ZPO*). Furthermore, it has the power to:

- Decide on the admissibility of taking evidence.
- Take evidence.
- Freely assess such evidence.

(*Section 1042(4)2, ZPO*.)

Unless otherwise agreed by the parties, the arbitral tribunal also has the authority to:

Determine the place of arbitration (*section 1043(1)2, ZPO*).

Determine the language of the proceedings (*section 1045(1)2, ZPO*).

Appoint experts (*section 1049(1)1, ZPO*).

Decide on the procedure with regard to oral hearings, including the choice not to take evidence in oral hearings at all (*section 1047(1)1, ZPO*).

In addition, unless the parties have agreed otherwise, the arbitral tribunal has discretion to order, at the request of a party, any interim measure it considers necessary given the subject matter of the dispute (*section 1041(1)1, ZPO*).

Arbitration proceedings

Commencing arbitration

Unless otherwise agreed by the parties, a claimant can initiate arbitration proceedings by sending a notice of arbitration to the respondent (*section 1044, ZPO*). The proceedings commence on the date that the notice of arbitration is received by the respondent. Under the DIS Rules, arbitration proceedings commence on receipt of the request for arbitration by the DIS Secretariat (*section 5.1, DIS Rules*).

The notice of arbitration must include the following details:

- The names of the parties.
- A short description of the issues in dispute and a reference to the arbitration agreement.
- The appointment of an arbitrator.

While there is no express requirement to sign the notice of arbitration, it is strongly advisable to do so.

Conduct of proceedings

The procedural rules arbitrators are likely to follow often also depend on the legal background of the parties and the arbitrators. The German

international arbitration community tends to seek guidance from the IBA Rules on the Taking of Evidence in International Arbitration, but without acknowledging them as binding.

General rules are that:

- The parties must be treated equally and each party must be given a full opportunity to present its case (*section 1042(1), ZPO*).
- Counsel cannot be excluded from acting as authorised representatives (*section 1042(2), ZPO*).
- Any default of a party justified by that party to the arbitral tribunal's satisfaction must be disregarded (*section 1048(4), ZPO*).

In most other respects, the parties can agree on the applicable procedural rules (*section 1042(3), ZPO*). They may draw from the procedure applicable in German court proceedings, any foreign procedural law or individual provisions in any of those laws, as well as "soft law" instruments, such as the IBA Rules mentioned above. If the parties fail to agree, the tribunal may conduct the arbitration in such manner as it considers appropriate (*section 1042(4), ZPO*).

In particular, the parties may choose whether the proceedings should include an oral hearing (*section 1047(1), ZPO*; *section 29, DIS Rules*). Without party agreement, this decision is up to the arbitral tribunal, but the arbitral tribunal must hold a hearing if requested by one of the parties.

In order to expedite the proceedings, the DIS Rules provide that the respondent is to provide its Answer within 45 days following the respondent's receipt of the Request, with a possible extension of 30 days on request (*section 7.2, DIS Rules*). This is meant to ensure that the Answer is provided shortly after the arbitral tribunal has been constituted.

The arbitral tribunal is to engage in active case management. Unless any party objects, it is to seek to encourage an amicable settlement of the dispute or of individual disputed issues at every stage of the arbitration, and to discuss with the parties possible alternative methods of dispute resolution, such as mediation (*sections 26 and 27.4, DIS Rules*).

A case management conference is to take place in principle within 21 days after the constitution of the arbitral tribunal. At the case management conference, the arbitral tribunal and the parties must discuss the procedural rules, the procedural timetable, as well as measures to increase the procedural efficiency of the proceedings (*section 27, DIS Rules*). The measures to be discussed are contained in two annexes to the DIS Rules and include limiting the length and number of submissions, limiting the duration of the oral hearing, dividing the proceedings into individual stages, or having the arbitral tribunal provide a preliminary assessment on the facts and on the law. If expedited proceedings are used, each party can make two submissions and the final award is to be rendered in principle within six months of the case management conference.

Place of arbitration

If the parties have not agreed on the place of arbitration, it shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties (*section 1043(1), ZPO*). In any event, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing. The arbitral tribunal shall also determine the language(s) to be used in the proceedings if the parties have not made a determination (*section 1045, ZPO*).

Evidence

The parties may also agree on the procedure for taking evidence. Unless otherwise agreed, the German arbitration law applies and the arbitral tribunal will conduct the taking of evidence in a manner it considers appropriate. In particular, the arbitral tribunal is then empowered to determine the admissibility of evidence (*section 1042(4), ZPO*).

In arbitration proceedings with a solely German background, a tribunal will usually adhere more to the procedure followed in German litigation, while arbitrations with an international element tend to follow the IBA Rules on the Taking of Evidence in International Arbitration.

It is accepted that anyone may be a witness, including parties and party representatives. There is a tendency towards tribunal-appointed experts, but party-appointed experts are also admissible.

