



Arbitration Guide
IBA Arbitration Committee

GERMANY

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TABLE OF CONTENTS

| | | PAGE |
|-------|--|------|
| I. | Background | 3 |
| II. | Arbitration Laws | 4 |
| III. | Arbitration Agreements | 6 |
| IV. | Arbitrability and Jurisdiction | 8 |
| V. | Selection of Arbitrators..... | 9 |
| VI. | Interim Measures | 10 |
| VII. | Disclosure/Discovery..... | 11 |
| VIII. | Confidentiality..... | 12 |
| IX. | Evidence and Hearings | 13 |
| X. | Awards | 16 |
| XI. | Costs | 18 |
| XII. | Challenges to Awards | 19 |
| XIII. | Recognition and Enforcement of Awards..... | 21 |
| XIV. | Sovereign Immunity | 24 |
| XV. | Investment Treaty Arbitration..... | 25 |
| XVI. | Resources | 26 |
| XVII. | Trends and Developments..... | 27 |

I. Background

(i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

Arbitration is a popular means of dispute resolution in Germany, particularly for cross-border disputes. The revision of the German arbitration law in 1998 has contributed to the increased use of arbitration in recent years. State court proceedings, however, have remained the most prevalent means of dispute resolution in Germany.

The non-public nature of arbitration—allowing the parties, in particular, to retain confidentiality—is considered one key advantage of arbitral proceedings as compared to state court proceedings. Further, those advantages include the relatively fast and final resolution of the dispute without the availability of an appellate procedure and the easier enforceability of arbitral awards as compared to court judgments outside of the EU. Moreover, arbitration is seen as a more suitable forum for the resolution of complex international disputes that may benefit from more expertise in cross-border business transactions on the part of institutional arbitration bodies and arbitrators than may typically be available at German state courts.

Importantly, arbitrations can be conducted in a foreign language, whereas under German law, German state court proceedings can generally be conducted only in German, with some exceptions: A few courts in Bonn, Cologne, Aachen and Frankfurt (the latter effective 1 January 2018) allow for hearings held in English in commercial matters if both parties agree.

One of the perceived disadvantages of arbitration is the absence of a single comprehensive set of governing procedural rules as provided in the German Code of Civil Procedure (*Zivilprozessordnung*, or ZPO). Because various sets of procedural rules are available for arbitration proceedings and arbitrators have a large degree of discretion, arbitrations are seen as less predictable than German court proceedings. The costs of arbitration—which are sometimes higher than in court proceedings—may also be seen as a disadvantage.

(ii) **Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

The majority of arbitrations in Germany is institutional.

German parties tend to choose the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*, or DIS) as the body to administer the arbitration and to choose the DIS Rules to govern the procedure. Where appropriate, German parties refer their disputes to industry-specific arbitral tribunals.

In cross-border disputes involving German and foreign parties, the use of internationally recognized rules is common, including the DIS Rules, but more frequently the International Chamber of Commerce Arbitration Rules (ICC Rules of Arbitration).

The DIS Rules, which entered into effect in 1998, have recently been subject to extensive discussion with a view toward their imminent revision, in particular with the goal of making them more appealing in the context of international arbitration. As of this writing, the revised DIS Rules were expected to be promulgated and enter into effect in early 2018; they are not the subject of specific or extensive commentary in this chapter, but should by all means be consulted going forward.

(iii) What types of disputes are typically arbitrated?

Disputes commonly submitted to arbitration in Germany include those related to general sales agreements, construction, licensing and post-M&A matters.

(iv) How long do arbitral proceedings usually last in your country?

Dependent on the nature of the dispute, the parties involved and their procedural approach, on average, an arbitration proceeding may take between 12 and 24 months.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

There are no such restrictions. However, it is common practice for parties to agree that one or more members of an arbitral tribunal, particularly the chairman, be admitted to the German bar.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

Arbitrations conducted in Germany—whether international or domestic—are governed by the German Arbitration Act of 1998 as set forth in the Tenth Book of the ZPO, sections 1025 *et seq.* Where the ZPO provides no mandatory statutory rules, the parties have discretion to agree on the procedure of the arbitration.

The German Arbitration Act largely adopts the UNCITRAL Model Law, with a few notable exceptions, including: (1) more lenient form requirements for the arbitration agreement, (2) the option to request a ruling from a court on the admissibility of arbitration prior to the constitution of the tribunal, (3) greater powers of state courts to support the appointment of arbitrators and enforce interim relief,

(4) the obligation to apply the law of the country to which the subject matter is most closely connected in the absence of an agreement by the parties on the substantive law and (5) time limits for the initiation of annulment proceedings.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

German arbitration law does not distinguish between domestic and international arbitration, with the exception of the rules governing enforcement (see XIII. below).

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

The most relevant international arbitration treaty adopted by Germany is the 1958 New York Convention. Germany has also adopted the 1961 European (Geneva) Convention, the 1965 Washington International Centre for the Settlement of Investment Disputes (ICSID) Convention and the 1994 Energy Charter Treaty (ECT). In addition, Germany is party to a number of bilateral and multilateral agreements, including friendship and commerce as well as investment protection treaties, which contain regulations relevant to arbitration and cross-border enforcement of arbitral awards.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

ZPO section 1051 sets forth four relevant rules in this regard: *First*, the tribunal shall decide a dispute in accordance with the law chosen by the parties. Such choice is deemed to relate only to the substantive law, not the conflict of law rules. *Second*, in the absence of an agreement, the tribunal shall apply the law of the state to which the subject matter is most closely related. *Third*, an arbitral tribunal may decide a dispute in equitable discretion only if the parties have expressly authorized it to do so. *Fourth*, in any event, an arbitral tribunal shall decide a case in accordance with the terms of the relevant contract and shall take into account any commonly accepted trade usages.

