GERMANY (2)

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Country report – Germany

1. Arbitrability and public policy

Germany is an UNCITRAL-Model Law country - UNCITRAL-ML. The UNCITRAL-ML 1985 has been incorporated as sections 1025 -1066 into the German code of civil procedure – CCP in an almost one to one scale with very few exceptions, deviations or amendments. An important German amendment to the UNCITRAL-ML relates to arbitrability which is defined in section 1030 I CCP[1]. Accordingly, all matters having an economic interest are arbitrable. That applies in principle to all commercial matters including anti-trust issues, or disputes related to intellectual property or patents and therefore in general to international commercial arbitration as intended by the UNCITRAL-ML.

There is no restriction of arbitrability in a business to business relationship. However, arbitrability is restricted as far as the arbitration agreement concerns a business – consumer relationship. This restriction is part of the public policy of the European Union[2]. Its German equivalent is based on the functioning and very efficient domestic court system, where disputes resulting from a business – consumer relationship are normally decided within a few months at very low costs to both parties due to statutory scales on the costs of court proceedings and lawyers' fees[3] that are compulsory, unless the parties agree otherwise. Consumers almost never agree to higher fees. The statutory scales are based on the amount in dispute. In all German court proceedings, the losing party has to reimburse the

[1] section 1030 I CCP:
Any claim involving an economic interest (vermögensrechtlicher Anspruch) can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute.

[2] See ECJ, 6 Oct. 2009, C – 40/08 Asturcom Telecomunicaciones SL (2009) ECR I – 9579; Green Paper on consumer protection of the European Union (COM (2001) 531 final)

[3] Statute on costs in court proceedings (BGBl.I 2004,718); Statute on lawyers´ fees (BGBl I 2004, 788)

winning party, including the court costs and the statutory fees for lawyers[4].This is one of the reasons why there are almost no frivolous court claims initiated by consumers and no arbitrations initiated by consumers against commercial enterprises.

In a long line of cases the Bundesgerichtshof – BGH – (German Supreme Court) has held arbitration agreements or clauses in financial contracts between American brokers and their German consumer – clients to be in violation of consumer protection and therefore invalid[5]. These public policy restrictions may not be circumvented by standard form contracts selecting a foreign law combined with an arbitration clause according to which the arbitral tribunal has its seat outside of Germany. The BGH has held such standard form clauses to be invalid in the business (broker) – client (consumer) relationship where New York law had been stipulated and the seat of the arbitral tribunal was to be in New York City[6]. The Anglo – American finance industry in their dealings with German consumers have since then stopped to include arbitration clauses into the contracts with their German consumer clients.

2. Definition of a violation of public policy

In general the violation of (German) public policy is defined as a violation of "the most basic principles of German law, in particular the violation of constitutional basic rights"[7]. Even if a German state court judge, by applying compulsory German law, would have come to a result different from the arbitral tribunal, there is no automatic violation of public policy. Such violation is only to be assumed in "extreme exceptional cases"[8].

3. Domestic and international public policy

Germany in theory follows Switzerland and France in distinguishing on issues of public policy between a domestic public policy applicable in purely domestic arbitrations[9] and international public policy applicable in international arbitrations where the arbitral tribunal has its seat outside of Germany. The differences between both are only minimal and semantic.[10] Therefore, the distinction very seldom influences either the annulment proceedings of an award rendered in Germany[11] or the enforcement proceedings of a foreign award.[12]

4, Due process

The BGH confirmed its long line of jurisdiction that a violation of due process by the arbitral tribunal – in terms of German constitutional law a violation of the

[4] Section 91 CCP
[5] BGH, 22 November 1994 – XI ZR 45/91, NJW 1995, 1225; 17 May 2011 – XI ZR 299/08, juris
[6] BGH, 3 May 2011 – XI ZR 373/08, NJW – RR 2011, 1350
[7] BGH, 28 January 2014 – III ZB 40/13, SchiedsVZ 2014, 98, ann. 4
[8] BGH, 8 May 2014 – III ZB 371/12, SchiedsVZ 2014, 151, ann. 29
[9] Seat of the arbitration in Germany, no party having its residence outside Germany.
[10] BGH, 30 October 2008 – III ZB 17/08, SchiedsVZ 2009, 66, ann. 5.
[11] Section 1059 II 2(b) = Article 34(2)(b)(ii) of the Model Law.
[12] Section 1061 of the CCP.

right to be heard – that may have influenced the result reached by such tribunal constitutes both, a violation of domestic and international public policy. A domestic award is to be annulled even if it has been issued in an international arbitration.[13] A foreign award may not be recognised in accordance with Article V, Section 2(b) of the New York Convention,[14] should the arbitral tribunal have violated a party's right of due process.