Disclosure

There is no general duty to disclose documents in litigation or arbitration in Germany. Nevertheless, arbitral tribunals may order the disclosure of documents and the attendance of witnesses and experts. However, tribunals do not have the power to enforce these orders. If a party fails to comply with an order, the arbitral tribunal can either request the assistance of the state courts (see *Powers of state courts to support arbitration proceedings*) or draw negative inferences.

Decision of the arbitral tribunal

Unless otherwise agreed by the parties, any decision of the arbitral tribunal shall be made by a majority of all its members. If an arbitrator refuses to take part in the vote on a decision, the other arbitrators may take the decision without him, unless otherwise agreed by the parties. Individual questions of procedure may be decided by the chairperson alone, if so authorised by the parties, or all members of the arbitral tribunal (*section 1052(3), ZPO*; *section 14, DIS Rules*).

Confidentiality

There is no provision on confidentiality in German arbitration law. Therefore, by law, while arbitrations are not public, the parties are not necessarily bound by a duty of confidentiality if they have not agreed on such a duty. However, there is a very broad confidentiality provision in section 44 of the DIS Rules, whereby the parties, the arbitrators and the individuals at the DIS Secretariat who are involved in the administration of the arbitration proceedings must maintain confidentiality towards all persons regarding the conduct of arbitration proceedings, particularly relating to the parties involved, witnesses, experts and other evidentiary materials.

Powers of state courts to support arbitration proceedings

General powers

German courts tend to be arbitration-friendly and therefore reluctant to intervene in arbitration proceedings.

German courts can intervene during a pending arbitration to:

- Grant interim relief (*section 1041, ZPO*).
- Assist in taking evidence (*section 1050, ZPO*).

Assistance in taking evidence includes assistance in compelling witnesses to attend. However, German courts are bound by their own procedural rules when assisting arbitration proceedings. Therefore, they cannot, for example, assist in enforcing broad disclosure orders that would be inadmissible under German procedural law.

The Federal Court of Justice has held that decisions by a local court relating to court assistance in the taking of evidence for arbitration are generally appealable, but only where the request for court assistance is denied, not if it is granted (see *Docket No. I ZB 45/19*, discussed in Legal update, German Federal Court of Justice on appealability of court decisions regarding assistance in taking evidence).

Interim measures

An arbitration agreement shall not prevent a court from granting, at the request of a party before or during arbitral proceedings, an interim measure relating to the issue in dispute in the arbitral proceedings (*section 1033, ZPO*). There is no exclusivity for courts or for the arbitral tribunal.

Unless otherwise agreed by the parties, the arbitral tribunal can, at a party's request, order any interim measures it considers necessary in relation to the dispute (*section 1041, ZPO*; *section 25, DIS Rules*). If the party against whom the order is made refuses to comply, the court can, at a party's request, order enforcement of the measure, unless an application for a corresponding interim measure has already been made to the court. The court can amend the tribunal's order if necessary, to facilitate enforcement.

Court proceedings brought in breach of a valid arbitration agreement

If a court action is brought in breach of an arbitration agreement and the respondent raises an objection, the court will reject the action as inadmissible, unless the court finds that the arbitration agreement is any of the following:

- Null and void.
- Inoperative.
- Incapable of being performed.

(*Section 1032(1), ZPO.*)

The respondent must raise this objection before the oral hearing on the merits in the court action has begun. Failure to comply with this time limit bars the respondent from later raising this objection. If a court action is rejected as inadmissible, a claimant can initiate arbitral proceedings if it wishes to pursue the claim.

In a decision of the Federal Court of Justice, the court rejected the argument that an arbitration agreement was inoperative because it erroneously referred to non-existent arbitral rules (*Docket No III ZB 70/10*). The court held that the relevant question was whether there was a clear intention of the parties to arbitrate their dispute and exclude the state courts. In this case, it was consistent with the parties' intentions to interpret the agreement to provide for ad hoc arbitration under the ZPO. (For

more detail, see Legal update, German Federal Court of Justice decision on inoperativeness of pathological arbitration agreement.)

However, the Higher Regional Court of Cologne has held that an arbitration agreement is incapable of being performed if the claimant lacks the funds to pay for the arbitration and there is no other option available to the claimant to secure funding for the arbitration (*Docket No 18 W 32/13*, discussed in Legal update, German Court considers arbitration agreement incapable of being performed if insolvency administrator lacks assets to pay arbitration costs).

Before the constitution of the arbitral tribunal, a party can apply to the court to determine whether the arbitration is admissible (*section 1032(2), ZPO*). The Federal Court of Justice has held that an application to the court to determine whether an arbitration was admissible was made in time if the court received the application before the constitution of the tribunal (*Docket No III ZB 59/10*). The application does not need to have been served on the other side before the tribunal has been constituted. See further Legal update, German Federal Court of Justice decision on timeliness of application to courts to determine admissibility of arbitration. The Federal Court of Justice also explicitly confirmed that this application can be brought by the claimant in arbitral proceedings (and not only the respondent) if this is in the interest of procedural efficiency (see *Docket No I ZB 21/18*, discussed in Legal update, Claimant entitled to request that court determine admissibility of arbitral proceedings if in interest of procedural efficiency).