III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

ZPO section 1031 stipulates the form and content requirements for arbitration agreements. In conformity with the UNCITRAL Model Law, the arbitration agreement must be documented in writing, ie, must be part of a signed contract or contained in an exchange of letters, telefaxes or other written communication that provides a record of the agreement.

In contrast to the UNCITRAL Model Law, the form requirements under German law are also fulfilled if the arbitration agreement is contained in a document sent by one party to the other party or by a third party to both parties and is not objected to by the receiving party in due time provided that the lack of such objection can be deemed a consent. Further, there are more restrictive form requirements if one of the parties to the arbitration agreement is a consumer.

As to content, the arbitration agreement must provide that certain or all disputes among the parties in relation to a defined legal relationship shall be finally resolved by arbitration. While the parties do not need to state any further details, it is advisable to specify at least the seat of the arbitration, the number of arbitrators, the applicable law and language of the proceedings and the administering institution (if any). Furthermore, the parties should clearly use the term “arbitration” and avoid terms like “conciliation,” “expert determination,” or any other form of alternative dispute resolution.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?**

German courts will generally ensure that agreements to arbitrate are given effect. If one party initiates court proceedings notwithstanding the existence of an arbitration agreement covering the same dispute, the other party may raise an objection prior to the beginning of the oral hearings in court. The court shall reject the court proceedings as inadmissible unless it finds the arbitration agreement to be null and void, inoperative, or incapable of being performed. In addition, prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether arbitration is admissible. Arbitral proceedings may be commenced or continued during the pending court proceedings.

- (iii) **Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced)**

common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

The use of multi-tier arbitration clauses is not unusual, although they have recently been met with increasing skepticism, as experience has shown that these frequently do not promote dispute resolution, but are instead cause for unnecessary delay. In lieu of such clauses, market participants tend to employ multi-tier dispute resolution mechanisms informally and on a case-by-case, voluntary basis. Where arbitration is commenced in disregard of a mandatory multi-tier procedure, non-observance creates a temporary procedural obstacle, but does not necessarily affect the jurisdiction of the arbitral tribunal, nor does it render the claims non-arbitrable.

(iv) What are the requirements for a valid multi-party arbitration agreement?

German arbitration law does not stipulate any specific requirements for multi-party arbitration agreements, which are generally subject to the same validity requirements as other arbitration agreements. They are not valid if they accord undue influence to one of the parties with respect to the formation of the tribunal, thereby violating the fundamental principle of equality of the parties. However, in such case, the disadvantaged party can request a court to appoint the relevant arbitrator(s) in deviation from the arbitration agreement with a view to ensuring a balanced composition of the arbitral tribunal.

The DIS Rules contain a special provision for multi-party disputes and it is not anticipated that this will materially change as a result of their forthcoming revision in 2018.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

The German Arbitration Act does not address agreements conferring a unilateral right to arbitrate. However, such agreements would appear to be enforceable as long as all parties have agreed to such a unilateral right and the general requirements as to form of the arbitration agreement are met.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

Due to the principle of privity of contract, a third party cannot validly be bound by an agreement concluded between third parties without its consent, be it an arbitration agreement or any other type of private agreement. Third parties can be bound by an arbitration agreement on grounds of legal succession or contractual

assignment. An extension of the arbitration agreement to third parties via the “group of companies doctrine” or a “piercing of the corporate veil” is generally not recognized in Germany. However, a third party may participate in arbitration proceedings with the consent of all parties.

IV. Arbitrability and Jurisdiction

- (i) Are there types of disputes that may not be arbitrated? Who decides—courts or arbitrators—whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

ZPO section 1030 governs the issue of arbitrability. Both monetary disputes (*vermögensrechtliche Ansprüche*) and other disputes that can be the subject of a settlement are arbitrable. Examples of matters that are not arbitrable include divorce, child custody matters, issues of family status, criminal law matters, disputes regarding the existence of residential leases and certain issues concerning the land title register and the company register. The arbitrability of certain kinds of IP claims is controversial. Employment disputes are arbitrable only in accordance with the specific provisions of the German Labor Court Act (*Arbeitsgerichtsgesetz*, or ArbGG).

Both courts and arbitral tribunals can decide whether a matter is capable of resolution by arbitration. A court will review the arbitrability of the subject matter in the context of proceedings pursuant to ZPO section 1032(1) or section 1032(2) (see III.(ii) above), or in the context of annulment and enforcement proceedings. The lack of arbitrability affects the arbitral tribunal’s jurisdiction.

- (ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

If court proceedings are initiated notwithstanding the existence of an arbitration agreement, the court must dismiss such proceedings as inadmissible provided the respondent raises the defense prior to the first hearing on the merits and unless the court finds that the arbitration agreement is void, inoperative or incapable of being performed. In arbitration proceedings, an objection as to the jurisdiction of the arbitral tribunal must be raised no later than in the statement of defense.

A party does not generally waive its right to arbitrate by participating in court proceedings. In fact, arbitral proceedings may be initiated or continued during pending court proceedings.

- (iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature**

and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

Before the constitution of the tribunal, the lack of jurisdiction may be raised in a separate court proceeding. After the constitution, such an objection must be raised in the arbitral proceeding by no later than the time at which the statement of defense is submitted. Pursuant to the ZPO, arbitrators may decide on their own jurisdiction. However, an arbitral tribunal's affirmative decision on its own jurisdiction can be challenged before a court within one month from receipt of such decision in writing. This statutory provision is non-derogable, as the German Federal Court of Justice (*Bundesgerichtshof*, or BGH) has held.

