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IBA ARBITRATION COMMITTEE

Arbitration Guide

GERMANY

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Dr. Arno Riethmüller
Maximilian Menz
Marios Kourtis

WACH UND MECKES und Partner
Rechtsanwälte PartGmbB
Karolinen Karree
Karlstraße 12
80333 München

arno.riethmueller@wachundmeckes.com
maximilian.menz@wachundmeckes.com
marios.kourtis@wachundmeckes.com

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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 well-established form of dispute resolution in Germany, particularly for international commercial disputes. However, recourse to state courts has remained the most prevalent dispute resolution mechanism.

The possibility of the parties to influence the composition of the arbitral tribunal by selecting arbitrators with a specific expertise and industry knowledge on the subject-matter of the dispute is seen as a key advantage of arbitration proceedings. This holds especially true for international disputes, in relation to which the (perceived) neutrality of the arbitral tribunal as compared to state courts is considered an additional advantage. Further, the increased procedural flexibility of arbitration proceedings allows for solutions tailored to meet the specific requirements of the respective dispute. This includes the free choice by the parties of the language of the proceedings. Moreover, the privacy and confidentiality of arbitration proceedings is a major advantage over state court proceedings, which are generally open to the public. Finally, 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 are traditionally seen as key advantages of arbitration. These advantages are corroborated by the arbitration-friendly approach of the German state courts, the existence of a robust arbitration community and a leading arbitration institution, the German Arbitration Institute (*Deutsche Institution für Schiedsgerichtsbarkeit* or DIS).

One of the perceived disadvantages of arbitration are the relatively high costs. Especially, when the amount in dispute is low or the dispute does not present a high degree of complexity, recourse to German state courts may be a more cost-efficient solution. Furthermore, arbitration is sometimes not considered the most suitable forum for the resolution of multi-party disputes due to the overarching principles of consent and party autonomy, which impose certain limitations. An additional perceived shortcoming of arbitration is the absence of publicly available precedents, resulting from the non-publication of the majority of arbitral awards. This may lead to a risk of diverging decisions. Coupled with the large degree of procedural discretion enjoyed by arbitrators, arbitration proceedings may—arguably—be less predictable than German state court proceedings.

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

As in other jurisdictions, the precise number of ad hoc arbitration proceedings conducted in Germany is unknown. An empirical study of publicly available decisions in setting-aside and enforcement proceedings before German courts seems to indicate that the majority of arbitration proceedings are institutional. However, ad hoc proceedings are not uncommon, especially in corporate disputes.

The aforementioned study suggests that most arbitrations conducted in Germany are domestic. Also, according to the statistics published by the DIS, of the 175 arbitration proceedings initiated in 2023 (excluding sport arbitration proceedings) 60 per cent involved only German parties, 35 per cent one foreign party and 5 per cent foreign parties on both sides.

The most prominent German arbitration institution is the DIS. Specifically, German parties are keen to choose the DIS to administer the proceedings and the 2018 DIS Arbitration Rules to govern the procedure. The latter entered into effect on 1 March 2018, replacing the 1998 DIS Arbitration Rules. The new rules provide a modern procedural framework for domestic and international proceedings alike, with an emphasis on time and cost efficiency and the promotion of amicable settlements. Arbitrations under the ICC Rules are also common, especially in case of high-volume cross-border disputes involving German parties. Furthermore, some regional chambers of commerce also act as arbitration institutions (eg, the Court of Arbitration of the Hamburg Chamber of Commerce). Industry-specific institutions, like the German Maritime Arbitration Association or various commodity exchanges, exist as well.

(iii) What types of disputes are typically arbitrated?

Arbitration is a popular means of resolving in particular post-M&A disputes, disputes related to general sales or license and distribution agreements, as well corporate, energy and (international) construction matters.

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

Dependent on the nature of the dispute, the procedural approach adopted by the arbitral tribunal and the conduct of the parties involved, arbitration proceedings may generally last between 12 and 24 months.

According to the DIS, arbitration proceedings at the institution last, on average, between 18 and 22 months. However, the parties can agree—especially for smaller disputes—that the rules on expedited proceedings shall apply (Annex 4 to the 2018 DIS Arbitration Rules). In this case, the final award shall be made at the latest six months after conclusion of the initial case management conference.

(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. Under German arbitration law, also lawyers admitted in other jurisdictions can act as counsel. Similarly, the law does not specify any requirements as to who can act as an arbitrator (eg, German nationality). Any natural person with legal capacity can generally act as an arbitrator. However, in practice, parties either explicitly agree in the arbitration agreement that one (particularly the presiding arbitrator) or even all members of the arbitral tribunal have a fully completed legal training or effectively implement this by their selection of the arbitrators.

II. Arbitration Laws

(v) 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?

The core provisions governing arbitration proceedings with their seat in Germany are found in the German Arbitration Act of 1997, which came into force on 1 January 1998. They are codified in the 10th Book of the German Code of Civil Procedure (*Zivilprozessordnung* or ZPO), Sections 1025 *et seq*. These provisions are supplemented by some sector-specific provisions in other statutes, mostly dealing with the question of arbitrability.

The German Arbitration Act of 1997 extensively amended the earlier German arbitration law, largely adopting the 1985 UNCITRAL Model Law, with a few modifications and additions, most notably:

- The 10th Book of the ZPO applies to all types of arbitration, ie domestic and international proceedings and commercial and non-commercial disputes alike (see Section II(ii) below).
- If the claimant or the respondent have their seat or habitual residence in Germany, German courts may assist the parties in the constitution of the tribunal even if the place of arbitration has not yet been determined, ie it has not yet been determined that the arbitration proceedings have their seat in Germany (Section 1025(3) ZPO).
- German arbitration law eases the form requirements for arbitration agreements in a commercial context, while stipulating stricter form requirements for arbitration agreements involving consumers (Section 1031(2) and (5) ZPO; see Section III(i) below).
- Prior to the constitution of the arbitral tribunal, an application can be made to the court to determine whether or not arbitration is admissible (Section 1032(2) ZPO).

