ALERT MEMORANDUM

Germany Seeks to Reform Its Arbitration Law

July 3, 2024

On June 26, 2024, the German Federal Government presented its draft bill on the modernization of German arbitration law ("**Draft Bill**")[1]. This follows the publication of a key issues paper on April 18, 2023[2] and an initial draft on February 1, 2024[3] by the German Federal Ministry of Justice (*Bundesministerium der Justiz*). As a result of this significant step, it is becoming increasingly clear what shape the planned reform will take.

This intended reform seeks to strengthen Germany's position as an attractive venue for arbitration and legal proceedings on the international stage. The last reform dates back around 26 years.

The main focus of the modernization efforts is to adapt to the continuously advancing digitalization of procedural law as well as to various developments in international and national arbitration, some of which have already been established in other legal systems for some time.

This *Alert Memorandum* outlines the key areas set to change under the intended reform and offers a brief perspective on the expected impact in practice.

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1 Available in German here; see also the corresponding press release from the Federal Ministry of Justice dated June 26, 2024, available in German here.
2 Available in German here.
3 Available in English here.

I. Key areas of reform

1. Relaxed formal requirements for arbitration agreements

As it currently stands, German arbitration law stipulates certain formal requirements for arbitration agreements that apply if, for instance, the arbitration proceedings constitute a commercial transaction for all parties. These formal requirements are to be withdrawn without replacement under the Draft Bill, meaning that arbitration agreements can essentially be concluded in free form in the future. This amendment should have a noticeable effect in terms of simplifying the conclusion of arbitration agreements, particularly in commercial transactions.

The Draft Bill nevertheless expressly maintains the strict formal requirements for arbitration agreements in consumer transactions that exist under current law.[4]

Under the Draft Bill, the court also makes a decision on the existence or validity of an arbitration agreement, upon a party's request, as part of its decision on the admissibility of the arbitration proceedings.[5]

2. Digitalization of arbitration

The Draft Bill allows for the possibility of conducting oral hearings before arbitral tribunals by video link as well as the recording of the hearing if the parties have not reached an agreement to the contrary.[6] By doing so, legal clarification has been provided to arbitral tribunals based in Germany regarding video hearings, which have been a component of some institutional arbitration rules since the coronavirus pandemic. In particular, "hybrid" hearings and individual parties or witnesses joining via video link should also be possible. The Draft Bill also enables individual hearing dates to be held in person and others via video.[7]

In addition, the Draft Bill allows arbitral awards to also be issued in electronic form – conditional upon the objection of a party – which had not previously been envisaged in the key issues paper. This would require the qualified electronic signature of the members of the arbitral tribunal.[8] The explicitly stipulated right of objection is intended in particular to ensure that parties who expect to face problems related to the recognition or enforcement of electronic arbitral awards abroad receive a written arbitral award. In light of this, the Draft Bill also provides that even a party who did not initially object may subsequently request a copy in the conventional form.[9]

3. Submission of English-language documents

A further development is the planned introduction of the possibility to submit any English-language arbitration agreement or document related to arbitration proceedings without a translation as part of (German-language) proceedings in certain matters.[10] This primarily concerns documents in proceedings for declarations of enforceability and the annulment of arbitral awards as well as those related to the taking of evidence and other judicial assistance actions. It should be emphasized in this context that expenses incurred for the translation of procedural files into German or for the translation of decisions for the purpose of publication are not to be imposed on the parties in the relevant proceedings.[11]

4. Appointment of arbitrators

Under current law, a sole arbitrator can already be appointed by the court upon the request of a party if the parties are unable to agree on an arbitrator. The same applies if, in arbitration proceedings with three arbitrators, the respective party-appointed arbitrators cannot agree on a chairperson. There are currently no requirements in this respect for multi-party arbitration proceedings. The Draft Bill intends to close this gap. For multi-party arbitration proceedings with more than one arbitrator, the Draft Bill therefore provides for the following: in the event that joined parties do not fulfill their obligation to jointly appoint an arbitrator within one month after all joined parties

4 Draft Section 1031(1) of the German Code of Civil Procedure (Zivilprozessordnung, ZPO); currently Section 1031(5) of the ZPO.
5 Draft Section 1032 (2) Sentence 2 of the ZPO.
6 Draft Section 1047(2) of the ZPO.
7 Explanatory memorandum of the German Federal Government, Draft Bill, p. 36.
8 Draft Section 1054(1) of the ZPO.
9 Draft Section 1054 (5) Sentence 2 of the ZPO.
10 Draft Section 1063b of the ZPO.
11 Annex 1 to the German Court Fees Act (*Gerichtskostengesetz*; GKG), item 7 of the comment on draft no. 9005.

have received the corresponding request from the opposing party, the arbitrator is to be appointed by the court at the request of either that party or any individual joined party.[12]

5. Publication of arbitral awards

The publication of arbitral awards is to be simplified, provided the parties do not object or agree otherwise.[13] Subject to any deviating agreement between the parties, consent will be deemed to have been given by a party if it has not raised an objection to publication within three months of having received the request for consent from the arbitral tribunal, indicating the consequences of a lack of action.[14] With this amendment, the German Federal Government aims to increase the transparency of arbitral decisions and promote the further development of the law.

