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German Federal Ministry of Justice publishes Draft Bill for the Modernisation of Arbitration Law

Tweaks and updates to maintain Germany's attractiveness as a seat of arbitration

In addition to a number of small changes in the details of German arbitration law, the Draft aims to better align arbitration-related litigation such as challenge and recognition proceedings with the recently-created German Commercial Courts, which conduct high-volume commercial disputes entirely in English. Moreover, in a return to a previous version of German arbitration law, formalities requirements for arbitration agreements will be largely abolished in business-to-business contexts.

I. Fine-tuning, not overhaul

The Federal Ministry of Justice's Draft Bill (here) is aimed at tweaking a number of minor points in the tried-and-tested German arbitral law, contained in Book 10 of the Civil Procedural Code. Since the last major update took place over 25 years ago, modifications were necessary to reflect technological progress, but also to react to changes in best practice in domestic and international commercial arbitration, for example the now-ubiquitous use of video conferencing. The Draft's aim, reflected in its publication in both German and English – a rarity in the German legislative process –, is explicitly to "further … improve the competitiveness of the German arbitration law at the international level." As a result, much of the Draft reacts to developments in Austria, France and Switzerland as reference jurisdictions, as well as to trends in international arbitration more generally.

II. Integration with the new Commercial Courts

Perhaps the Draft's most significant feature is increased integration between (international) arbitration and the recently created German Commercial Courts, which hear high-value business claims entirely in English and aim to compete with institutions such as the English High Court and rival courts in jurisdictions such as France or the Netherlands. Drawing on the linguistic and technical expertise available at the German Commercial Courts, under the terms of the Draft these can be endowed with exclusive competence to hear arbitration-related disputes such as challenge or enforcement proceedings. Both proceedings and judgments are in English, with a

German translation included for enforcement purposes. Even for those issues which – like evidence-gathering or enforcement – fall within the competency of lower-level courts, the Draft authorises the use of English-language documents unless the relevant court explicitly demands a translation. While this tends towards greater use of English, a point worth highlighting is that proceedings before the German Federal Court of Justice can only be conducted in English where that court agrees, meaning there is as yet no guarantee that a dispute commenced in English will remain in this language throughout.

III. No formalities for B2B arbitration agreements

As between businesses, the Draft abolishes all formalities requirements, thus returning to the pre-1998 position in German arbitration law. This change aims to address perceived difficulties in chains of contracts. While such arbitration agreements can now be concluded without formalities, the Draft provides that either party may require the other one to confirm the contents of the arbitration agreement. Whether, however, this latter mechanism will avoid disputes about the validity of arbitration agreements is open to doubt. Once a dispute materialises parties are unlikely to be cooperative; prior to this phase, they will frequently want to let sleeping dogs lie. While no longer technically necessary, best practice will therefore still be to put any agreement to arbitrate in writing, ideally with the help of an institutional model clause.

IV. Separate determination of the validity of arbitration agreements

s 1032 (2) Civil Procedural Code, which gives German courts the power to support arbitral proceedings by issuing orders clarifying whether arbitration or litigation is the correct forum, will also be modified slightly. Under the Draft, it will now be possible not just to clarify whether arbitration is (in)admissible, but also to resolve the more general question of the validity of an agreement to arbitrate with binding force. This has the advantage of harmonising determinations by the State courts with those reached by arbitral tribunals when determining their jurisdiction.

V. Challenge to awards declining jurisdiction

Where tribunals incorrectly decline jurisdiction, German arbitration law previously did not provide for judicial redress, since challenges were possible only on the basis that a tribunal had incorrectly found itself *competent*. The Draft fixes this issue, with challenges to both "negative" and "positive" determinations of competency now subject to the same rules.

VI. New procedure for arbitrator appointment in multi-party disputes

Moreover, the Draft changes the procedure where parties in multi-party arbitration cannot agree on an arbitrator. Given that these cases are possible both as a genuine conflict of interest or as a form of guerrilla tactic, the Draft gives courts, when called upon to appoint an arbitrator, discretion as to whether to appoint only one or both arbitrators.

VII. Better enforcement of tribunal-issued interim relief

Furthermore, the Draft will improve the enforcement of interim relief issued by foreign-seated tribunals by clarifying that German courts must permit enforcement of such awards if none of the limited exceptions to recognition applies. In addition to the typical grounds for challenge to arbitral awards, these grounds for refusal are that a similar form of interim relief has already been applied for in Germany, security for costs (where required by the tribunal) has not been paid and that the tribunal itself has suspended or revoked the order for interim relief.

VIII. Publication of awards

As part of the Draft's drive to increase transparency in arbitration, any decision issued by the Commercial Courts must be published in anonymised form. Moreover, the Draft also contains a new provision under which the default position regarding arbitral awards will be (anonymised) publication unless the parties object. In practice, this provision is likely to have limited impact. Institutional rules already frequently contain explicit provisions on publication (see eg the ICC or VIAC Rules), which would take precedence over the statutory default. Moreover, even where this is not the case, experience teaches

that parties are likely to object to publication, given that confidentiality is frequently one of the main motivations to choose arbitration in the first place.

IX. Separate opinions

The Draft also clarifies the admissibility of separate opinions to arbitral awards. Like many of the changes contained in the Draft, this is a minor fix reacting to a German court decision which questioned the enforceability of awards containing separate opinions and which had generated uncertainty in the German arbitration community. Given that separate opinions are comparatively rare, once again the practical impact of this provision is likely to be limited.

X. Bug fixes and miscellaneous provisions

The Draft also takes the opportunity to make a number of changes resolving or clarifying minor points of German arbitration law. For example, for the avoidance of doubt, the Draft contains an explicit provision stating the admissibility of using video conferencing in arbitral proceedings. It also provides for the possibility of electronically issued awards where the parties agree. Finally, it harmonises arbitral and civil procedural law by providing for similar remedies in cases of abuse of arbitral proceedings, for example to combat awards obtained by fraud or duress.

XI. Assessment

Overall, the new Draft deals primarily with questions of detail, not of principle. This sits well with the general perception that German arbitration law has, over the last 25 years, by and large performed well. A point of note is the comprehensive approach to English-speaking dispute resolution embraced by the greater harmonisation of German arbitral law with the Commercial Courts. However, these courts, when compared to their rivals in London or Paris, suffer from a certain lack of centralisation; Germany's federal structure means that a single nationwide Commercial Court, while desirable in terms of specialisation and expertise, is unlikely to be feasible in the foreseeable future, leading to considerable fragmentation.

In sum, the Draft is unlikely to have a major impact on Germany's comparatively strong position in the competition between arbitral jurisdictions. Nonetheless, it ensures that German arbitration law keeps step with international developments and thus provides a welcome update.

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