- If the arbitration agreement grants preponderant rights to a party with respect to the composition of the arbitral tribunal and this imbalance places the other party at a disadvantage, the disadvantaged party may seize the court to restore balance, by appointing the tribunal in deviation from the nomination made (Section 1034(2) ZPO).
- In the absence of a party agreement on the substantive law, the arbitral tribunal has to apply the law of the state to which the subject-matter of the dispute is most closely connected instead of the law determined by the conflict of laws rules which the tribunal considers applicable (Section 1051(2) ZPO; see Section II(iv) below).
- In an effort to mitigate the effects of truncated arbitral tribunals, German arbitration law provides that if an arbitrator refuses to participate in a vote, the other members of the arbitral tribunal may decide without him or her unless otherwise agreed by the parties (Section 1052(2) ZPO).
- Unlike the UNCITRAL Model Law, German arbitration law includes a provision on the allocation of costs (Section 1057 ZPO).
- The three-month time limit for the initiation of setting-aside proceedings can have an impact on the potential grounds for opposing enforcement of a domestic award (Section 1060(2) ZPO).

Germany has not yet adopted the 2006 amendments to the UNCITRAL Model Law. However, a planned revision of German arbitration law is expected to reflect these amendments, at least in part (see Section XVIII(iv) below).

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

There is no distinction between domestic and international arbitration, with the exception of the rules governing recognition and enforcement of arbitral awards (see Section XIV).

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

Germany has adopted the 1958 New York Convention, originally subject to a reciprocity reservation pursuant to Article I (3), which was withdrawn in 1998. Moreover, Germany has adopted the 1961 European (Geneva) Convention and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

Originally, a signatory to the 1994 Energy Charter Treaty (ECT), Germany has notified its withdrawal in late 2022. The withdrawal came into effect on 20 December 2023. However, pursuant to the so-called sunset clause in Article 47(3) of the ECT, existing investments will continue enjoying protection for 20 years following the date on which the withdrawal became effective.

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.

(viii) 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?

The law applicable to the merits of the dispute is determined according to the following rules set out in Section 1051 ZPO.

First, the tribunal shall apply the law or the legal rules chosen by the parties. Unless stated otherwise, a choice of the law of a specific state shall be deemed to refer only to its substantive law, not its conflict of laws rules. Section 1051 ZPO does not expressly set any limits to party autonomy in this respect. However, an arbitral tribunal with its seat in Germany will have to apply mandatory rules of German substantive law, a disregard of which would constitute a violation of public policy (most notably, mandatory rules of German and EU competition law). Otherwise, the award may be set aside. Second, in the absence of a party agreement, the arbitral tribunal shall apply the law of the state to which the subject-matter of the dispute is most closely connected. Third, the arbitral tribunal may decide in equity (*ex aequo et bono* or

as *amiable compositeur*) only if the parties have expressly authorised it to do so. Fourth, in any event, the tribunal shall decide in accordance with the terms of the contract and take account of any relevant trade usages.

Under the 2018 DIS Arbitration Rules, the law applicable to the merits of the dispute shall be determined according to a set of rules similar to the aforementioned Section 1051 ZPO. However, unlike the ZPO, the DIS Rules do not stipulate a closest-connection test. Rather, the arbitral tribunal shall apply the rules of law that it deems to be appropriate.

III. Arbitration Agreements

(viii) 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?

In line with the 1985 UNCITRAL Model Law, Section 1031 ZPO requires that the arbitration agreement is documented in writing, ie, must be contained in a document signed by the parties or in an exchange of letters, faxes, telegrams or other means of telecommunication which provide a record of the agreement.

In deviation from the 1985 UNCITRAL Model Law, consent to an arbitration agreement can also be implicit if this is in accordance with common usage. More specifically, an arbitration agreement is deemed to be formally valid if it is contained in a document transmitted by one party to the other party or by a third party to both parties and the addressee has not raised an objection in due time, provided that the lack of such objection can be deemed a consent in accordance with common usage. The main field of application of this rule are letters between commercial parties confirming prior oral contractual negotiations. Under German law, failure to object to such a letter is, generally, deemed a consent.

Moreover, an arbitration agreement can be concluded by way of incorporation, ie, by reference to another document (eg, general terms and conditions), provided that the reference is made in a document that meets the aforementioned form requirements.

In contrast, arbitration agreements involving consumers must fulfil more restrictive form requirements, ie, they must be contained in a separate document personally signed by the parties.

Notably, Germany intends to modernise its arbitration law to adapt it to the advancing digitalization of the procedural law as well as to various developments in international and national commercial arbitration. Accordingly, the German Federal Ministry of Justice has published a Draft Bill on the modernisation of arbitration law on 1 February 2024 (Draft Bill). The Draft Bill allows the conclusion of form-free arbitration agreements in transactions between commercial parties in line with Option II of Article 7 of the 2006 UNCITRAL Model Law. In this case, either party will have the right to request the other party to confirm the contents of the arbitration agreement in writing.

As to content, the arbitration agreement must provide that the parties submit to arbitration all or certain disputes which have arisen or may arise between them in relation to a defined legal relationship, whether contractual or non-contractual in nature (Section 1029 ZPO). The arbitration agreement must reflect the parties' intention that the disputes are finally resolved by arbitration to the exclusion of the state courts. In this respect, the parties should expressly use the term 'arbitration' and avoid terms relating to other forms of alternative dispute resolution, eg, 'conciliation' or 'expert determination'. In addition to the above mandatory content, it is advisable to specify at least the seat of the arbitration, the number of arbitrators, the language of the proceedings, the applicable law to the merits and the administering institution (if any). Finally, in case of disputes concerning the validity of shareholder resolutions, the arbitration agreement must meet some additional requirements (see Section IV(i) below).

(ix) 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 an action is brought before a court in a matter that is the subject of an arbitration agreement, the respondent may raise an objection prior to the beginning of the hearing on the merits of the case (Section 1032(1) ZPO). If the respondent has raised the objection in time, the court

has to dismiss the action as inadmissible, unless it finds that the arbitration agreement is null and void, inoperable or incapable of being performed.

However, the objection may be inadmissible—and the arbitration agreement not be given effect—if it was raised in bad faith. This may be the case if the respondent has challenged the validity of the arbitration agreement before the arbitral tribunal, but then invokes the arbitration agreement before the state court in the same matter.

Furthermore, prior to the constitution of the arbitral tribunal, an application can be made to the court to determine whether or not arbitration is admissible (Section 1032(2) ZPO). In any event, arbitration proceedings may be commenced or continued and an award may be issued in spite of the aforementioned court proceedings (Section 1032(3) ZPO).

(x) 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 dispute resolution clauses—or escalation clauses, as they are more commonly known in Germany—is not unusual. The DIS also provides users with model clauses on the combination of expert determination or adjudication with arbitration proceedings. However, the views on the merits and efficiency of such clauses vary. One main point of criticism is that parties keen to resolve their dispute amicably will explore this possibility in any event. In contrast, mandatory negotiations or other ADR procedures prior to arbitration proceedings will be of little avail when the parties are entrenched in their positions, leading to unnecessary expenses and delays.