Therefore, while the arbitral tribunal is competent to render a first decision on its jurisdiction, the final say is with the courts. Hence, arbitral tribunals seated in Germany have only a preliminary competence-competence.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

German law does not stipulate any specific (personal) requirements for arbitrators. Generally, the parties are free to agree on the procedure for nomination, the number of arbitrators and certain personal requirements, such as language skills. As a default mechanism, the number of arbitrators is three, with the parties each appointing one arbitrator and the two party-nominated arbitrators selecting the tribunal chairman. If the parties cannot agree on a sole arbitrator, the party-nominated arbitrators fail to timely agree on a chairman, or one party does not timely appoint its arbitrator, such arbitrator will be appointed by the competent Higher Regional Court at the request of one of the parties.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Arbitrators shall disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. Justifiable doubts exist if an arbitrator considers it possible that a given fact might raise doubts with regard to his or her impartiality or independence. Business contacts to one of the parties to the dispute generally raise such doubts and therefore must be disclosed.

In case of such doubts, each party may challenge the respective arbitrator. A challenge can be filed only after constitution of the arbitral tribunal and requires a written notice stating the reasons that give rise to the concerns. The challenged arbitrator will then usually be asked to make a statement as to his impartiality and independence. In the absence of a deviating party agreement, the default rule under German law is that the arbitral tribunal then decides on the challenge, unless

the arbitrator either voluntarily resigns or the parties jointly agree on the replacement of the arbitrator. Where the tribunal rejects the challenge, recourse can be sought before the competent Higher Regional Court.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

There are generally no limitations on who may serve as an arbitrator. Under the 1998 DIS Rules, absent a party agreement to the contrary, the chairman of the tribunal or the sole arbitrator must be a lawyer (but necessarily a German lawyer); it is anticipated that this will change as a result of their forthcoming revision in 2018. While German arbitration law does not provide for any express ethical duties for arbitrators, certain general requirements of conduct for arbitrators do exist (see V.(iv) below).

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

There are no rules under German law addressing conflicts of interest of arbitrators specifically. The IBA Guidelines on Conflicts of Interest are not part of German arbitration law, but they represent an international standard, which has influenced German arbitration case law and is recognized by German courts.

VI. Interim Measures

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

If not otherwise agreed by the parties, arbitrators have the power, upon application of a party, to order any provisional measures they deem necessary. These are not limited to the types of interim relief available in German court proceedings. In order for an arbitral tribunal to issue preliminary relief, it must, of course, first be constituted. Prior to the constitution of the arbitral tribunal, parties may take recourse to the German courts for provisional relief (see VI.(ii) below). Interim relief is typically granted in the form of an order rather than an award. An arbitral tribunal may make the granting of interim relief dependent on the provision of appropriate security.

Only the courts have the power to enforce decisions, including those rendered by arbitral tribunals. Arbitral tribunals cannot themselves enforce interim orders. Upon request of a party, a court may order the enforcement of such measures, including by ordering coercive means.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

Upon application of a party, German courts are generally empowered to grant provisional relief both prior to and after the commencement of arbitral proceedings, including after the constitution of the arbitral tribunal.

Pursuant to the general rules on enforcement, German courts can grant two types of interim relief: pre-judgment attachment (*Arrest*) and preliminary injunction (*einstweilige Verfügung*) (ZPO sections 916 *et seq.*, ZPO sections 935 *et seq.*). Pre-judgment attachment is directed at securing the potential future enforcement of a monetary claim. Preliminary injunctions serve to secure the enforcement of non-monetary rights or to regulate a legal relationship preliminarily.

- (iii) **To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

German courts may grant assistance in the taking of evidence in an arbitration upon request of the arbitral tribunal or upon request of a party subject to the arbitral tribunal's approval under the general rules governing court proceedings, although in practice this is relatively rare. The arbitral tribunal is entitled to participate in any judicial taking of evidence and to ask questions. Courts will refuse to render assistance with respect to pieces of evidence or measures not admissible under German law, such as US-style pre-trial discovery of documents. Courts may refuse to provide evidentiary assistance if it is manifest that the arbitral tribunal itself would be in a position to undertake the requested measure.

VII. Disclosure/Discovery

- (i) **What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

The German-law approach to disclosure and discovery is restrictive—both in litigation and arbitration. It is a general principle of German law that each party must gather the evidence necessary to fully substantiate the facts that support its respective claims and defenses and that the counterparty is not obliged to assist or otherwise participate in that process. Accordingly, German practitioners tend to take a comparatively restrictive approach with regard to disclosure and discovery in arbitration.

In litigation proceedings, unless mandated by law (such as in certain IP and anti-trust matters), German courts tend to adhere to this general rule rather strictly,

with exceptions made in situations where withholding information would be contrary to the principle of good faith and procedural fairness. Even in such instances, a party would typically not be ordered to produce information. Instead, the court would apply a mechanism comparable to the common law principle of drawing an adverse inference. In any event, a court would almost certainly confine any order to produce information to document production.

The approach taken in arbitration is more liberal, particularly in international arbitrations, where the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) are often used, either by direct reference or as general guidelines for the arbitral tribunal. Even in arbitral proceedings, however, German practitioners will often be more reluctant to order disclosure or discovery than their colleagues from other—especially common law—jurisdictions. This is particularly true where the arbitral tribunal is mainly comprised of German judges or where the parties refer to general rules of civil procedure in their arguments. As in litigation, any order to provide the opposing side with information will likely be limited to document production.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

While there is no express restriction as to the permissible scope of discovery requests, German practitioners will typically order only document production. The parties can agree at any time on extensive disclosure or discovery. However, it is uncertain whether an arbitral tribunal seated in Germany may do so *ex officio*. Where a request for document production is made, the applicant will be required to specify the relevant documents and their content with considerable detail. The respective requirements under the IBA Rules (eg, Article 3.3) will usually be taken very seriously.