In Docket No 12 SchH 5/22, the German Higher Regional Court of Berlin, in the context of an application under section 1032(2) ZPO, explicitly confirmed that an arbitration agreement is not deemed inexecutable because parties are affected by sanctions. Because its attempt to effect service under the Hague Service Convention was rejected by Russian courts, the Berlin court ordered service of the documents by public notice which, under sections 185 to 188 of the ZPO is available if service abroad is not possible or will not be successful (see Legal update, German court allows service by public notice to overcome obstacles in effecting service in Russia of request for declaration that arbitration is proper forum for a dispute (German Higher Regional Court of Berlin)).

In Docket No 12 SchH 2/24, the German Higher Regional Court of Berlin again issued a declaration under section 1032(2) ZPO that arbitration based on an UNCITRAL arbitration clause with a Swiss seat was the proper forum for the dispute between a German and a Russian party, even though the Russian Arbitrazh State Court had issued a decision on substance in the same matter (see Legal update, German court issues declaration that arbitration is proper forum for dispute despite Russian court decision on substance (Higher Regional Court of Berlin)).

In *Docket Nos I ZB 43/22, I ZB 74/22 and I ZB 75/22*, the BGH allowed Germany's appeal against a judgment of the Higher Regional Court of Berlin (see Legal update, Higher Regional Court of Berlin rejects Germany's request to declare ICSID arbitration inadmissible), holding that, to give full effect to the primacy of EU law, member state courts are competent to declare intra-EU ICSID arbitrations inadmissible. The BGH agreed with the Berlin court that the ICSID Convention is a closed system of rules, under which arbitral tribunals have exclusive competence to determine their own jurisdiction. Therefore, court proceedings to determine the admissibility of any arbitration under the ICSID Convention are not generally possible. However, the BGH opined that an exception must apply in intra-EU arbitrations under the ICSID Convention to give EU law full effect, even vis-á-vis international law, in line with the consistent case law of the European Court of Justice. See Legal update, German Federal Court of Justice holds that primacy of EU law means member state courts may deny admissibility of intra-EU ICSID arbitration. In Docket No 2 BvR 1277/23, the German Federal Constitutional Court held that such reasoning was not "objectively arbitrary" and that therefore the complaint before it (which alleged that the BGH had erred in intervening in an ICSID arbitration to give effect to the primacy of EU law) was inadmissible. The court noted that this interpretation conflicted with the ICSID Convention and cemented a shift of competence from member states to the EU (see Legal update, German Federal Constitutional Court dismisses two complaints relating to permissibility of intra-EU and extra-EU investment arbitration).

However, in a decision of the BGH made in an enforcement context, the BGH held that arbitration agreements in bilateral investment treaties (BITs) between an EU member state and a third country (extra-EU BIT) do not violate EU law. In *Docket No I ZB 12/23*, the BGH rejected the Republic of India's argument that the ECJ's decision in *Achmea*, which held that arbitration agreements in intra-EU BITs violate EU law, should also be applied to extra-EU BITs. According to the court, it clearly followed from the subsequent ECJ decision in *Komstroy* that the ECJ does not consider extra-EU BITs to violate of

EU law. Therefore, the BGH saw no reason to refuse enforcement of the award rendered against India (see Legal update, Arbitration agreements in extra-EU-BITs do not violate EU law, rules German Federal Court of Justice). Docket 2 BvR 85/24 concerned a complaint filed by India with the German Federal Constitutional Court, in which it argued that the BGH's refusal to refer its case to the ECJ violated its constitutional right to a "lawful judge". Finding no manifest error, the constitutional court held that the BGH had not violated India's constitutional rights, emphasising that the BGH had specifically distinguished between intra-EU and extra-EU arbitrations and that this was plausible (see Legal update, German Federal Constitutional Court dismisses two complaints relating to permissibility of intra-EU and extra-EU investment arbitration).

Also, in Docket No 2 O 447/22, the German Regional Court of Essen rejected Spain's request for an anti-enforcement injunction to prevent enforcement of an intra-EU ICSID award in the US. Although the court did not question that the ICSID award against Spain was not enforceable in the EU, it held Spain's request for anti-enforcement relief to be inadmissible and without merit, emphasising the principle of territoriality and state sovereignty (see Legal update, No anti-enforcement injunction to prevent enforcement of intra-EU ICSID award in the US (German Regional Court of Essen)).

Even if a court action has been brought under section 1032(1) or (2) of the ZPO, arbitration proceedings can still be commenced and continued, and an arbitration award can be made while the issue is pending before the court (*section 1032(3), ZPO*).

Parties can apply to the court to have partial or interim awards confirming the jurisdiction of an arbitral tribunal reviewed (*section 1040(3), ZPO*). A court decision on the jurisdiction of the arbitral tribunal is then binding in any subsequent proceedings to enforce or set aside a resulting final award (see *Docket No I ZB 7/15*, discussed in Legal update, Court decision confirming an arbitral tribunal's preliminary ruling on jurisdiction is binding in subsequent proceeding (German Federal Court of Justice)).