Non-observance of a mandatory multi-tier clause, ie, direct commencement of arbitration proceedings in disregard of the earlier procedural steps, creates a temporary procedural obstacle. Yet, this does not affect the jurisdiction of the arbitral tribunal or the arbitrability of the dispute per se.

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

Currently, German arbitration law does not stipulate any specific validity requirements for multi-party arbitration agreements nor does it contain any provisions on the conduct of multi-party arbitration proceedings. This means that multi-party arbitration agreements are subject to the same validity requirements as other arbitration agreements. According to the Draft Bill of the Federal Ministry of Justice, the planned modernisation of German arbitration law shall also address multi-party arbitrations by introducing provisions on the joint appointment of arbitrators. Furthermore, by introducing the option of a court-appointed arbitrator in case several parties on one side of the proceedings cannot agree on the appointment of an arbitrator. In this case, the court may, after hearing the other party, also appoint an arbitrator for that party.

Moreover, as of today, the 2018 DIS Arbitration Rules contain provisions on multi-party arbitration proceedings and joinder of additional parties, including provisions regarding the joint appointment of arbitrators as well as a set of supplementary rules for (multi-party) corporate disputes. However, these provisions do not address the possibility of third-party notices in order to achieve a binding effect for potential recourse proceedings. Accordingly, there are proposed practical solutions in form of supplementary rules such as The Munich Rules on the Participation of Third Parties in Arbitration Proceedings (published in March 2021) and the Supplementary Rules for Third-Party Notices by the DIS (DIS-TPNR, effective as of 15 March 2024).

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

There are no specific provisions concerning agreements conferring a unilateral right to initiate arbitration proceedings. Still, such agreements are not per se invalid under German law and would generally be enforceable provided that they are contained in an individual agreement and that they do not disadvantage one party or curtail its right to legal protection in a way that violates public policy. However, unilateral clauses contained in general terms and conditions have in some cases been found to be invalid by the German Federal Court of Justice (*Bundesgerichtshof* or BGH).

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

Under German law, consent is in principle required for an arbitration agreement to be binding upon a party. However, there are certain exceptions: eg, (1) non-signatories can be bound by an arbitration agreement on grounds of legal succession or assignment of rights; (2) administrators in insolvency proceedings are bound by an arbitration agreement concluded by the insolvent debtor, however, not in relation to claw back claims, (3) third-party beneficiaries of rights under a contract may rely on an arbitration agreement contained in the contract, but are also bound to submit their claims to arbitration, and (4) general partners are bound by an arbitration agreement concluded between the partnership and a creditor.

In contrast, the extension of an arbitration agreement to non-signatories via the 'group of companies doctrine' or a 'piercing of the corporate veil' is generally rejected in Germany. In a recent decision rendered in enforcement proceedings, the BGH confirmed its restrictive stance and rejected an extension of the arbitration agreement based on the 'group of companies doctrine' (BGH, decision dated 9 March 2023 – I ZB 33/22).

(xiv) How do the courts in the jurisdiction determine the law governing the arbitration agreement?

There is no conflict of laws rule for arbitration agreements under German law. For a long time, the prevailing approach was that the national rules of private international law on contractual obligations are applicable. Consequently, most courts took the view that the substantive validity of the arbitration agreement is governed by the law—explicitly or implicitly—chosen by the parties. In absence of such a choice, by the law of the country with which the arbitration agreement is most closely connected. On the basis of the closest connection test, courts have often applied the law of the main contract.

However, with respect to arbitration agreements concluded after 2009, the problem arose that the national conflict of laws rules on contractual obligations were abrogated without a substitute (the currently applicable Rome I Regulation excludes arbitration agreements from its scope of application). Accordingly, the BGH clarified in 2021 that—for reasons of coherency—the law governing the arbitration agreement shall be determined on the same basis, both before and after an award has been made. Therefore, in accordance with Article V(1)(a) of the New York Convention, the arbitration agreement is governed by the law chosen by the parties or—failing any indication thereon—by the law of the country where the award was or will be made.

(xv) Do courts in your jurisdiction distinguish between the seat (or legal place) of the arbitration and the venue of meetings/hearings?

German arbitration law makes this distinction. In accordance with the UNCITRAL Model Law, Section 1043 ZPO provides that the parties are free to agree on the place of arbitration, ie, the seat. Absent such agreement, the place of arbitration shall be determined by the arbitral tribunal.

Notwithstanding these provisions, the arbitral tribunal may—unless otherwise agreed by the parties—meet at any place it considers appropriate in order to hold an oral hearing, to hear witnesses, experts or the parties, to deliberate, to inspect property or to review documents. The venue of hearings can also be situated in a different country, provided that this does not disadvantage one party to the extent that it violates its right to present its case.

(xvi) Are blockchain- and NFT-related disputes arbitrable in your jurisdiction?

Disputes related to blockchain and NFT technology appear to be arbitrable. In principle, any claim involving an economic interest can be submitted to arbitration (see Section IV(i) below). Particularly with respect to disputes related to crypto assets, no public policy issues appear to exist, which could affect arbitrability, since trading in such assets is legal in Germany. However, issues arising from such disputes are only starting to emerge. Thus, it remains to be seen how the theory and practice of arbitration in Germany will deal with them.

(xvii) Are there circumstances in which courts find that a valid arbitration agreement has become inoperable?

An arbitration agreement may become inoperable—ie, cease to have legal effect—if it has been terminated by one party or revoked by both parties. Similarly, German courts may find that a valid arbitration agreement has become incapable of being performed in cases of practical obstacles to the arbitration proceedings. Such an obstacle may be the inability of a party to fund the arbitration proceedings. In some cases, impecunious parties have been allowed to commence proceedings before state courts where legal aid is granted. However, even in the face of obstacles, courts tend to give effect to arbitration clauses when possible. For instance, if the parties have submitted their dispute to a non-existent institutional arbitral tribunal, the German courts will try to find a competent arbitral tribunal by way of a so-called 'supplementary interpretation' (akin to the implication of contract terms under common law).

IV. Arbitrability and Jurisdiction

(xvii) 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?

In principle, any claim involving an economic interest can be submitted to arbitration (Section 1030 ZPO). Arbitration agreements regarding other, non-monetary claims have legal effect insofar as the parties are entitled to conclude a settlement regarding the subject-matter of the dispute. Specific statutes also restrict the arbitrability of some types of disputes. Examples of matters that are not arbitrable include disputes regarding the existence of residential leases within Germany, matrimonial and child custody matters, matters relating to so-called non-contentious proceedings (including issues relating to family status, succession, the land title register and the company register) or criminal law matters. Labour law disputes are only arbitrable within the narrow limits of the German Labor Court Act (*Arbeitsgerichtsgesetz*). The arbitrability of some kinds of intellectual property disputes, eg, regarding the validity of patents, is disputed.