(iii) Are there special rules for handling electronically stored information?

No. The same requirements as with regard to paper documents apply. However, such electronically stored information might also fall within the scope of data protection or IT law and be subject to specific requirements.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

The level of confidentiality will mostly depend on the parties' agreement, as the German arbitration law does not itself provide for the confidentiality of arbitral proceedings. However, it is widely accepted that arbitrators—but not the parties—are under an implied duty of confidentiality. The parties will often agree on confidentiality, eg by choosing the 1998 DIS Rules, which contain an explicit confi-

dentiality provision in section 43; it is not anticipated that this will materially change as a result of their forthcoming revision in 2018.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

German arbitration law does not specifically address the protection of trade secrets, which has so far not received much attention from commentators even though related issues, particularly concerning IP matters, are large in number. An agreement of the parties that provides for comprehensive measures for the protection of trade secrets (eg, an agreement to conduct institutional arbitration under the World Intellectual Property Organization (WIPO) Arbitration Rules) will be respected by arbitral tribunals, and an award rendered will be upheld by the German courts.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

No. Commentators regularly rely on the scarce provisions addressing this issue in general civil procedure law and in criminal law. In civil procedure law, evidentiary rules similar to attorney privilege are known only in the context of (oral) witness examination where testimony would violate professional duties of confidentiality, such as in an attorney-client or bank-customer relationship. Section 203 of the German Criminal Code (*Strafgesetzbuch*, or StGB) imposes criminal sanctions on the members of certain professions, including lawyers and auditors, if they disclose information obtained from their clients in the context of their profession.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

The IBA Rules on the Taking of Evidence in International Arbitration are widely used as guidelines in international arbitrations conducted in Germany, although less commonly agreed to be binding by arbitral tribunals and parties.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Parties and arbitral tribunals are generally free to conduct the proceedings as they deem appropriate, subject to ZPO section 1042(1), which provides that the parties shall be treated equally and be given an effective and fair hearing. Every party has a right to counsel.

- (iii) **How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

Written witness statements have become increasingly common in both domestic and international arbitrations seated in Germany. Likewise, common-law style cross-examination and direct examination, which are not known as such in German litigation, are usually permitted. Both in domestic and international arbitration, arbitrators regularly question witnesses.

In domestic arbitrations, witnesses are traditionally questioned by the arbitral tribunal first and only subsequently by the parties. In international arbitrations, the tribunal generally follows what can be considered international best practice, namely to allow the parties to question the witnesses first.

- (iv) **Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?**

German arbitration law does not contain specific provisions prescribing who can or cannot appear as a witness. Arbitral tribunals cannot require a witness to take a formal oath, although they do have the power to issue an admonition or reminder of the obligation to tell the truth subject to criminal sanction, and will generally do so.

- (v) **Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?**

There is no statutory distinction between witnesses that are connected with one of the parties and unrelated witnesses. Arbitral tribunals will, however, take into account a given witness's interest in the outcome of the dispute and will assess the probative value of the respective testimony accordingly.

- (vi) **How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

Both the parties and the tribunal can introduce expert opinions into the arbitral proceeding. Expert testimony is usually first presented in writing, and the expert is later examined orally in an evidentiary hearing. Where appropriate, the parties may even be asked to submit briefs discussing the expert's assumptions and conclusions. Appearance is mandatory for tribunal-appointed experts only, but will commonly also be ordered for party-appointed experts. Experts appointed by the arbitral tribunal must be independent and impartial. They are required to inform

the parties and the arbitral tribunal of any circumstances that might raise doubts with regard to their impartiality or independence.

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

Given the German-law position that only court-appointed expert opinion may be considered as “true” evidence within the *numerus clausus* of admissible evidence, the default under German arbitration law is to use tribunal-appointed rather than party-appointed experts. Parties do, however, frequently appoint their own experts, particularly in the context of international arbitration.

German arbitrators generally give more weight to expert reports delivered by tribunal-appointed experts than to those provided by party-appointed experts since only the former are subject to a duty of impartiality and independence. Party-appointed experts are viewed with more suspicion than would be the case in a common law-inspired arbitration and tribunal.

There is no requirement to select experts from any particular list. However, since an arbitral tribunal may not itself require an expert to give a sworn expert opinion, it is advisable to appoint experts that are officially approved and sworn. Institutions such as the regional chambers of commerce keep lists of such experts in different areas of expertise.

- (viii) **Is witness conferencing (‘hot-tubbing’) used? If so, how is it typically handled?**

German practitioners use witness conferencing to a lesser extent than their colleagues in other civil law jurisdictions, such as Switzerland. Expert conferencing, which can be conducted either in preparation for or in the course of an evidentiary hearing, is the most common form used in Germany. The arbitral tribunal will usually pose specific questions for the experts to discuss with one another in advance of the hearing. The evidentiary hearing will then be dedicated exclusively to any remaining points of disagreement among the experts. During the hearing, the arbitral tribunal will usually pose a specific question to be answered by each expert in turn. The parties will invariably be given the opportunity to pose further follow-up questions arising from the witness conferencing.

- (ix) **Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

The German arbitration regime does not provide any rules as to the use of arbitral secretaries. Arbitral secretaries are commonly used, however.

X. Awards

- (i) **Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

Such formal requirements are set forth in ZPO section 1054. The arbitral award must be in writing and signed by the arbitrator(s). If a member of the arbitral tribunal cannot or will not sign the arbitral award, it is sufficient for the majority of the arbitral tribunal to have signed the award as long as the reasons for the missing signature are stated. Moreover, the arbitral award must state the date of issuance and seat of the arbitration. Finally, the arbitral award must state the reasons on which it is based, ie, usually the facts found by the tribunal and the legal conclusions drawn from them. However, there is no such duty to state the reasons where the parties have agreed otherwise or where it is an award on agreed terms.

