Important Steps towards the Modernisation of Arbitration Law in Germany

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On 1 February 2024, the German Federal Ministry of Justice (*Bundesministerium der Justiz*, „BMJ") presented a ministerial draft bill on legislation for the modernisation of arbitration law (Gesetz zur Modernisierung des Schiedsverfahrensrechts, the „Draft Bill").[1] Following last year's publication of the key issues paper (link to our article[2]), an important step has been taken towards the implementation of the proposed reform.

The Draft Bill should be viewed in conjunction with the 2023 draft of the Legal Venue Strengthening Act (*Justizstandort-Stärkungsgesetz*).[3] Similarly to this, the Draft Bill aims to make Germany a more attractive location for international and large-scale commercial disputes. The BMJ recognises the im-portance of implementing a reliable legal framework for efficient dispute resolution tailored to the practical needs of the business community as a key location factor. In this context, proceedings in state courts and arbitration – correctly – are not primarily seen as two competing dispute resolution mechanisms, but as complementary ones, the strengthening of which will be of overall benefit to Germany as a business location.

In the following, we would like to present and evaluate, from a practical perspective, the most important changes to German arbitration law that the Draft Bill provides.

Informal Arbitration Agreement

According to the Draft Bill, it will be possible to conclude arbitration agreements informally, provided that the arbitration agreement is a commercial transaction for all parties (Section 1031 (4) of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO-E)).

1 www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_Modernisierung_Schiedsverfahrensrecht_2024.pdf
2 https://hengeler-news.com/de/articles/bmj-legt-eckpunktepapier-zur-modernisierung-des-deutschen-schiedsverfahrensrechts-vor
3 www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_Justizstandort_Staerkung.pdf

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The planned legislative changes will allow for arbitration agreements to be concluded implicitly or verbally. The Draft Bill sees a practical need for this in connection with global supply chain and framework agreements. Whether the proposed changes are expedient in such circumstances is debatable. In any event, the omission of any written form has the potential to cause disputes and consequently delays and legal uncertainty.

An arbitration agreement typically contains not only the agreement that an arbitral tribunal shall have jurisdiction, but also various other provisions on the conduct of the arbitration proceedings (in particular the choice of an arbitration institution, the number of arbitrators and the place of the arbitration). For evidentiary purposes alone, the parties should therefore draw up their agreement in writing. Alternatively, if the parties wish to ensure that any disputes are to be adjudicated by state courts, it is advisable to document this decision as well. Otherwise, proceedings before the state court could be delayed in future by claiming that an oral arbitration agreement has been concluded and that the state court therefore has no jurisdiction.

The Draft Bill further increases the potential for abuse that results from eliminating any formal requirement by expanding the possibilities for reviewing the (non-)existence of an arbitration agreement. Under the Draft Bill, an arbitral award can also be set aside by state courts if the arbitral tribunal has wrongly denied its jurisdiction (Section 1040 (2) ZPO-E).

Finally, the elimination of any formal requirement is likely to impair the free circulation of arbitral awards issued in Germany and consequently runs against the objective of increasing the attractiveness of Germany as a place of arbitration. Article II (1) of the New York Convention states that contracting states are only required to recognise written arbitration agreements. Admittedly, the most-favoured-treatment principle of Article VII (1) alternative 2 of the New York Convention allows an arbitration party to invoke more lenient formal requirements of the domestic law of the state in which it wishes to enforce an arbitral award. However, this only helps the parties to an arbitral award issued in Germany if such regulations exist in the state of enforcement. It seems rather unlikely that the parties will take this into consideration when concluding an arbitration agreement verbally or by implication.

Video Hearings and Electronic Arbitral Awards

The Draft Bill provides that the arbitral tribunal may conduct the oral hearing by video and audio transmission (video hearing) after hearing the parties, unless the parties have agreed otherwise (Section 1047 (2) ZPO-E). Under the current law, a video hearing is already possible due to the principle of procedural freedom. The fact that the Draft Bill expressly provides for the admissibility of video hearings is nevertheless a welcome development. The BMJ supports arbitral tribunals in cases in which a party objects to a video hearing without reasonable grounds, thereby potentially jeopardising the effective conduct of proceedings. The planned legislation clarifies that a video hearing satisfies a person‘s right to be heard and that conducting a video hearing, despite (unreasonable) objections by a party, in and of itself does not constitute a violation of this right.

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According to the Draft Bill, parties must be informed in good time if a video hearing is to be organised (Section 1047 (2) ZPO-E). This ensures that, if a party has reasonable grounds to object to a video hearing, it can present these in advance to the extent necessary.

The Draft Bill also considers digitalisation by introducing an electronic arbitral award. With the consent of the parties, the arbitral tribunal may issue the award electronically, provided that the names of the arbitrators and their qualified electronic signatures are included in the electronic document (Section 1054 (2) ZPO-E).