Moreover, the arbitrability of disputes concerning the validity of shareholder resolutions in stock companies and limited liability companies is a matter of controversy, the problem being that arbitral awards lack the *erga omnes* effect, which the law confers to state court decisions in these matters. Regarding limited liability companies, the BGH has clarified that such disputes are arbitrable provided that the arbitration agreement meets the following requirements: (1) all shareholders have consented to the arbitration agreement, (2) all shareholders need to be informed about the commencement and progress of the arbitration proceedings so that they can join them, (3) all shareholders must be able to participate in the establishment of the arbitral tribunal, unless the arbitrators are selected by a neutral third party (such as an arbitral institution) and (4) all disputes concerning the same resolution are brought before and decided by the same arbitral tribunal. These criteria also apply to partnerships to the extent that the partnership agreement stipulates an *erga omnes* effect of the shareholder resolutions. The 2018 DIS Arbitration Rules provide supplementary rules for Corporate Disputes (DIS-CDR) to assist parties in meeting the requirements of the BGH.

The arbitral tribunal can decide whether a matter is capable of resolution by arbitration, subject to judicial review in the context of setting-aside or enforcement proceedings. Additionally, a state court may review the question of arbitrability in case a claim is filed to the state courts and the respondent raises the objection that the dispute is subject to an arbitration agreement (see Section III(ii) above). The lack of arbitrability affects the adjudicability of the claim by the arbitral tribunal with the legal effect that it has to declare its lack of jurisdiction *ex officio*.

(xviii) 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 despite an arbitration agreement and the respondent objects on this basis, the court has to dismiss the action as inadmissible, unless it finds that the arbitration agreement is null and void, inoperable or incapable of being performed (see Section III(ii) above). The objection must be raised prior to the beginning of the hearing on the merits of the case.

Moreover, parties do not generally waive their right to arbitrate by participating in court proceedings. Instead, arbitration proceedings may be commenced or continued and an award being rendered even during pending court proceedings.

(xix) 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?

The principle of competence-competence is applicable in Germany. The arbitral tribunal may rule on its own jurisdiction and, in this context, on the existence or the validity of the arbitration agreement (Section 1040 ZPO). For this purpose, the arbitration agreement shall be considered to be separate from the main contract. In principle, an objection to the arbitral tribunal's jurisdiction has to be raised no later than the submission of the statement of defence. If the arbitral tribunal is of the opinion that it has jurisdiction, it shall 'in general' decide on the jurisdictional objection by way of a preliminary ruling. In this case, the ruling can be challenged before the competent court within one month from receipt of such ruling in writing. If the arbitral tribunal affirms its jurisdiction only in the final award, its decision will be subject to judicial review at the setting-aside stage. Whereas, a competence-competence clause conferring the final and binding decision on jurisdiction to the arbitral tribunal—thus limiting the above forms of judicial review—is null and void. Furthermore, under the Draft Bill on the modernisation of German arbitration law the arbitral tribunal shall have the power to determine that it lacks jurisdiction by means of a procedural award. Such award may then be challenged with an application to set aside.

Prior to the constitution of the arbitral tribunal, an application can be made to the courts to determine whether arbitration is admissible or not (see Section III(ii) above). In the context of this application, the court will examine whether a valid and operable arbitration agreement exists and whether it covers the matter submitted to arbitration. The Draft Bill on the modernisation of German arbitration law contains an express clarification to this effect.

V. Selection of Arbitrators

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

Under German arbitration law, the parties are generally free to agree on the number of arbitrators and on a procedure for appointing the members of the arbitral tribunal. Unless otherwise agreed, the number of arbitrators is three, with each party appointing one arbitrator and the two party-appointed arbitrators selecting the presiding arbitrator. If one party fails to timely appoint its arbitrator, the party-appointed arbitrators fail to timely select the presiding arbitrator or if the parties cannot agree on a sole arbitrator, the appointment shall be made by the competent court at the request of a party. Furthermore, courts can assist in the enforcement of a party agreement on the appointment procedure if the parties, the party-appointed arbitrators or a third-party (eg, an appointing authority) fail to act accordingly.

In addition, courts can remedy an imbalance resulting from the arbitration agreement granting to one party preponderant rights as to the composition of the arbitral tribunal at the disadvantage of the other party (see Section II(i) above).

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

The relevant provision of German arbitration law (Section 1036 ZPO) is an almost verbatim adoption of the UNCITRAL Model Law. Accordingly, arbitrators are under a continuous duty to disclose any and all circumstances which can raise doubts as to their impartiality or independence. While the duty to disclose is not limited to circumstances that can give rise to justifiable doubts, the arbitrators should assess whether—from the perspective of the parties—the relevant circumstances might reasonably raise doubts as to their impartiality or independence. Such circumstances include business or closer personal contacts to one of the parties.

The parties are free to agree on a challenge procedure, eg, by incorporating the rules of an arbitral institution, subject to judicial review. The default procedure under German law is that the party wishing to challenge an arbitrator has to file a written notice with the arbitral tribunal stating the grounds for the challenge. The notice has to be filed within two weeks after the party became aware of the constitution of the arbitral tribunal or of the grounds for the challenge. Unless

the challenged arbitrator voluntarily resigns or the other party agrees to the challenge—thus terminating the arbitrator's mandate by mutual consent—the arbitral tribunal has to decide on the challenge. If the challenge of an arbitrator under the procedure agreed upon by the parties or under the default procedure remains unsuccessful, the challenging party can seek recourse before the competent court (Section 1037 ZPO).

(xxi) 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 no specific requirements as to who can act as an arbitrator. Any natural person with legal capacity can assume the office. The parties are generally free to agree on specific qualifications (eg, language skills or admission in a certain jurisdiction), including by reference to the rules of an arbitral institution. In this respect, the 2018 DIS Arbitration Rules provide that the sole arbitrator or the chairman of the tribunal shall be of a nationality different from that of any party, unless all the parties are of the same nationality or have agreed otherwise. Furthermore, in domestic proceedings, the parties sometimes agree that the chairman of the arbitral tribunal shall be a judge at the German state courts. However, judges may only accept a nomination after obtaining official authorisation. As a result, it is rare for state court judges to gain arbitration experience parallel to their active career in the judiciary.