German procedural law does not expressly limit the relief a tribunal may grant the parties. The permissible types of relief are essentially the same as those that can be issued by a German court, including monetary relief and damages, injunctive relief and declaratory relief.

- (ii) **Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?**

While this is not codified as an express restraint, punitive or exemplary damages cannot be awarded under German law. That is because an arbitral award ordering such damages would be set aside or refused enforcement in Germany on grounds of a violation of public policy.

Interest, including compound interest, can generally be awarded to the extent that this is permissible under the applicable substantive law, which is not the case under the German Civil Code (*Bürgerliches Gesetzbuch*, or BGB).

- (iii) **Are interim or partial awards enforceable?**

Partial awards that contain a final and binding decision on a separable part of the dispute, such as on one of several claims raised in the arbitration, are enforceable as long as they meet the requirements as to form and content and those as to enforceability. The same applies to awards finally rejecting the arbitral tribunal's jurisdiction with respect to parts of the dispute or the arbitrability or admissibility of

certain claims. Interim awards deciding merely preliminary matters, such as individual defenses, preliminary procedural questions, or the legal basis of a claim, and which thus do not finally resolve any part of a dispute, cannot be enforced and will therefore not be declared enforceable.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

German arbitration law does not contain any provisions governing dissenting opinions. Most practitioners believe that dissenting opinions are permissible. In any event, international arbitral awards containing a dissenting opinion are enforceable in Germany. To avoid this issue in practice, if an arbitrator dissents, the award might simply state that the decision is based on a majority decision.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Awards by consent may be issued upon application of the parties if the parties settle their dispute during the arbitral proceedings, agree on such an award on agreed terms, and the content of the settlement does not violate German public policy. As opposed to a “real” settlement agreement, an award by consent generally needs to fulfill the same requirements as any other arbitral award, except that it does not need to state the reasons on which it is based. It also must specifically state its nature as an award.

Where no award is rendered, proceedings can be terminated by order of the arbitral tribunal in four cases, ie, (1) the claimant fails to submit its statement of claims, (2) the claimant withdraws its claim, (3) the parties agree on a termination of the proceedings, or (4) the parties fail to continue the proceedings or a continuation of the proceedings has become impossible.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Such powers are provided for in ZPO section 1058. The arbitral tribunal may correct computational, typographical and other errors of a similar nature on its own initiative or on application of a party. The tribunal may issue an interpretation of certain parts of an award, which are ambiguous or contradictory, only upon application of a party. In addition, German law permits an arbitral tribunal, upon party application, to issue a supplemental award in relation to such claims as were raised in the arbitral proceedings but not addressed in the original arbitral award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

In the absence of a party agreement, the tribunal awards the costs at its own discretion considering the circumstances of the case and, in particular, the outcome of the proceedings. Arbitral tribunals invariably adhere to the rule followed in German court proceedings that costs follow the event. Occasionally, arbitral tribunals will deviate from that rule in order to penalize dilatory conduct and/or bad faith behavior of a party during the proceedings.

(ii) What are the elements of costs that are typically awarded?

The following costs will typically be awarded: arbitrators' fees and expenses; institutional and administrative fees; attorneys' fees and expenses; costs for the taking of written and oral witness evidence. Costs incurred by the parties, particularly costs accruing from legal counsel, will be awarded to the extent they were "necessary" for the pursuit of the parties' respective claims and defenses. Tribunals tend to take a rather restrictive approach with regard to attorneys' fees. In domestic cases this is particularly true regarding the reimbursement of attorney fees exceeding statutory rates.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

In institutional arbitration, the institution typically manages the fees of the arbitral tribunal and bases them on the institution's schedule of costs and the amount in dispute. The parties pay an advance on costs and the institution may—if warranted—raise the advance in the course of the arbitration proceeding. In ad hoc arbitration under German law, the arbitrators are prohibited from deciding on their own fees.

The arbitrators typically agree with the parties on an advance on costs. If one of the parties fails to pay the advance, the arbitrators may discontinue their work until payment is received or stay the proceedings to allow the other party to seek relief before a state court against the defaulting party. The arbitrators may not, however, themselves pursue a claim before a court for the payment of the advance on costs against the defaulting party until the arbitration proceeding is completed.

- (iv) **Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?**

While arbitral tribunals have discretion as to the allocation of costs, tribunals seated in Germany typically use the rule that costs follow the event. German-qualified arbitrators will regularly refer to the rules applicable to litigation costs (ie, ZPO sections 91 *et seq.*).

- (v) **Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

Courts can review an arbitral tribunal's award on costs only in the context of setting-aside or enforcement proceedings. As with all other arbitral awards, the grounds for setting aside an award or for denying its enforcement are very limited (see XII.(i) and XIII.(i) below). In particular, courts do not have the competence to review whether the arbitral tribunal's apportionment of costs between the parties is appropriate.

If the award on costs is rendered in a separate award, the setting-aside of the award on jurisdiction and/or the merits, to which the award on costs relates, will automatically invalidate any award on costs.

XII. Challenges to Awards

- (i) **How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

Awards issued by arbitral tribunals seated in Germany may be challenged only in annulment proceedings before the competent Higher Regional Court. The catalogue of grounds for setting aside an arbitral award contained in ZPO section 1059(2) matches Article 34(2) of the UNCITRAL Model Law and can be divided into two categories.

Grounds which fall within the first category are partly procedural in nature—or concern scope and validity of the arbitration agreement—and have to be expressly invoked and fully pleaded by the applicant. An arbitral award can thus be set aside if the applicant shows in a substantiated manner that (1) the arbitration agreement was invalid or one of the parties lacked the capacity to enter into the agreement, (2) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case, (3) the arbitral tribunal in its award went beyond the mandate conferred upon it by the agreement to arbitrate, or (4) the composition of the arbitral tribunal

or the arbitral procedure was not in accordance with the agreement of the parties or the provisions of the German arbitration law and that this defect affected the award.