5. Substantive public policy

On issues related to substantive public policy German courts almost never annul a domestic award or refuse the recognition and enforcement of a foreign award because of an alleged violation of public policy. The underlying reason for this restrictive approach is the internationally recognised principle which inhibits the courts to do a révision au fond of the award.[15] Even if a German state court judge by applying compulsory German law would have come to a different result from that of the arbitral tribunal, there is no automatic violation of public policy. Such violation is only to be assumed in "extreme exceptional cases". [16] Required is the violation of "the most basic principles of German law, in particular the violation of constitutional basic rights". [17] An example would be an award based on bribery. But such "hard core" cases of substantive public policy in relation to international or domestic arbitrations have not (yet) come before the BGH.

6. State immunity as public policy objection to the enforcement of awards

The enforcement of awards rendered under investment treaties may be difficult in Germany if the state raises the objection of state immunity in regard to the subject matter of the execution. The objection is upheld by the German courts, if the ambassador of the state has confirmed in writing that the object matter is used for sovereign purposes of that state within the territory of Germany.The court of execution does not need to test whether the letter of the ambassador corresponds with reality.[18] It is therefore rather easy for a foreign state to thwart execution by claiming that the asset, into which the beneficiary of the award intends to execute, is serving sovereign purposes of the state. By that technique Russia has been able to frustrate the execution of an award rendered in Stockholm 1998 to the benefit of a German investor (Sedelmayer) for almost 15 years. The BGH – decision, which finally confirmed the execution of the 1998 award against Russia, dates from 29 January 2015.[19]

[13] According to Article 1(3) of the Model Law an arbitration is international if the parties to the arbitration agreement have their places of business in different states.
[14] BGH, 15 January 2009 – III ZB 83/07, SchiedsVZ 2009, 126, ann. 7.
[15] BGH, 28 January 2014 – III ZB 40/13, SchiedsVZ 2014, 98, ann. 6.
[16] BGH, 8 May 2014 – III ZB 371/12, SchiedsVZ 2014, 151, ann. 29.
[17] BGH, 28 January 2014 – III ZB 40/13, SchiedsVZ 2014, 98, ann. 4.
[18] BGH, 1 October 2009, VII ZB 37/08, juris, ann. 25.
[19] BGH, 29 January 2015, V ZR 93/14, juris, ann. 4 et sequ.

BGH = Bundesgerichtshof = German Supreme Court. All decisions by the BGH are available on the Internet (in German) under www.bundesgerichtshof.de

Identification of the decision	**Summary of the public policy argument**	**Substantive**	**Procedural**	**Enf. denied**	**Enf. accepted**
BGH, 22 November 1994, XI ZR 45/9; 3 May 2011,XI ZR 373/08; 17 May 2011, XI ZR 299/08	Non—arbitrability of disputes based on financial contracts between American brokers and German consumers based on New York law and seat of the arbitration in NYC. The public policy restriction related to the invalidity is based on consumer protection.	X	X	X	
BGH, 30 October 2008,III ZB 17/08	Enforcement of a domestic award: Violation of compulsory norms of German law does not constitute an automatic violation of German public policy. Differences between German domestic public policy and German international public policy are only semantic and not in substance. PP-violation requires the violation of a non-waivable norm which is part of the fundamental German legal order.	X	X		X
BGH, 15 January 2009, III ZB 83/07	Enforcement of a foreign award: The procedural public policy of the right to be heard (due process) is only violated, if the violation may have an influence on the decision by the arbitral tribunal according to the legal point of view taken by the tribunal.		X		X
BGH, 1 October 2009, VII ZB 37/08	Objection of state immunity against the execution of a 1998 BIT-award against Russia accepted, based on letter by the Russian ambassador, the validity of which was not to be probed by the German courts.			X	

BGH, 28 January 2014, III ZB 40/13	Enforcement of a domestic award: A violation of public policy must be obvious or evident, which is the case if constitutional rights have been violated. That corresponds to modern international public law which protects only the core of a legal system in order not to infringe on the prohibition of a révision au fond.	X	X		X
BGH, 8 May 2014, III ZR 371/12	Objection of a foreign arbitration agreement by a foreign party in German court proceedings, sect.1032 CCP = Art. 8 UNCITRAL-ML: Patent-and patent license disputes are fully arbitrable and do not violate German public policy. It is for the arbitral tribunal with its seat in India to decide whether the Danish claimant is bound by the arbitration agreement.	X	X		
BGH, 29 January 2015, V ZR 93/14	Objection of the state immunity by Russia against the execution of a 1998 BIT-award rejected.				X