If a final award on the merits is rendered prior to a final court decision on the jurisdiction of the arbitral tribunal having been reached, the Federal Court of Justice has held that the time limit for challenging the award on the merits does not begin to run until the validity of the interim award on jurisdiction has been finally confirmed by the courts (see *Docket No I ZB 1/15*, discussed in Legal update, Legal relief from tribunal's preliminary ruling on jurisdiction required even where final award rendered (German Federal Court of Justice)).

In Docket No I ZB 75/16, the Federal Court of Justice explicitly confirmed that a need for legal relief is also required where a party applies to the court for a decision on an arbitral tribunal's jurisdiction, irrespective of whether the arbitral tribunal has made a preliminary ruling. For further details, see Legal update, Need for legal relief to obtain court decision on tribunal's jurisdiction (German Federal Court of Justice).

Awards

Form, content and notification

An award must be made in writing and signed. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal will suffice, provided that the reason for any omitted signature is stated (*section 1054, ZPO*; *section 39, DIS Rules*). In *Docket No I ZB 34/23*, the BGH, overturning a lower court decision, applied section 1054 of the ZPO to uphold an award that was signed by only two arbitrators. The court noted that the purpose of the provision was to prevent an obstructive arbitrator from thwarting an otherwise valid award by refusing to sign it. It confirmed that a reason for the missing signature must be given for the sole purpose of making clear to the outside world that the signature was not omitted in error and that the award was the final result of the arbitral proceedings. As such, the note on the signature block of the award in this case, which stated simply "signature could not be obtained", was sufficient (see Legal update, German Federal Court of Justice finds award signed by majority of the arbitrators sufficient and clarifies formal requirements for missing signature court).

A copy of the signed award must be sent to each party (*section 1054(4), ZPO*).

German arbitration law is silent on the question of whether an arbitrator may issue a dissenting opinion. However, the prevailing opinion in legal literature is that a dissenting arbitrator may issue such an opinion, as long as the internal deliberations of the arbitral tribunal are kept secret. In January 2020, the Higher Regional Court of Frankfurt am Main, in obiter dictum, took issue with the dissenting opinion issued in a domestic arbitration, arguing that a dissenting opinion might constitute a violation

of the domestic principle of the confidentiality of deliberation between arbitrators, but did not base its decision on this reasoning (see *Docket No. 26 Sch 14/18*, discussed in Legal update, German Higher Regional Court of Frankfurt am Main on dissenting opinions in domestic arbitrations).

German arbitration law does not set an express time limit for rendering an award. However, the arbitration agreement or institutional arbitration rules may provide for a time limit. Under the DIS Rules, the arbitral tribunal is to render an award within three months after the last hearing or the last authorised submission, whichever is later. If the arbitral tribunal does not meet this time limit, the Arbitration Council has the discretion to reduce the fee of one or more of the arbitrators. (*section 37, DIS Rules*).

Types of awards

Possible types of awards are final awards, partial awards, interim or interlocutory awards and awards on agreed terms.

Correction and interpretation

Any party may request the arbitral tribunal to:

- Correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature.
- Interpret a specific part of the award.
- Make an additional award for claims presented in the arbitral proceedings but omitted from the award.

Any such request should be made within one month of receipt of the award. The arbitral tribunal should make the correction or give the interpretation within one month and make an additional award within two months. The arbitral tribunal may also correct its award on its own initiative (*section 1058, ZPO*; *section 40, DIS Rules*).

Challenges to awards

An application can only be made to the German courts to set aside an award if the award was rendered in Germany (*section 1059, ZPO*).

Competent courts

Applications for the setting aside or enforcement of an arbitral award must be made before the competent Higher Regional Court (*Oberlandesgericht*). There is only one level of appeal, to the Federal Court of Justice (*Bundesgerichtshof*). Enforcement proceedings or setting-aside proceedings and the appeal will each usually take anywhere between three months and one year. The costs incurred at each level depend on the amount in dispute. The costs will generally be apportioned taking into account the outcome of the dispute, meaning that the losing party will bear the court fees and the statutory lawyer's fees of both parties.

Grounds for challenge

An award may be set aside where the applicant can show sufficient cause that:

- A party to the arbitration agreement was under some incapacity according to the law applicable to it (*section 1059(2)1(a)*, ZPO).
- The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of this, under German law (*section 1059(2)1(a)*, ZPO). For example, the Higher Regional Court of Munich has held that the arbitration agreement between ice speed skater Claudia Pechstein and the International Skating Union was invalid. The court found that the arbitration agreement violated mandatory anti-trust law because the inclusion of arbitration agreements in agreements between athletes and sports unions constitutes a substantial abuse of a dominant market position (see *Docket No U 1110/14 Kart*, discussed in Legal update, Higher Regional Court of Munich decides that arbitration agreements for athletes are invalid and CAS Arbitral Award is not enforceable). This decision was overturned by the Federal Court of Justice in June 2016. While the Federal Court of Justice confirmed the market dominating position of the sports unions, it held that this position was not abused by requiring athletes to submit to arbitration before the Court of Arbitration for Sport (CAS). It applied a balancing test, placing particular emphasis on the aligned interests of athletes and sports unions to fight doping on an internationally consistent basis. According to the court, this is only possible by submitting disputes to a uniform disputes body, such as CAS (see *Docket No KZR 6/15*, discussed in Legal update, German Federal Court of Justice finds that CAS arbitration agreements are valid). In an unusual turn of events, in June 2022 the Federal Constitutional Court held that this decision of the Federal Court of Justice violated Claudia Pechstein's right of access to justice, paving the way for the Higher Regional Court of Munich to

decide on the merits (see Legal update, German Federal Constitutional Court upholds Pechstein's constitutional complaint regarding a violation of rights of access to justice).