English as the Procedural Language

The Draft Bill allows proceedings in arbitration matters before the German courts to be conducted in English. For example, the appointment or challenge of arbitrators, the admissibility or inadmissibility of arbitration proceedings, the annulment or declaration of enforceability of arbitral awards and the enforcement, annulment or amendment of interim or protective measures can in future be heard and decided in English (Sections 1062 (5), 1063a ZPO-E). Responsibility for these proceedings is intended to lie with the Commercial Courts, which are to be introduced by the Legal Venue Strengthening Act.

The Draft Bill authorises the state (*Länder*) governments to establish by statutory order the necessary conditions for proceedings to be conducted entirely in English (Section 1062 (5) sentence 2 ZPO-E and section 1063a (1) sentence 1 no. 1 ZPO-E in conjunction with Section 184a (1) sentence 1 no.1 of the German Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG-E)). The parties must have expressly or implicitly agreed to the proceedings being conducted in English or, if they are represented by legal counsel, they must have entered an appearance in English without objection (Section 1063a (1) sentence 1 no. 2 ZPO-E).

However, the parties cannot rely on being able to pursue all stages of legal recourse in English. In appeal proceedings, the German Federal Court of Justice's (*Bundesgerichtshof*) agreement is required for the proceedings to be conducted in English (Section 1065 (3) sentence 1 no. 3 ZPO-E) and it can order at any time, without giving reasons, that the proceedings be continued in German or that parts of the case file be translated into German (Section 1065 (3) sentence 4 in conjunction with Section 184b (2) GVG-E).

In addition to conducting proceedings in English before the Commercial Courts, the Draft Bill includes the option of submitting in proceedings conducted in German English-language documents that have been prepared or submitted in arbitration proceedings (Section 1063b (1) ZPO-E). The court may only request a translation in individual cases where there is a special need (Section 1063b ZPO-E), for example if the judges are generally not sufficiently proficient in English or if a matter is in dispute that requires knowledge of specialised English terminology that the court does not have.

Even though the Draft Bill does not guarantee that proceedings will be conducted in English across all instances, it should be welcomed that the Commercial Courts will be responsible for matters relating to arbitration proceedings. It remains to be seen whether the reform plans will ensure the desired internationalisation of Germany as a judicial venue. If in the

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future arbitration proceedings are conducted in English, legal counsel will no longer need to translate pleadings and court decisions for English-speaking clients. The fact that the Draft Bill introduces the submission of English-language documents before all courts is a positive development, even though many courts already accept documents in the English language anyway. The planned legal reform would relieve the parties of time-consuming and cost-intensive translations.

Dissenting Opinions and Publication of Arbitral Awards

The Draft Bill's clarification of the admissibility of separate opinions (Section 1054a ZPO-E) is also to be welcomed. Already identified in 1996 as a possible subject of regulation in the preparatory work for the revision of German arbitration law, there is currently no mention of separate opinions in the arbitration law of the German Code of Civil Procedure. The BMJ now proposes introducing a provision according to which an arbitrator may set out his or her dissenting view on the arbitral award or its grounds in a separate opinion, unless the parties agree otherwise (Section 1054a (1) ZPO-E).

Up until now, an arbitral separate opinion has harboured the risk that a domestic arbitral award will be set aside or that a foreign arbitral award will not be recognised in Germany. It is argued that the submission of a separate opinion violates the secrecy of the proceedings and that this gives the arbitral award such a serious flaw that its recognition and enforcement in Germany would be contrary to German public policy (*ordre public*). This view has been supported most notably by an *obiter dictum* of the Higher Regional Court of Frankfurt am Main, which ultimately did not have to decide the question, but did express serious reservations about separate opinions (decision of 16 January 2020, case no. 26 Sch 14/18).

This is why the BMJ's proposal is a positive step. The proposed regulation would further legal certainty, namely for an instrument that can show the litigant that the arbitral tribunal has considered such arguments that were ultimately not able to support the majority decision.

It also makes sense that the Draft Bill, as a rule, permits the publication of arbitral awards with the consent of the parties (Section 1054b (1) ZPO-E). With this proposal, the Draft Bill addresses the frequentlyvoiced criticism of the lack of transparency in arbitration proceedings.

From a practical point of view, the exception that the parties can agree otherwise is important (Section 1054b (2) ZPO-E). A deviating party agreement may also consist of the choice of institutional arbitration rules, such as those provided by the International Chamber of Commerce (ICC) or the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit e. V., DIS). In contrast to the draft legislation, institutional arbitration rules or the guidelines for their application sometimes provide for an objection solution (i.e., an opt-out) rather than the possibility to opt-in. This means that they require a party to expressly object in order to prevent the publication of (anonymised) arbitral awards, summaries or extracts. Choosing institutional arbitration rules alone, thus, does not reliably protect parties from the publication of the arbitral award.