German arbitration law does not provide for any express ethical duties for arbitrators nor are there any major soft law instruments in this respect.

(xxii) 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?

Besides the general standards of impartiality and independence, there are no detailed rules or codes of conduct regarding conflicts of interest of arbitrators. The assessment whether circumstances exist which might raise doubts as to the impartiality or independence of the arbitrators is made on a case by case basis. Still, the IBA Guidelines on Conflicts of Interest—albeit not binding by virtue of law—are recognised in arbitration practice and German case law as an international soft law standard providing guidance for these decisions. There is no reason to expect that the updated 2024 Guidelines will be treated differently.

VI. Interim Measures and Emergency Arbitration

(xxii) 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?

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of one of the parties, order any interim or conservatory measures which it considers necessary in relation to the subject-matter of the dispute (Section 1041 ZPO). In principle, these are not limited to the types of interim relief available in German state court proceedings. However, the powers of the arbitral tribunal to order interim or conservatory measures are limited to the parties to the arbitration. Interim relief is typically granted in the form of an order rather than an award. The arbitral tribunal may require either party to provide reasonable security in connection with such a measure.

If interim measures ordered by an arbitral tribunal have not been voluntarily complied with, the competent court may provide leave for enforcement, upon request of a party. However, the court may do so only if an application for a corresponding measure has not already been filed with a court. In case of measures of interim relief unknown to German enforcement law, the court may recast them in order to render them enforceable. The Draft Bill on the modernisation of German arbitration law enumerates the reasons for which leave for enforcement may be refused (notably, if a ground for setting-aside applies mutatis mutandis or if the party seeking enforcement has not provided the security ordered by the tribunal). Furthermore, the Draft Bill allows for the enforcement of interim measures ordered by *foreign* arbitral tribunals.

(xxiii) 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 request of a party, a court may order interim or conservatory measures in relation to the subject-matter of the dispute both prior and after commencement of the arbitration proceedings, including after the constitution of the arbitral tribunal (Section 1033 ZPO). Court ordered interim or conservatory measures remain in force following the constitution of the arbitral tribunal.

Specifically, the German courts may grant the following two, mutually exclusive types of interim relief: pre-judgment attachment (*Arrest*) and preliminary injunction (*einstweilige Verfügung*). A pre-judgment (or pre-award) attachment is directed at securing the potential future enforcement of a monetary claim. Preliminary injunctions serve to secure non-monetary rights or to provisionally regulate a legal relationship.

Although *ex parte* measures are permissible, the German Federal Constitutional Court (*Bundesverfassungsgericht*) has held that the principle of equality of arms generally requires that the opposing party is heard before interim relief is granted.

(xxiv) 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?

Upon request of the arbitral tribunal or of a party with the approval of the arbitral tribunal, the competent court may provide assistance in the taking of evidence or in the performance of other judicial acts, which the arbitral tribunal is not empowered to carry out (eg, compelling a witness or administering an oath; Section 1050 ZPO). In this case, the respective rules for proceedings before German state courts shall apply. However, the arbitrators are entitled to participate in the taking of evidence and to ask questions. In practice, this is only rarely used since the procedure tends to be rather time consuming.

Provisional relief in relation to evidentiary matters can also be granted by way of a so-called independent procedure for the preservation of evidence. This procedure is directed at safeguarding evidence in cases where there is a risk that evidence may be lost or become more difficult to obtain.

(xxv) Are decisions by emergency arbitrators enforceable in your country?

Given that emergency arbitration is a relatively recent phenomenon, uncertainty still exists as to the enforceability of emergency orders or awards. Nonetheless, domestic emergency orders would appear to be enforceable under the procedure for leave of enforcement of interim measures ordered by the arbitral tribunal (see Section VI(i) above). With respect to foreign emergency orders, it is controversial whether the same procedure applies or whether such orders are only enforceable under the 1958 New York Convention—and whether the latter also covers awards or orders granting interim relief.

(xxvi) What is the approach in your country to anti-suit injunctions or injunctions by arbitrators preventing parties from initiating litigation proceedings?

Under EU law, German courts—like all EU Member State courts—are prohibited from granting anti-suit injunctions to prevent parties from commencing or continuing proceedings in the courts of other EU Member States in breach of an arbitration agreement. More importantly, German law does not provide for a procedural instrument similar to the common law anti-suit injunction in the first place. Nevertheless, some German courts have recently enjoined parties from pursuing proceedings before foreign courts aimed at prohibiting the opposing party from pursuing litigation in Germany. The respective rulings—functionally tantamount to an anti-anti- and an anti-anti-anti-suit injunction—were based on tort law considerations, rather than on procedural law.

Injunctions by arbitrators preventing parties from initiating litigation proceedings are not per se contrary to EU law. They are, however, uncommon, not least because of uncertainties in relation to their enforceability.

(xxvii). Do courts provide assistance in aid of foreign-seated arbitrations, including for disclosure of documents?

Courts may render evidentiary assistance pursuant to Section 1050 ZPO (see Section VI(iii) above), even if the seat of the arbitration is situated outside Germany or has not yet been determined. However, courts tend to refuse to provide assistance if the requested measure is inadmissible under German procedural law, for instance in case of a US-style pre-trial discovery of documents.

VII. Disclosure/Discovery

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

The approach to disclosure and discovery in arbitration is comparatively restrictive. It is influenced by the general principle under German civil procedure that each party must gather and furnish the evidence necessary to fully substantiate the facts that support its respective claims and defences. The opposing party is, in principle, not under a duty to assist in that process. Accordingly, in litigation proceedings, unless a party is obliged to provide information or produce a document under substantive law, courts tend to order the disclosure of documents only restrictively. However, even in such instances, the party refusing to disclose a document will not be compelled to do so. The court would rather evaluate the failure to comply in the context of the burden of proof or by way of a mechanism comparable to the common law principle of drawing an adverse inference.

Arbitral tribunals with a seat in Germany are not bound by the aforementioned restrictive rules since German arbitration law does not contain provisions on disclosure or discovery. Thus, it generally lies within the discretion of the arbitral tribunal to require from the parties to disclose a particular document or category of documents. Such a procedure is also permissible under the 2018 DIS Arbitration Rules, which provide that the arbitral tribunal shall discuss with the parties a procedure for the production of documents in the first case management conference. However, German arbitrators—especially in domestic proceedings—will generally be rather reluctant to allow extensive disclosure or discovery schemes.

In international arbitration proceedings, 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. If all parties come from civil law jurisdictions, sometimes the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration with their more restrictive approach on document production may also be used or provide guidance.