6. Dissenting opinions

While the key issues paper still listed the admissibility of dissenting opinions as one of its "other potential areas to be reformed" that would therefore only be subject to an "open-ended" examination, the admissibility of dissenting opinions was already envisaged in the initial draft and has now been expressly confirmed in the German Federal Government's Draft Bill. The new provisions intend for an arbitrator to be able to record his or her differing view regarding an arbitral award or its reasoning in a dissenting opinion, unless the parties agree otherwise.[15] The publication of dissenting opinions is also to be permitted under the same conditions as arbitral awards.[16] This development enables dissenting opinions, a common international practice, to now also be introduced to German law. There had recently been some ambiguity in this regard, particularly in light of an *obiter dictum* of the Higher Regional Court of Frankfurt am Main (that was subsequently also taken up by the German Federal Court of Justice), which had stated that the rendering of a dissenting opinion may qualify as a ground for annulment.

7. Proceedings before "Commercial Courts"

Jurisdiction in arbitration matters can be transferred in full to the newly established so-called Commercial Courts if a Commercial Court has been established on the basis of a statutory instrument issued by federal state governments (*Landesregierungen*).[17] [18]

Arbitration proceedings before the Commercial Courts are to be conducted entirely in English if the dispute relates to a specific field, in particular those between companies where the amount in dispute reaches EUR 500,000 or more, or if the parties agree to do so or a written plea is made in English without an objection.[19] Decisions drafted in English must be translated into German.[20] Decisions of the Commercial Courts are to be published, with the publication of English-language decisions also requiring a German translation.[21]

In addition, the Draft Bill allows the opportunity for the parties in proceedings before the Commercial Courts to receive a verbatim record (which can be read by the parties during the hearing) upon congruent application of both parties, provided that there are no factual grounds to the contrary.[22]

8. Request for retrial

The Draft Bill creates the possibility of a request for retrial as a new extraordinary legal remedy against

12 Draft Section 1035(4) of the ZPO.
13 Draft Section 1054b(1) Sentence 1, (2) of the ZPO.
14 Draft Section 1054b (1) Sentence 2 of the ZPO.
15 Draft Section 1054a(1) of the ZPO.
16 Draft Section 1054b of the ZPO, see above.
17 For further information, see the proposed Section 119b(1) of the Courts Constitution Act (*Gerichtsverfassungsgesetz*; GVG) in the draft bill for the Act for the Promotion of Germany as a Forum (*Justizstandort-Stärkungsgesetz*) and our *Alert Memorandum* on this legislative proposal, available here. The Act for the Promotion of Germany as a Forum is still undergoing the legislative process; however, the Committee on Legal Affairs (*Rechtsausschuss*) of the German Federal Parliament (*Bundestag*) recently issued its resolution recommendation (May 16, 2024).
18 Draft Section 1062(5) of the ZPO.
19 Draft Section 1063a(1) of the ZPO; Draft Section 119b(1) Sentence 1 of the GVG.
20 Draft Section 1063a (1) Sentence 2 of the ZPO.
21 Draft Section 1063a (3) of the ZPO.
22 Draft Section 1063a (4) of the ZPO in conjunction with Draft Section 613 of the ZPO (from the draft bill for the Act for the Promotion of Germany as a Forum in the version of the resolution recommendation issued by the Committee on Legal Affairs on May 15, 2024)

German arbitral awards.[23] If an application to annul an arbitral award, which is generally subject to a 3-month time limit,[24] is no longer admissible, the arbitral award can now nevertheless be set aside by a court if the petitioner asserts certain grounds for retrial[25] that are closely aligned in essence with the requirements for an action for retrial[26]. German courts have so far applied the grounds for retrial as unwritten grounds for annulment.

9. Contesting arbitral awards if jurisdiction is denied

The Draft Bill also provides for a new ground for annulment. It is intended that decisions that deny jurisdiction can be contested and, in the event of arbitral decisions that incorrectly deny jurisdiction, annulled.[27] Under current law, such decisions cannot generally be set aside by state courts.