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If they want to ensure the confidentiality of the arbitration proceedings, legal practitioners are well-advised to be careful in the specific arbitration proceedings and should consider including a confidentiality provision in the arbitration agreement.

Appointment of Arbitrators in Multi-Party Arbitration Proceedings

The Draft Bill also provides for a provision on the appointment of arbitrators in multi-party arbitration proceedings (Section 1035 (4) ZPO-E). This would close a regulatory gap of practical relevance for *ad hoc* proceedings.

The current statutory provisions on the appointment of arbitrators were drafted under the guiding principle of arbitration proceedings with only one claimant and one respondent, whereas multi-party arbitration proceedings are characterised by having more than one participant on at least one side (claimants or respondents). The Draft Bill refers to them as „joined parties" (*Streitgenossen*) in line with proceedings before state courts. The use of this terminology, however, is not intended to imply that the provisions on the joinder of parties in proceedings before state courts (Sections 59 et seq. ZPO) should apply accordingly in arbitration proceedings.

For the appointment of arbitrators in a three-member arbitral tribunal, there are two procedural issues in particular that need to be regulated in multi-party arbitration proceedings:

- Firstly, it must be decided whether the joined parties are obliged to agree on an arbitrator. This question has been largely answered in the affirmative in practice and literature to date. It is not a surprise that the Draft Bill also provides for the joint appointment of arbitrators by the joined parties, which is a good choice.
- Secondly, the question arises on how a replacement arbitrator is to be appointed if the joined parties are unable to agree on an arbitrator. The Draft Bill provides that it should be at the discretion of the court responsible for the appointment of a replacement arbitrator whether it only takes over the appointment of the arbitrator to be appointed by the joined parties in disagreement or also appoints the arbitrator of the opposing party. A comparable solution was already provided for in certain institutional arbitration rules (such as the DIS Arbitration Rules) and the arbitration law of other countries. Recently, however, there has been a trend in case law in favour of the concept of a socalled comprehensive solution. According to the comprehensive solution, both party-appointed arbitrators would have to be appointed by the competent court.

The BMJ's decision to allow the court to exercise its discretion when appointing a replacement is a positive development. A party confronted, whether voluntarily or not, with several opposing parties, therefore, does not have to worry about losing its right to choose an arbitrator just because the joined parties cannot agree on who to appoint. This is particularly useful in cases in which the joined parties block the joint appointment of an arbitrator for tactical reasons in order to deprive the opposing party of the opportunity to appoint its own arbitrator.

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Moreover, the Draft Bill provides that provisional or protective measures ordered by an arbitral tribunal with a foreign place of arbitration can be authorised by the court for enforcement in Germany (Section 1025 (2) ZPO-E in conjunction with Section 1041 (2) ZPO-E). This is intended to resolve the previously controversial issue of the possibility of such an authorisation.

In addition, the judicial discretion that exists under current law with regard to the court‘s authorisation to enforce interim measures is to be repealed. Instead, the courts will only be allowed to reject applications for an enforcement order if there are certain reasons, which are exhaustively listed in Section 1041 (2) sentence 3 ZPO-E. These include, but are not limited to, grounds that can lead to the annulment of an arbitral award, failure to provide a security for costs ordered by the arbitral tribunal, or that a corresponding interim measure has already been applied for before a domestic state court. On the other hand, the annulment or suspension of the interim measure by a state court at the foreign place of arbitration does not constitute grounds for refusal according to the Draft Bill. This should be viewed critically. The reference in the Draft Bill to the parallel problem of arbitral awards and the corresponding discussions in case law is not convincing. Considering the existing uncertainties in case law, it would be particularly desirable to have a statutory regulation for both arbitral awards and interim measures.

Overall, the proposals for reform regarding provisional or protective measures can be approved. However, it would also have been desirable to examine the possibility of providing for an emergency arbitrator in the ZPO, which was considered in the key issues paper but not taken up in the Draft Bill. Considering the numerous advantages that proceedings before an emergency arbitrator can offer (such as particularly quick decisions, specialised expertise and a high degree of confidentiality), it was hoped that a corresponding provision would be included in the Draft Bill.

Closing Remarks

The BMJ‘s initiative to strengthen Germany as a judicial venue is to be welcomed. The Draft Bill contains many useful and positive clarifications and innovations, but also includes a number of provisions and regulatory gaps that can be criticised. The consultations, which have just commenced, and the legislative process provide an opportunity to correct the weaknesses of the Draft Bill. If this opportunity is utilised, the proposed reform offers a real opportunity to make Germany more competitive internationally as a dispute resolution location.

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