Grounds for setting aside an arbitral award contained in the second category will be considered by the courts *ex officio* (with an application for the setting aside of course still being necessary). A court will thus set aside an award if (1) the subject matter is, wholly or in part, not considered to be arbitrable under German law or (2) recognition or enforcement of the award would lead to a result which is in conflict with German *ordre public*.

German courts tend to interpret all of these grounds for setting aside restrictively.

As a general rule, the time limit for challenging an award is three months from the receipt of the arbitral award by the applicant unless the parties have agreed otherwise. In most cases, decisions will be rendered by the Higher Regional Court no later than one year after the application is filed. This decision is final where no appeal is filed with the BGH or where such an appeal is not permissible according to the general rules for such appeals under ZPO sections 574 *et seq.* Under these rules, an appeal to the BGH is permissible where the subject matter of the setting-aside proceeding is of general legal interest or where a decision of the BGH is called upon in order to avoid conflicting decisions in the future.

Although contested among German courts and legal commentary, it is the prevailing view that annulment proceedings are no longer permissible once enforcement proceedings have been initiated. However, a court's refusal to declare an award enforceable will have the same legal effect (ie, retroactive annulment as the setting aside of the award).

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

Before arbitration proceedings have been initiated, parties cannot validly waive annulment proceedings. After the award has been rendered, one has to distinguish between the two categories of annulment grounds under the ZPO described above: (1) The respective party may waive its right to invoke the grounds for setting aside that fall within the first category described under XII.(i) above; such waiver will be effective only if at the time of its declaration the parties were aware that a ground for setting-aside which they intend to waive in fact existed. (2) The parties cannot waive their right to invoke the grounds for setting aside that fall within the second category described under XII.(i) above since these grounds are based on notions of non-derogable public policy.

- (iii) **Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

Parties may not appeal arbitral awards to the state courts and the parties cannot validly enter into an agreement that has such effect. Parties are, however, free to agree on an appellate procedure before another arbitral tribunal. The principle of party autonomy demands that the parties be able to agree on as many levels of appeal they deem appropriate.

- (iv) **May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

In the context of annulment proceedings, courts may set aside and remand the case on application by one of the parties. According to the law, the court shall remand “in feasible cases.” The court will generally remand the case only where it is convinced that the “old” arbitral tribunal will render an award more quickly (and without leaving the award susceptible to further annulment proceedings) than a new tribunal comprised of different arbitrators would. This will regularly be the case where the award is set aside due to procedural defects such as a violation of the applicant’s right to be heard.

In cases where the court does not remand the case, the exact legal consequences of an annulment appear to be disputed. It is uncertain whether jurisdiction of the state courts “revives” or the arbitration agreement “survives” the annulment. Assuming “survival” of the arbitration agreement, legal commentary presents different views on whether the “old” tribunal retains jurisdiction or a new tribunal needs to be constituted. In cases of a remand, the old tribunal must decide the case anew. Doing so, the “old” tribunal is not legally bound by the court’s reasoning. However, arbitrators will *de facto* almost always consider the reasons given by the court.

XIII. Recognition and Enforcement of Awards

- (i) **What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

Enforcement of (domestic and foreign) arbitral awards in Germany is subject to a two-step process:

First, the applicant has to obtain a declaration of enforceability from the competent Higher Regional Court. Here, different procedural rules apply for domestic and foreign arbitral awards. Pursuant to ZPO section 1060(2), the declaration of enforceability of a domestic award will be denied if the prerequisites for setting

aside the award under ZPO section 1059(2) are fulfilled. As in annulment proceedings, the lack of arbitrability and any violation of public policy will be considered *ex officio*. All other grounds for the denial of a declaration of enforceability have to be fully pleaded by the respondent within the three-month time limit that would also apply in annulment proceedings. There is no *revision au fond*, ie, the state court does not carry out a legal assessment of the case, nor a review of the tribunal's fact finding or legal considerations.

The issuance of a declaration of enforceability of a foreign award can be rejected only on the grounds set forth in Article V of the New York Convention. Provided that both countries are signatories of the European (Geneva) Convention, the declaration of enforcement of a foreign arbitral award cannot be refused in Germany even if the award was successfully challenged in the country in which (or under whose law) it was issued, provided that all parties to the arbitration agreement have their seat in a contracting state, and that the grounds on which the award was challenged do not fall within the list of accepted grounds. In accordance with the most-favored-nation principle, German courts will generally give priority to that source of international law that better facilitates recognition and enforcement.

Second, once the arbitral award has been declared enforceable, the applicant can apply for actual enforcement measures (such as seizure or attachment). These proceedings are governed by the general German law of civil procedure (see XIII.(ii) below). Where an award has not yet been declared enforceable, an applicant may seek conservatory measures which will, as a general rule, be granted if it is likely that enforcement will be thwarted or at least severely hindered by lapse of time.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Once an award has been declared enforceable by the competent Higher Regional Court, it is treated like any other enforceable title under German law (ZPO sections 704 *et seq.*). The German enforcement regime is complex. Different procedures apply depending on whether the award creditor is entitled to demand payment of money or seeks to enforce relief of a non-monetary nature, such as restitution of property or an injunction.