10. Enforcement

As part of court proceedings on the declaration of enforceability of arbitral awards, the presiding judge of a division can, under the current law, issue interim protective orders at his or her own discretion without having previously heard the opposing party (*ex parte*). In accordance with the Draft Bill, such a measure is only to be permitted in future upon application and, in order to establish consistency with provisions on seizure and interim injunctions, in urgent cases.[28]

11. Remand to the arbitral tribunal in the case of simultaneous annulment and declaration of enforceability proceedings

Furthermore, the Draft Bill sets out the possibility that a court may remand the dispute to the arbitral tribunal even if a declaration of enforceability is denied (which is accompanied by an annulment in the case of German arbitral awards [29]).[30] This provides a legal framework for an existing practice that was based on an analogous application of the law.[31]

12. Interim measures

In addition, the provisions on interim measures are to be amended. Accordingly, German courts must also admit interim measures with regard to arbitral awards issued abroad if none of the standardized grounds for exclusion apply. A ground for exclusion exists, *inter alia*, if the arbitral award could be set aside, a corresponding interim measure has already been filed with a German court, security requested by the arbitral tribunal has not been provided, or the interim measure has been terminated or suspended by the arbitral tribunal.[32]

13. Discarded approaches

The key issues paper originally raised the suggestion of transferring the responsibility for assisting in the taking of evidence and performing other judicial acts from the local courts (*Amtsgerichte*) to the higher regional courts (*Oberlandesgerichte*). This proposal already did not feature in the initial draft and has not been revived in the Draft Bill. The originally planned inclusion of so-called emergency arbitrators who can take interim measures even before an arbitral tribunal is formed is also not part of the Draft Bill.

II. Assessment and outlook

Overall, the modernization efforts outlined largely align with the points envisaged in the key issues paper and included in the Federal Ministry of Justice's initial draft. Some of the planned changes are essentially legal clarifications and confirm previous arbitration practice. Other areas that are being reformed, on the other hand, hold out the prospect of positive changes.

In particular, the possibility of conducting proceedings in English before the Commercial Courts in the future is to be welcomed. In parallel with the intended modernization of arbitration law, this could strengthen Germany's competitive position on the international legal stage.

The same applies to the plan to keep a verbatim record at the request of the parties in proceedings before the Commercial Courts and the ability to submit English-

23 Draft Section 1059a of the ZPO.
24 Section 1059 (3) Sentence 1 of the ZPO.
25 Draft Section 1059a(1) of the ZPO.
26 Cf. Section 580 of the ZPO.
27 Draft Section 1040(4) of the ZPO.
28 Draft Section 1063 (3) Sentence 1 of the ZPO.
29 Cf. Section 1060(2) Sentence 1 of the ZPO.
30 Draft Section 1060 (2) Sentence 4 of the ZPO.
31 To date, such a remand has been based on an analogous application of Section 1059 (4) of the ZPO.
32 Draft Section 1041(2) of the ZPO.

language documents without translation in proceedings conducted in German.

The new development allowing video hearings before arbitral tribunals based in Germany is also to be welcomed. In particular, the fact that the German Federal Government intends for video hearings to be able to be used flexibly, i.e., that they can be made use of both in "hybrid" form and through individual parties or witnesses joining, for example, should greatly increase Germany's appeal, as this should also make it possible to handle logistically complex large-scale proceedings with a high number of witnesses and parties more efficiently.

The ability to issue arbitral awards on a purely digital basis and confirm them with a qualified electronic signature is also an encouraging step forward. However, it may be problematic that the requirements governing the qualified electronic signature originate from the eIDAS Regulation[33] and are therefore not necessarily known outside the European Union. It therefore remains to be seen to what extent it will be possible to adapt to these requirements in practice.

The plan to generally exempt arbitration agreements from a formal requirement and to provide for exceptions only in circumstances involving a consumer that are rather of little practical importance also represents a pro-arbitration step that is necessary in view of advancing digitalization.

The further endeavor to promote a practice of more widespread publication in arbitration through regulations facilitating the publication of arbitral awards and thereby to create greater transparency in the development of the law and establishment of case law through arbitral awards is, in principle, to be welcomed. However, whether the proposed regulations will actually lead to an increase in the number of publications in practice remains to be seen and appears debatable to say the least. This is particularly pertinent in light of the fact that arbitration proceedings are sometimes preferred to proceedings before state courts precisely because of their confidentiality.

Finally, the proposed provisions on the admissibility of dissenting opinions represent an important legal clarification that would put an end to the rising uncertainty as of late with regard to a possible risk of annulment. Especially given that the Draft Bill stipulates that an arbitrator should inform the other arbitrators of his or her intention to render a dissenting opinion as early as possible and thus express this dissenting opinion at an early stage of the deliberations, this provision has the potential to raise the quality of arbitral dispute resolution. Ultimately, it should also be conducive to the further development of the law by arbitrators that both dissenting opinions and arbitral awards are to be published more frequently in the future, as they could be used as a (supplementary) basis for decisions in comparable proceedings with similar legal issues.

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[33] Regulation (EU) No. 910/2014 of July 23, 2014.