In any event, disclosure or discovery typically refers only to the production of documents. In case of an unjustified refusal to produce a document, it is generally recognised that the arbitral tribunal may draw adverse inferences. Neither the arbitral tribunal nor the competent court may compel a party to produce the document.

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

The parties are free to agree on an extensive US-style discovery procedure. However, it is doubtful whether an arbitral tribunal seated in Germany may order so *ex officio*, as it is unlikely that this corresponds to the intention of the parties, especially in the absence of any connection to a common law jurisdiction.

Where the parties have not agreed to such an extensive discovery procedure, arbitral tribunals will likely not allow fishing expeditions. Accordingly, requests for the production of documents will generally have to describe the requested documents in reasonable detail and demonstrate their relevance for the case (*cf.* Article 3(3) IBA Rules). The document production procedure—in case provided for in the procedural calendar—is likely conducted on the basis of a Redfern Schedule in line with international practice. However, how arbitrators apply these principles specifically may vary from case to case.

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

There are no specific rules for the handling of electronically stored information (ESI). The parties or, in the absence of a party agreement, the arbitral tribunal may determine how ESI is to be produced (*cf.* Article 3(12) (b) IBA Rules). In this respect, the 2018 DIS Arbitration Rules explicitly clarify that the arbitral tribunal's power to order document production includes electronically stored data. However, any processing of personal data within the arbitration proceedings—including in the context of production of ESI—must be performed in accordance with the EU General Data Protection Regulation (GDPR).

VIII. Confidentiality

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

Although there is consensus on the privacy of arbitration hearings, the confidentiality of arbitration proceedings will mostly depend on the parties' agreement. The German arbitration law does not provide for the confidentiality of arbitration per se. While it is widely recognised that arbitrators are under an implied duty of confidentiality, it is debatable whether the same applies to the parties. The parties will often agree on confidentiality, eg, by choosing the 2018 DIS Arbitration Rules which contain a provision on confidentiality that extends to parties, their outside counsel, the arbitrators, the DIS employees and other persons associated with the DIS.

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

There are no such provisions in the German arbitration law. However, the parties are free to agree on measures for the protection of trade secrets and confidential information, eg, by choosing the 2021 ICC Arbitration Rules (see Article 22 (3)) or the 2021 WIPO Arbitration Rules (see Article 54) which empower the arbitral tribunal to take measures of protection. In the absence of a party agreement, the arbitral tribunal may make arrangements to ensure the protection of such information in exercise of its discretion, eg, via the redaction of documents or the use of confidentiality advisors.

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

As extensive disclosure obligations are not envisaged under German procedural law, no specific rules of privilege exist. Such rules are usually deduced from other legal rules or principles, eg, a criminal law provision that imposes criminal sanctions on the members of certain professions (including doctors, lawyers and auditors) if they disclose information obtained from their clients in the context of their profession. A further example is a provision in civil procedure law that sets out the right to refuse witness testimony if it would violate professional duties of confidentiality (eg, in an attorney-client or bank-customer relationship).

If the parties to the dispute come from different jurisdictions with different concepts of privilege, the arbitral tribunal would have to take into account the parties' right to equal treatment enshrined in German arbitration law. This would generally lead to the application of the same rules of privilege to both parties.

IX. Evidence and Hearings

(xxxi) 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 are widely referred to in international arbitration proceedings conducted in Germany. However, arbitral tribunals and parties generally use them as guidelines, rather than binding rules. By contrast, in purely domestic proceedings, the taking of evidence is often conducted in a manner similar to state court proceedings. This means, inter alia, a more inquisitorial role of the arbitral tribunal and a restrictive approach on document production.

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

Section 1042 ZPO enshrines the parties' rights to equal treatment, the right to be heard and the right to counsel. These rights are supplemented by a few more mandatory provisions, eg, the right of parties to be given advance notice prior to hearings and meetings for the taking of evidence or the provisions on the impartiality and independence of tribunal-appointed experts.

Within the limits of these mandatory rules, the parties and, in the absence of a party agreement, the arbitral tribunal are free to determine how the proceedings shall be conducted. In particular, it lies within the discretion of the arbitral tribunal to take an active role regarding the conduct of the proceedings and the collection of evidence. In this respect, the law clarifies that the arbitral tribunal has the power to decide on the admissibility of the taking of evidence and to take and freely assess evidence.

Unless otherwise agreed by the parties, the arbitral tribunal's discretion also includes the decision whether to hold oral hearings or to conduct a 'documents only' arbitration. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at the request of a party.

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

German arbitration law does not contain any provisions on how the testimony of fact witnesses shall be presented. As in other civil law countries, in litigation proceedings, the parties identify in their submissions (1) the fact witnesses on whose testimony they intend to rely on and (2) the facts on which the witnesses shall testify. The court then determines which witnesses it wishes to examine and questions them. Only subsequently the parties' lawyers are offered the opportunity to ask additional questions. This way of witness examination is rather common in domestic arbitration proceedings.

In international arbitration proceedings, but also increasingly in domestic arbitrations, testimony is presented by way of written witness statements, which often substitute extensive direct examination. Whether the examination of witnesses is led by the arbitral tribunal or the parties largely depends on the procedural preferences of the arbitral tribunal and the individual circumstances of the case. In international proceedings, arbitral tribunals will usually allow the parties to start with the questioning. In this case, a usually brief direct examination (if any) is followed by a cross-examination and, potentially, a re-direct and a re-cross examination.

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

There are no such rules in German arbitration law. In principle, any person can provide witness testimony. This includes parties and their legal representatives (eg, managing directors) since the relevant restrictions in the context of litigation proceedings do not apply. However, where state courts provide assistance to the arbitral tribunal in the examination of witnesses, certain persons will have the right to refuse testimony (see Section VIII(iii) above).

Arbitral tribunals are not allowed to administer oaths. If they wish to obtain a sworn witness testimony—which rarely happens in practice—they have to seek court assistance. However, arbitral tribunals can and should remind witnesses of their duty to tell the truth subject to criminal sanction, and will usually also do so.

(xxxv) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative, director or employee) and the testimony of unrelated witnesses?

The law does not distinguish between witnesses that are related to one of the parties and those who are not. Arbitral tribunals will, however, take into account the interest a witness may have in the outcome of the dispute and assess the probative value of the respective testimony accordingly. Furthermore, the common practice of sequestering witnesses will generally not apply to parties and party representatives.