Money claims can be enforced by attachment of movable or immovable property or by attachment of monetary claims or other assets (eg, company shares). Attachment of movables is effected by a bailiff taking (formal) possession of the respective asset or furnishing the asset with a bailiff's seal. Attachment of real estate is effected by the district courts (*Amtsgericht*) by way of registration of a compulsory mortgage, by a compulsory sale, or by compulsory administration. Attachment of monetary claims or proprietary rights is effected by the district courts by way of an order of attachment and assignment. The attachment involves (1) a pro-

hibition against the “third-party debtor” to satisfy his creditor, ie, the title debtor and (2) a prohibition against the title debtor, ie, the claim creditor, to dispose of the claim. The order further assigns the claim to the award creditor by operation of law.

Means to enforce claims of a non-monetary nature vary in accordance with the conduct to which the award creditor is entitled under the award. Non-personal undertakings are enforced through substitute performance (and not through fines); personal undertakings, ie, undertakings which only the award debtor and not any third person can perform, are enforced through coercive fines or, in very exceptional cases, by coercive imprisonment of the award debtor. The same, ie, coercive fining and imprisonment, essentially applies to awards ordering a debtor to refrain from certain actions or to tolerate particular actions of someone else.

German law foresees specific remedies at the enforcement stage that are designed, for instance, to prevent (1) the enforcement of titles in violation of enforcement rules, (2) to a limited extent, the enforcement of claims that have no merit and (3) the enforcement in cases of undue hardship. However, where the title debtor does not actively seek such relief by application to the competent court, substantive or procedural defects of the award or of the declaration of enforceability will generally not be considered *ex officio* during the enforcement proceeding.

(iii) Are conservatory measures available pending enforcement of the award?

Pending enforcement of the award, upon application, the competent Higher Regional Court may grant the award creditor the right to take conservatory measures to secure the later enforcement of the arbitral award. The Higher Regional Court's decision may be rendered *ex parte* if hearing the award debtor on this issue would be likely to frustrate the enforcement of the award.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

German courts tend to support the enforcement of domestic and foreign arbitral awards.

However, where a foreign award has been set aside at the foreign seat, such an award will most likely not be granted enforcement in Germany, unless it falls within the limitations of the European (Geneva) Convention (see XIII.(i) above). Moreover, if a German declaration of enforceability has already been granted before the award is set aside at the foreign seat, the award debtor may apply for annulment of the German court's declaration of enforceability. In this context, it is generally irrelevant whether the grounds on which the award was set aside at the

foreign seat of the arbitration are also recognized grounds for annulment under German law.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Enforcement proceedings in Germany approximately take between three months and a year, depending on whether objections against the enforcement are raised (see above XIII.(ii)). There are no direct or express time limits for initiating proceedings to have an award declared enforceable. There is also no general time limit for commencing enforcement proceedings—neither enforcing a state court decision nor an arbitral award (once declared enforceable).

However, some limitations, albeit rare in practice, do exist. *First*, after expiry of 30 years from the issuance of the award, the award creditor may still seek enforcement, but the award debtor may raise an objection, invoking the statute of limitation. *Second*, pursuant to the principle of good faith (BGB section 242), finally awarded claims are subject to “legal forfeiture” even before the expiration of 30 years.

XIV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

In conformity with generally accepted principles under public international law, state parties enjoy immunities only in relation to their sovereign acts but not in relation to their commercial acts. Regarding the intervention of German courts in arbitration proceedings involving state parties (eg, for interim measures), an immunity defense is generally not permissible. A state which has consented to arbitration is considered also to have accepted court intervention in connection with the arbitral proceedings.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

Regarding the actual enforcement of an arbitral award, states are generally immune from enforcement measures with respect to assets that are used for sovereign, non-commercial purposes, while enforcement measures may generally target assets that serve commercial purposes. An arbitration agreement concluded by a state does not result in a waiver of immunity in the context of compulsory enforcement of the arbitral award. An exception exists for the first step in the enforcement stage (described under XIII.(i) above): At least in those cases where the arbitration agreement refers to the enforcement of an award according to domestic

law, the state is considered to have submitted itself to the declaration of enforceability proceeding.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

The Washington Convention has been in force in Germany since 1969. Germany is also a party to the Energy Charter Treaty (ECT) which entered into force in 1998. Further, Germany is an active member of the United Nations Commission on International Trade Law (UNCITRAL).

On the EU level, the Transatlantic Trade and Investment Partnership (TTIP) envisaged between the EU and the USA and the Comprehensive Economic and Trade Agreement (CETA) envisaged between the EU and Canada have recently had broad coverage in German media, along with strong opposition by a number of stakeholders, in particular, due to both treaties' investor-state arbitration mechanisms.

Taking up related concerns of the German public, the Federal Ministry of Economic Affairs and Energy has promoted the transparency of the envisaged rules governing investor-state arbitration. According to the Ministry's website, the Ministry played a crucial role in modernizing the EU's approach to investment protection and the settlement of investment disputes. The Ministry states that its 2015 recommendations in this regard were broadly accepted on the EU level and have found their way into the EU's 2015 position paper prepared for the further TTIP negotiations. The recent EU proposal to the settlement of investor-state disputes involves, inter alia, the implementation of a publicly constituted investment court composed of judges appointed by the signatories of the respective treaty, the public availability of submitted briefs, court decisions and hearings as well as "true" appeal proceedings.

The Ministry considers the recent modernization a "basis" for coming investment treaties, including TTIP. The reformed dispute settlement mechanism was first adopted in 2016 by the investment treaty concluded between the EU and Vietnam, and it is also provided for in CETA. Notably, both treaties oblige the parties to replace the newly established investment court system with a permanent multilateral investment court system. The EU Commission is currently assessing possible approaches to such a new multilateral investment court and invited all stakeholders to take a position on the planned reform by 15 March 2017.¹

¹ Further information are available at the EU Commission's [website](#).