- A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case (*section 1059(2)1(b)*, ZPO).
- The award deals with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award containing decisions on matters not submitted to arbitration can be set aside) (*section 1059(2)1(c), ZPO*). For example, German courts originally rejected the argument raised by Slovakia with regard to the EUR22 million arbitral award in favour of Dutch insurer Achmea that the arbitration clause in the bilateral investment treaty (BIT) between the Netherlands and Slovakia was invalid and violated EU law. However, the Federal Court of Justice requested guidance from the Court of Justice of the European Union (ECJ) on the compatibility of intra-EU BITs with EU law (see *Docket No I ZB 2/15*, discussed in Legal update, German Federal Court of Justice requests guidance from ECJ on compatibility of intra-EU BITs with EU law). The ECJ held that the arbitration clause contained in the Dutch-Slovak BIT violated EU law and was, therefore, inapplicable. As a consequence, the Federal Court of Justice set aside the award, finding that there was no valid arbitration agreement (see *Docket No. I ZB 2/15*, discussed in Legal update, German Federal Court of Justice sets aside arbitral award in Achmea v Slovakia). In July 2024, the German Federal Constitutional Court rejected a complaint by Achmea against that decision, explaining that the Netherlands-Slovakia BIT had been retroactively terminated (see Legal update, Agreement to terminate intra-EU BITs in force) and, therefore, the arbitration agreement was retroactively invalid. As a result, even if the constitutional complaint were successful, the Federal Court of Justice would have to set aside the arbitral award once again (see Legal update, German Federal Constitutional Court rejects Achmea's constitutional complaints).
- In November 2021, the Federal Court of Justice reconfirmed this approach for the Austria-Croatia BIT, holding that the landmark decision of the ECJ in Achmea was relevant for all intra-EU BITs and finding that an arbitration based on the Austria-Croatia BIT was therefore inadmissible (see *Docket No. I ZB 16/21*, discussed in Legal update, German Federal Court of Justice confirms that arbitration under Austria-Croatia BIT is inadmissible).
- The composition of the arbitral tribunal or the arbitral procedure was in breach of German arbitration law or of an admissible agreement of the parties, and it can be presumed that this affected the award (*section 1059(2)1(d)*, ZPO). In a decision of the Higher Regional Court of Frankfurt am Main, the court set aside an award on the ground that the tribunal had not adhered to the agreed procedure for submission of briefs and terms of reference for an expert (see *Docket No 26 Sch 13/10*, discussed in Legal update, German court sets aside award where tribunal did not adhere to what the court held to be the parties' agreed procedure). More recently the German Federal Court of Justice changed its jurisprudence holding that even where a tribunal appointed expert fails to disclose circumstances that might give rise to doubts as to its impartiality and independence, an award may be set aside on the basis that it is presumed to have been tainted by such failure (see *Docket No I ZB 1/16* discussed in Legal update, German Federal Court of Justice on setting aside award due to biased tribunal-appointed expert). In a second review of this case, the Federal Court of Justice held that a balancing of the specific circumstances of the individual case is necessary, taking into account the severity of the undisclosed circumstances, to determine whether the mere fact that the expert had failed to disclose these specific circumstances warranted his removal, and therefore the setting aside of the award (see *Docket No I ZB 46/18*, discussed in Legal update, German Federal Court of Justice revisits setting aside of arbitral award on basis of biased tribunal-appointed expert).

The court may also set aside an award where it finds that:

- The subject matter of the dispute is not capable of settlement by arbitration under German law (*section 1059(2)2(a)*, ZPO).
- The arbitral tribunal has misapplied a mandatory provision of German competition law. In *Docket No KZB 75/21*, the Federal Court of Justice set aside an award due to the arbitral tribunal's misapplication of mandatory German competition law, which violated German public policy. The court held that state courts must fully review awards to confirm the correct application of

mandatory competition laws, including the underlying legal and factual basis. It explicitly held that any misapplication would lead to a violation of public policy and the award being set aside. While recognising that this position deviates from some other jurisdictions, including France, the Federal Court of Justice ruled that, in cases regarding competition law, a restriction to only obvious violations would be nearly impossible, as competition law itself is predicated on a case-specific complex balancing of interests. It held that the general prohibition of a full review as to substance of awards by state courts is not applicable to key law principles of the state. See Legal update, German Federal Court of Justice finds that misapplication of German competition law by arbitral tribunal must be fully reviewed by courts.