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

Unless otherwise agreed by the parties, both the arbitral tribunal and the parties can appoint experts. Pursuant to the relevant default rule (Section 1049 ZPO), tribunal-appointed experts can present their testimony to the questions submitted to them by the arbitral tribunal either in an oral or a written report, although the latter is the norm. At the request of a party or if the arbitral tribunal considers it necessary, the tribunal-appointed experts shall participate in an oral hearing where the parties may question them. In addition, the parties can present their own expert witnesses to testify on the issues in question. Although not explicitly stipulated in the above provision, parties may also submit written reports by their experts and usually do so before the expert is questioned.

Tribunal-appointed experts have to meet the same independence and impartiality requirements as arbitrators. They are under the same disclosure obligations and may be challenged on the same grounds (see Section V(ii) above). However, challenges against experts cannot be submitted to the courts if the tribunal has rejected the challenge, although the presence of relevant grounds may be taken into account in the context of setting-aside proceedings.

(xxxvii) 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?

In German state court proceedings, only the opinions of court-appointed experts have evidentiary value within the *numerus clausus* of admissible evidence. By contrast, opinions rendered by party-appointed experts are treated as part of the parties' submissions. While it is generally recognised that these strict rules do not apply in arbitration proceedings, the default rule under German arbitration law remains the use of tribunal-appointed experts. A similar approach has been adopted by the 2018 DIS Arbitration Rules, which, however, explicitly stipulate that the arbitral tribunal shall consult with the parties before appointing an expert.

In practice, especially in international arbitrations, parties will very often present their own expert evidence, initially by way of written statements of their expert witnesses filed with their submissions. If the opinions rendered by expert witnesses are conflicting—as is often the case—the arbitral tribunal may appoint its own expert. In particular, some German practitioners tend to give more weight to the opinions of tribunal-appointed experts than to those of party-appointed experts since only the former are under a formal duty of independence and impartiality. In any case, potential solutions to the problem of the 'battle of experts' are being discussed and practiced, including the use of expert witness conferencing (see Section IX(viii) below), technical secretaries or expert teaming (eg, by use of the 'Sachs protocol').

There is no requirement that experts have to be selected from a particular list. However, since the arbitral tribunal cannot administer an oath or take an affirmation, it may consider appointing an officially appointed and sworn expert in the applicable profession. Some institutions keep lists of such experts in different areas of expertise (eg, the nationwide experts directory of the chambers of commerce).

(xxxviii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

Witness conferencing is permitted and occasionally employed, mostly in international arbitrations. However, since it deviates from the rule of civil procedure that witnesses are to be heard individually, German practitioners appear generally less keen to use this method in arbitration than practitioners from other jurisdictions. Furthermore, commentators point out that witness conferencing should be used in a way that respects the principle of equality of the parties and their right to present their case. In this respect, there appears to be some scepticism towards witness-led conferences.

Expert conferencing is the form most commonly used in Germany. In advance of the evidentiary hearing and sometimes even prior to the drafting of the expert reports, the arbitral tribunal will often hold an expert meeting in which the party-appointed experts will be asked to establish the points of agreement and disagreement. The evidentiary hearing will then be focused on the latter. Whether the questioning is led by the arbitral tribunal or the parties will vary on the agreement of the parties or the preferences of the arbitral tribunal. More often, the arbitral tribunal will first examine the experts in turn on the same issue and subsequently give parties the opportunity to ask follow-up questions.

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

There are no explicit requirements as to the use of arbitral secretaries. However, it is generally recognised that the arbitral tribunal should inform the parties of its intention to appoint a secretary and, preferably, secure the parties' approval before doing so. Furthermore, arbitral secretaries have to meet the same impartiality and independence requirements as arbitrators and are under the same obligations of confidentiality. While it is accepted that secretaries may attend deliberations, they are not allowed to influence the arbitral tribunal's decision making.

The use of arbitral secretaries is common, especially in international or complex proceedings.

(xl) Are there any ethical codes or other professional standards applicable to counsel and arbitrators conducting proceedings in your jurisdiction?

There are no ethical codes or professional standards in relation to arbitration specifically (*cf.* Section V(iv) above). Yet, German lawyers have to comply with the professional rules of conduct set out in the Federal Lawyers Act (*Bundesrechtsanwaltsordnung,* BRAO) and the Professional Code of Conduct for Lawyers (*Berufsordnung für Rechtsanwälte*, BORA). These rules also apply *mutatis mutandis* to certain categories of foreign lawyers who have settled and practice in Germany. Other foreign counsel or arbitrators have to observe the professional standards applicable in their home jurisdiction.

Moreover, the 2013 IBA Guidelines on Party Representation in International Arbitration are sometimes—especially in international arbitration proceedings—used as an international soft law for best practises, providing guidance to the parties, their counsel and the arbitral tribunal. However, a direct reference by the parties or the arbitral tribunal on their application is less common than references to the IBA Rules (see Section VII(i)) and the IBA Guidelines on Conflicts of Interest (see Section V(iv)).

(xli) Have arbitral institutions in your jurisdiction implemented rules empowering arbitral tribunals to exclude counsel based on conflicts of interest or other reasons?

We are not aware of such rules. Unlike other institutional rules (eg, the 2020 LCIA Rules), the most prominent institutional rules in Germany, the 2018 DIS Arbitration Rules, do not contain provisions on the authorised representatives of a party.

(xlii) Has your jurisdiction adopted any rules with regard to remote hearings and have there been any court decisions on same?

While the law explicitly permits remote hearings in state court proceedings, no such provision exists in the German arbitration law. However, it is generally recognised that remote or hybrid hearings in arbitration proceedings are per se permissible, unless the parties have agreed otherwise. In any case, arbitral tribunals will usually seek to obtain the parties'

consent to a remote hearing, as they would do with the place of in-person hearings. Although German practitioners widely resorted to remote hearings during the Covid-19 pandemic, they seem to have a preference for in-person evidentiary hearings. In contrast, pre-hearing conference calls or video conferences are popular for discussions on organisational matters.

We are not aware of any German court decisions on remote hearings in arbitration.

Under the Draft Bill on the modernisation of German arbitration law, the arbitral tribunal will be able to order remote hearings after consulting with the parties, unless otherwise agreed by them.

X. Awards

(xlii) 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 Section 1054 ZPO which is an almost verbatim adoption of the UNCITRAL Model Law. The arbitral award must be made in writing and signed by the arbitrator(s). In case of a multi-arbitrator tribunal, the signature of the majority of its members is sufficient, provided that the reason for the absence of the signature is stated. The award must state the date on which it was made and the place of arbitration. It shall be deemed to have been made on that date and at that place. The Draft Bill on the modernisation of German arbitration law further allows awards to be issued electronically if no party objects and the members of the arbitral tribunal have signed with a qualified electronic signature.