While the TTIP negotiations have been paused since the new Trump Administration was inaugurated in 2016—and it appears to be unclear whether TTIP will enter into force at all—, CETA was signed in 2016. The German Federal Constitutional Court held in 2016 that CETA may not enter into effect “preliminarily” in its entirety, as had been envisaged by the EU and Canada. Following this decision, in particular, the rules on investor-state arbitration were excluded from the preliminary entry into force of CETA in Germany in September 2017. CETA is now being subject to ratification in the EU member states, including Germany, which will award CETA “full effect” and establish the modernized investment court system if the ratification is successful.

(ii) Has your country entered into bilateral investment treaties with other countries?

Germany concluded the first modern bilateral investment treaty with Pakistan in 1959. Since then, it has entered into bilateral investment treaties with more than 130 countries, making it the country with the single largest number of bilateral investment treaties.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

We recommend the following reference materials available with respect to German arbitration law: *Arbitration in Germany: The Model Law in Practice in Germany* by Karl-Heinz Böckstiegel, Stefan Michael Kröll and Patricia Nacimien-to (2nd edn, Kluwer, 2014); *Handbuch für die Schiedsgerichtspraxis* by Jens-Peter Lachmann (4th edn, Dr. Otto Schmidt, 2016); *Schiedsgerichtsbarkeit – Kompendium für die Praxis* by Richard H. Kreindler, Jan K. Schäfer and Reinmar Wolff (Recht und Wissenschaft, 2006); *Schiedsgerichtsbarkeit* by Karl Heinz Schwab and Gerhard Walter (7th edn, Beck, 2005); *Commercial Arbitration in Germany* by Richard H. Kreindler, Reinmar Wolff and Markus Rieder (OUP, 2016); *Schiedsgericht und Schiedsverfahren* by Rolf A. Schütze (6th edn, C.H. Beck, 2016); and the bi-monthly *Zeitschrift für Schiedsverfahren* (German Arbitration Journal, or *SchiedsVZ*).

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

In the field of commercial arbitration, major general events include the annual *Petersberger Schiedstage*, the bi-annual conferences organized by the DIS and the annual Global Arbitration Review GAR Live Frankfurt.

The bi-annual DIS conferences also cover the area of investment arbitration. In the area of educational events on investment arbitration, the annual Frankfurt Investment Arbitration Moot Court (FIAC Moot) in Frankfurt, which is accompanied by a general conference program, is a major event.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Arbitration is accepted as an alternative to German state court litigation, especially in cross-border contexts. The DIS has established itself as a reliable and efficient arbitral institution in Germany. It is anticipated that the entry into effect of the revised DIS Rules in 2018 will make DIS arbitration, and institutional arbitration generally with a German seat, even more appealing in the context of international arbitration.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Germany is supportive not only of arbitration but also of other ADR procedures and approaches. Besides arbitration, the following methods can be used as ADR in Germany: mediation, conciliation (*Schlichtung*), expert determination (*Schiedsgutachterverfahren*) and adjudication. Further, ADR plays a role in state court proceedings; judges have a duty to assist the parties in reaching an amicable settlement of their dispute.

On the EU level, ADR legislation has gained momentum, evidenced by the 2013 ADR Directive and the 2013 Regulation on online dispute resolution for consumer disputes (ODR Regulation), accompanied by the 2016 German Act on ADR in Consumer Matters (*Verbraucherstreitbeilegungsgesetz*, or VSBG). Both the ADR Directive and the ODR Regulation aim at consumer protection and regulate the out-of-court resolution of disputes arising from consumer contracts.

German out-of-court mediation legislation is still developing. In July 2017, the German Federal Government published a 200-page evaluation report on the implications of the Mediation Act on mediation in Germany, suggesting that out-of-court mediation plays only a very limited role to date in practice.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

There are a few decisions of German courts that deserve attention:

In the 2016 landmark *Pechstein* decision broadly covered by the media, the BGH ruled that the Court of Arbitration for Sports (CAS) in Lausanne is an arbitral tribunal. A sports association that dominates the market for admission of athletes to

championships does not abuse its dominant position by conditioning athletes' participation in a championship on the signing of an arbitration agreement. In the matter at hand, the BGH ruled that the conclusion of the arbitration agreement did not violate former ice speed skating professional Ms. Pechstein's guarantee to access domestic courts composed of independent judges, holding that courts generally must recognize the parties' free decision as expressed in the arbitration agreement.

In 2017 the Administrative Court of Berlin rendered a decision that concerned the granting of access to records of a pending ICSID arbitration. The court affirmed a decision of the German Federal Ministry of Economics and Energy not to grant the claimant, who sought disclosure of "environmental information," access to confidential records of a pending ICSID arbitration proceeding. In its reasoning, the court deferred to the primacy of international law regarding investment arbitration and to the German state's discretion in determining whether disclosure of environmental information would have a negative impact on international relations. According to the court, the protection of international relations is generally granted priority over the public interest in disclosing confidential information.

In deviation from previous case law, the BGH ruled in 2017 that the failure of a tribunal-appointed expert to disclose all circumstances that might give rise to concerns about his impartiality or independence constitutes a procedural error. According to the court, if the arbitral award is based on such expert's opinion, and the concealed facts would have justified a challenge on grounds of bias, the arbitral award must be annulled. It is not required that the expert's partiality or dependence appears to be particularly obvious or serious.

As mentioned above, the DIS Rules, which entered into effect in 1998, have recently been subject to extensive discussion with a view toward their imminent revision, in particular with the goal of making them more appealing in the context of international arbitration. As of this writing, the revised DIS Rules were expected to be promulgated and enter into effect in early 2018. Finally, the Federal Ministry of Justice and Consumer Protection has formed a task force to further enhance the effectiveness of German arbitration law. Among the task force's key priorities are the declaration of enforceability of foreign awards. Its final report is expected for 2018.