- Recognition or enforcement of the award leads to a result that is in conflict with public policy (*ordre public*) (*section 1059(2)2(b)*, ZPO). The Federal Court of Justice has held that any violation of public policy must be obvious in order to warrant non-enforcement of an arbitral award (see *Docket No III ZB 40/13*, discussed in Legal update, German Federal Court of Justice on violation of public policy). Therefore, only in very exceptional cases will the enforcement of arbitral awards be denied by German courts on the basis of a violation of public policy. The parties' right to be heard forms part of the public policy ground. For examples of cases where German state courts have held that there was no breach of the right to be heard, see Legal updates, German Federal Court of Justice on the right to be heard where party fails to pay advance on costs, Higher Regional Court of Stuttgart on the right to be heard, Higher Regional Court of Munich on the right to be heard, Higher Regional Court of Munich decision on violation of right to be heard by relying on party-appointed expert evidence, German Higher Regional Court of Frankfurt rules on violation of right to be heard with regard to tribunal's assessment of witness evidence and Award can be based on arbitral tribunal's own internet research and on evidence admitted late in proceedings (Higher Regional Court of Frankfurt am Main). Rare instances of German courts accepting a violation of procedural public policy include the decisions in:
  - *Docket No I ZB 90/18* (discussed in Legal update, Award set aside for violation of right to be heard where tribunal failed to address party's core submission (German Federal Court of Justice)), where the Federal Court of Justice set aside an award, holding that the arbitral tribunal violated a party's right to be heard because it had not addressed the essential core of the party's submissions in the reasons of the award. Even though the arbitral tribunal had correctly and completely reproduced the claimant's requests, and had stated in the award that it had taken into account the parties' entire submissions, the court found that, in reality, the arbitral tribunal had disregarded the core argument in the claimant's submissions and had, instead, based its decision on a submission not made by the claimant;
  - *Docket No 102 Sch 39/24 e* (discussed in Legal update, German court sets aside award for violation of right to be heard and failure to meet minimum requirements for reasoning (Bavarian Supreme Court)), where the Bavarian Supreme Court set aside an award because the tribunal had violated the right to be heard and had failed to meet the minimum requirements for the reasoning of the award. The tribunal had failed to substantively engage with one of the party's core arguments on issues central to the dispute and the tribunal's reasoning was internally inconsistent, especially regarding the legal standard applied. The court highlighted that a tribunal cannot discharge its duties merely by listing submissions or summarising party arguments;
  - *Docket No I ZB 9/18* (discussed in Legal update, What is the scope of the res judicata-effect of an arbitral award in Germany? (German Federal Court of Justice)), in which the Federal Court of Justice held that where an arbitral tribunal misjudges the res judicata-effect of a previous decision (that is, that the res judicata-effect is limited to the request for relief and the underlying facts and does not extend to the reasoning of the award), the resulting award must be set aside; and
  - *Docket No. 12 Sch 5/18* (discussed in Legal update, Foreign award ordering payment of contractual penalty interest at 0.5% per day violates German public policy (Higher Regional Court of Berlin)), where the Higher Regional Court of Berlin held that a contractual penalty interest rate of 0.5% per day, which amounts to 180% per year, violates good morals and, therefore, German public policy.

In Docket No I ZB 42/25, the Federal Court of Justice gave guidance on the conditions under which a case may be remitted to an arbitral tribunal after an award has been set aside. The

court held that section 1059(4) of the ZPO grants the court discretion to remit suitable cases to the tribunal. Furthermore, that remittal serves process economy by avoiding the reconstitution of the tribunal and a complete re-arbitrating of the case, and the legislative assumption is that tribunals, like state courts, will not repeat their errors upon reconsideration. The court emphasised that only severe violations, such as manifest, grave disregard of a party's right to be heard, suggesting bias, preclude remittal. In the case under consideration, the court held that the tribunal's errors arose from the complexity of the case rather than deliberate disregard, and that there was no indication of bias. Accordingly, the lower court's decision to remit the award to the tribunal was upheld (see Legal update, German Federal Court of Justice confirms remittal to arbitral tribunal in AstraZeneca arbitration).

Time limits

Unless the parties have agreed otherwise, an application for setting aside cannot be made after three months have elapsed since the applicant received the award (*section 1059(3), ZPO*).

Excluding rights of appeal

The right to challenge an award under section 1059 of the ZPO cannot be excluded.

Enforcement of awards

German courts favour the enforcement of awards. Slightly different procedures exist for the enforcement of foreign and domestic awards. An overview of the relevant procedures is set out below. For detailed discussion of the process for enforcing (and resisting enforcement of) arbitral awards in Germany, see Practice notes, Enforcing arbitration awards in Germany and Enforcing ICSID Convention arbitration awards in Germany: overview.

Enforcement of domestic awards in Germany

Enforcement of domestic awards is governed by section 1060 of the ZPO.

A domestic award must first be declared enforceable by the competent court. The corresponding application will be granted unless there is a ground for setting aside the award (see *Grounds for challenge*).

However, grounds for setting aside will not be taken into account if, at the time when the application for a declaration of enforceability is served, an application to set aside based on these grounds has already been finally rejected. Further, the grounds for setting aside listed in section 1059(2)1 of the ZPO (see *Grounds for challenge*) will not be taken into account to the extent the relevant time limits for making an application for setting aside the award have expired.

Enforcement proceedings in the first instance take between three months and one year, depending on whether enforcement is resisted. There is no expedited procedure.

Enforcement of foreign awards in Germany

Enforcement of foreign awards is governed by section 1061 of the ZPO. Section 1061(1) provides that the recognition and enforcement of foreign arbitral awards is granted under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). If there are grounds for refusing a declaration of enforceability, the court will rule that the arbitral award is not to be recognised in Germany.

If a party objects to the recognition or enforcement of an award, the court will order a hearing (*section 1063(2) ZPO*). The rules on default judgment do not apply to proceedings for enforcement of a foreign arbitral award. Therefore, if a party raises objections against enforcement and then fails to appear at the hearing, the court will decide on the enforcement of the award in a reasoned decision, which can then only be appealed to the Federal Court of Justice (see *Docket No I-25 Sch 3/11*, discussed in Legal update, Hamm Higher Regional Court on default judgments in enforcement proceedings).

Consistent with their pro-arbitration stance, German courts will generally strive to enforce foreign awards. For example, the Higher Regional Court of Berlin has repeatedly rejected the argument that an arbitral award is unenforceable for reasons of sovereign immunity because the state voluntarily agreed to arbitration in a BIT (see *Docket No 20 Sch 10/11*, discussed in Legal update, Higher Regional Court of Berlin denies sovereign immunity objections in enforcement proceedings, upheld in *Docket No I ZB 13/15*, discussed in Legal update, Final confirmation on enforcement of award by Walter Bau against Thailand (German Federal Court of Justice)). Similarly, in *Docket No 12 SchH 7/21*, the same court held that, despite failing to

attach several non-essential documents to its enforcement application, the enforcing party had complied with the German Code of Civil Procedure. It went on to reject India's claims to sovereign immunity because India's impugned actions had been purely commercial in nature and it had submitted to arbitration under the BIT. Further, the court considered a pending set-aside application before the courts of the seat (Switzerland) was unlikely to succeed and enforcement would not violate German public policy (see Legal update, German court declares Deutsche Telekom can enforce arbitral award against India (Higher Regional Court of Berlin)).

As discussed in *Court proceedings brought in breach of a valid arbitration agreement*, the BGH enforced an award rendered against India in an investment arbitration, rejecting the state's argument that arbitration agreements in extra-EU BITs violate EU law (see *Docket No I ZB 12/23*, discussed in Legal update, Arbitration agreements in extra-EU-BITs do not violate EU law, rules German Federal Court of Justice).

The Higher Regional Court of Munich has held that, if the respondent is ambiguously identified in a foreign arbitral award, his identity may be determined in enforcement proceedings under narrow circumstances (see *Docket No 34 Sch 7/11*, discussed in Legal update, Munich Higher Regional Court on identifying the respondent in enforcement proceedings).

Where a decision declaring an award to be enforceable is appealed, the court may order a stay of execution on provision of security (*sections 1065(2) and 707, ZPO*). Where on appeal the enforcement decision is revoked and remitted to the lower court, the security will remain in place until the conclusion of the enforcement proceedings (see *Docket No III ZB 40/12*, discussed in Legal update, German Federal Court of Justice on provision of security in enforcement proceedings).

There is a tendency of German courts not to enforce foreign awards set aside at the place of arbitration. For example, in a decision of the Higher Regional Court of Munich, the court refused enforcement of an award that had been set aside in Ukraine (see *Docket No 34 Sch 18/10*, discussed in Legal update, Munich Higher Regional Court refuses enforcement of award set aside in Ukraine). This decision was upheld by the Federal Court of Justice in *Docket No III ZB 59/12,* discussed in Legal update, German Federal Court of Justice refuses to enforce arbitral award set aside in Ukraine. However, the Higher Regional Court of Munich has also enforced a foreign award despite ongoing proceedings to set aside the award and pending parallel enforcement proceedings in the country of origin (see *Docket No. 34 Sch 14*, discussed in Legal update, Enforcement of foreign arbitral award allowed despite set aside and parallel enforcement proceedings at seat of arbitration (Higher Regional Court of Munich)).

Conversely, the Federal Court of Justice has ruled that a decision by the courts of the seat rejecting an application to set aside an award is not binding on a German court considering an application to enforce the award. In *Docket No I ZB 33/22*, the court upheld the decision of the Higher Regional Court of Koblenz, which had refused to enforce an award because the debtors' objections to it were valid, despite the fact that the courts of the seat (Russia) had rejected those objections. While article V(1) (e) of the New York Convention provides that courts are bound by a court decision at the seat that sets aside an award, there is no such provision with regard to a court decision rejecting the setting aside request. This means that, where set aside proceedings fail at the seat of arbitration but enforcement is attempted in Germany, the losing party can rely on the same objections raised in the failed set aside proceedings to resist enforcement in Germany (see Legal update, German Federal Court of Justice rules on relationship between setting aside proceedings at seat and enforcement proceedings abroad).

Further, the Federal Court of Justice has confirmed that a failure to apply to the courts of the seat of arbitration to set aside an award on the ground that there is no valid arbitration agreement, will not preclude a party from resisting enforcement of the award in Germany (see *Docket No III ZB 100/09*, discussed in Legal update, Failure to apply to set aside award does not preclude objection in enforcement proceedings in Germany).

If the award is set aside abroad only after it has been declared enforceable by a German court, an application for setting aside the declaration of enforceability can be made.

Note that enforcement proceedings cannot be used as a platform to get claims confirmed in insolvency proceedings. The German Federal Court considered

this issue in *Docket No I ZB 119/15*, confirming the limits of enforcement proceedings of arbitral awards in the context of insolvency. For further details see Legal update, German Federal Court of Justice on effect of insolvency on enforcement proceedings.

Enforcement of domestic awards outside Germany

Germany is a party to the New York Convention, which has been in force in Germany since 28 September 1961. Its ratification of the New York Convention is not subject to any declarations or notifications. Germany is also a party to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (Geneva Convention). Various bilateral agreements relating to the recognition and enforcement of arbitration awards also exist. Therefore, arbitral awards made in Germany should be enforceable in New York Convention and Geneva Convention member states and in other countries that have bilateral agreements with Germany.

Costs

Legal fee structures

German law does not regulate the details of the arbitrators' remuneration and of other costs. This is different in institutional arbitrations, where the applicable rules provide a schedule of fees or another mechanism to calculate the costs of an arbitration.

Unless otherwise agreed by the parties, the arbitrators set the remuneration, taking into account the fee schedule that is customary at the place where the services are provided (*sections 612(2), 315, BGB*). The question of which fee schedule is customary in Germany has not yet been finally settled. Some commentators insist that the fee schedules in the RVG apply, even though the RVG explicitly excludes arbitrators from its scope of application (*section 1(2), RVG*).

Nor is there a common position on how to apply the RVG fee schedules to arbitrators. In a decision of the Regional Court of Mönchengladbach, the court applied the RVG fee schedule for appellate proceedings to arbitrators' fees, but with modifications that led to an increase in the fees (*Docket No 2 O 134/05*). Currently, a consensus is forming in the German arbitration community that, absent an agreement on fees, reference should be made to the fee schedule under the DIS Rules. This is appropriate, since the DIS Rules, unlike the RVG, were specifically prepared for arbitrators' fees.

Under the DIS Rules, the fee structure for arbitrators is based on the amount in dispute according to a schedule of costs, last revised on 1 July 2021.

Cost allocation

Unless the parties agree otherwise, the arbitral tribunal allocates, in the award, the costs of the arbitration between the parties, including the parties' costs incurred to properly pursue their claim or defence. The tribunal allocates costs at its discretion and takes into consideration all circumstances of the case, in particular the outcome of the dispute (*section 1057, ZPO*; *sections 39.2, 33 DIS Rules*). The arbitral tribunal can also consider the extent to which the parties have conducted the arbitration efficiently when making decisions on costs (*section 33.3, DIS Rules*).

Recoverable costs include the following:

- Fees and costs of the arbitrators.
- Costs of the parties.
- Costs for taking evidence.
- Fees and costs of the party representatives.

German arbitration law provides the arbitral tribunal with broad discretion regarding the allocation of costs (*section 1057, ZPO*). In domestic arbitration proceedings, arbitrators usually adhere to the general principle that the costs are allocated in proportion to the outcome of the dispute. Nevertheless, the tribunal can consider all circumstances of the individual case and find flexible solutions.

Third party funding

Third party funding of arbitration is permitted under strict requirements, which are slowly being relaxed under German law (*section 79 para. 2 no. 4, ZPO, section 4a Lawyers' Compensation Act (RVG), section 49b para. 2 Federal Code for the Legal Profession (BRAO)*).

Insolvency

The insolvency of one of the parties to an arbitration agreement does not lead to its invalidity. If an insolvent or impecunious party can no longer pay its share of the advance on costs, the other party must be given the opportunity to pay the entire advance on costs. However, should it refuse to do so, the arbitration agreement will be considered to have become incapable of performance (see decision of the Federal Court of Justice, *Docket No III ZR 33/00*).

There is no provision for security for costs in German arbitration law. Based on the general discretion of an arbitral tribunal to conduct the proceedings, in exceptional circumstances, the tribunal can order security for costs. In addition, the arbitral tribunal can require any party to provide appropriate security in connection with an interim measure it orders. This can include orders for a bank guarantee or an attachment.

With regard to enforcement proceedings, the Federal Court of Justice has held that applicants cannot use these proceedings as a platform for getting their claims confirmed in insolvency proceedings (see *Docket No. I ZB 119/15*, discussed in Legal update, German Federal Court of Justice on effect of insolvency on enforcement proceedings).