Furthermore, the award must state the reasons upon which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms. According to the case law of the BGH, the obligation to provide reasons only has to meet certain minimum requirements. It is sufficient that the arbitral tribunal provides a brief summary of the main reasons for its decision, as long as its reasoning is not absurd, does not contradict its decision and is not limited to empty phrases. However, the arbitral tribunal must address the issues that it considers to be central to the outcome of the arbitration proceedings as well as the parties' main defences. Accordingly, in some extreme cases German courts may set aside arbitral awards for a lack of reasoning.

German arbitration law is silent with regard to the arbitrators' remedial powers. As in other civil law jurisdictions, relief is generally seen as a matter of substantive law. Arbitrators have, in principle, a relatively broad discretion to fashion relief. This would, in any case, include the types of relief that can be granted by a German court, most notably monetary compensation, specific performance, injunctive relief, declaratory relief, interest and costs. The relief granted should, however, not violate public policy, otherwise the arbitral award would be set aside or its enforcement refused (*cf.* Section X(ii) below).

(xliii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Arbitrators cannot award punitive or exemplary damages. Not only are they alien to German substantive law, but they have been found to be contrary to German public policy.

Interest, including compound interest, can generally be awarded to the extent permitted by the applicable substantive law. Under German law, a creditor can claim interest, but generally not compound interest.

(xliv) Are interim or partial awards enforceable?

Interim awards—ie, awards that do not finally resolve the dispute, but address preliminary matters (eg, procedural issues or individual defences)—cannot be enforced and would therefore not be declared enforceable. In particular, an arbitral tribunal's ruling affirming jurisdiction is not deemed to be an award for enforcement purposes. However, this does not apply to the decision on costs it may contain. It is disputed whether awards which contain a final determination of the question of liability, but refer the question of quantum to a separate award can be declared enforceable. Finally, orders of

the arbitral tribunal granting interim relief can be enforced under a special procedure (see Section VI(i) above) while the provisions on the enforcement of arbitral awards do not apply.

Partial awards—ie, awards that contain a final decision on a separable part of the dispute (eg, one of several claims raised in the arbitration)—are enforceable provided that they meet the requirements as to form and content and those as to enforceability. Awards by which the arbitral tribunal denies its jurisdiction are treated in a similar manner for setting-aside purposes.

(xlv) 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 neither expressly permit nor forbid dissenting opinions. Views on their permissibility vary. The prevailing view is that they are generally permissible or that, at least, they do not constitute a ground for setting aside the award. According to the stricter approach, however, the issuing of a dissenting opinion violates the secrecy of the arbitral tribunal's deliberations applicable to domestic arbitration proceedings. Such a violation is contrary to German public policy and the award can be set aside. Therefore, it is advisable that—if an arbitrator dissents—the award simply states that it is based on a majority decision.

The Draft Bill on the modernisation of the German arbitration law takes a liberal approach towards dissenting opinions. Unless otherwise agreed by the parties, an arbitrator shall be able to provide a dissenting opinion on the award or its reasoning. Such opinion shall be in writing, signed by the arbitrator, and may not form part of the award.

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

Awards by consent ('awards on agreed terms', pursuant to Section 1053 ZPO) can be issued at the request of all parties if they settle the dispute during the arbitration proceedings and their content does not violate German public policy. Awards by consent need to fulfil the same formal requirements as any other arbitral award, except that they do not need to state the reasons upon which they are based. They must include the statement that they are an actual 'award'. If the settlement also extends to third parties, they have to accede to the arbitration agreement and join the arbitration proceedings.

Where no award is rendered, proceedings can be terminated by order of the arbitral tribunal in four cases, ie, (1) the claimant fails to timely submit its statement of claim, provided that such default is not justified, (2) the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest on part of the respondent in conclusively resolving the dispute, (3) the parties agree on a termination of the proceedings, or (4) the parties fail to pursue the arbitration even after being requested to do so by the arbitral tribunal or a continuation of the proceedings has become impossible. The 2018 DIS Arbitration Rules contain an essentially similar provision on the arbitral tribunal's powers to terminate the proceedings. It is supplemented by provisions empowering the DIS to terminate the proceedings for similar reasons prior to the constitution of the arbitral tribunal or for failure of the parties to pay deposits or administrative fees.

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

The arbitral tribunal can correct any computational, clerical or typographical errors and errors of similar nature at the request of a party as well as *sua sponte*. Upon application of a party, the arbitral tribunal may interpret specific ambiguous parts of the award. In addition, upon party application, the arbitral tribunal may make an additional award as to claims that were not addressed in the award even though they were raised in the arbitration proceedings. Unless otherwise agreed by the parties, the above applications have to be made within one month upon receipt of the award.

XI. Costs

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

Unless otherwise agreed by the parties, the arbitral tribunal awards the costs at its discretion considering the circumstances of the case, in particular the outcome of the proceedings (Section 1057(1) ZPO). The general rule in German state court proceedings is that costs follow the event. While this is not binding in arbitration proceedings, arbitral tribunals usually adhere to it. The arbitral tribunal may deviate from this rule when appropriate, for instance in order to punish a party's uncooperative or bad faith behaviour, dilatory conduct or pointless procedural tactics (eg, evidently unfounded pleadings needlessly complicating the proceedings). It is disputed whether the arbitral tribunal may follow a different rule on the allocation of costs (eg, the American rule on attorney's fees) solely on the basis of the parties' nationality.

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

The following costs will typically be awarded: the arbitral tribunal's fees and expenses; the administrative fees of the arbitral institution; costs incurred in connection with the conduct of the proceedings (eg, costs for transcription and translation services; booking of hearing rooms; costs of taking evidence, especially the fees and expenses of tribunal-appointed experts). Costs of the parties will be awarded to the extent they were necessary for the pursuit of the parties' respective claims and defences. This generally includes the fees and expenses of legal counsel. According to the prevailing view, these are not limited to statutory fees. Higher fees on the basis of hourly rates may be reimbursed if they were necessary, for instance in international arbitrations or in domestic arbitrations with a high degree of factual and legal complexity.

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

In principle, arbitrators cannot decide on their own fees as this would run counter to the prohibition of acting as judges in their own cause. This means that arbitrators are prohibited from awarding themselves their fees and invoking such an award against the parties. According to the prevailing view, however, where the arbitral tribunal's fees are fixed on an *ad valorem* basis, the arbitral tribunal can indirectly set its fees by determining the amount in dispute, since such a determination is only binding between the parties. In case of disputes as to the arbitrators' fees, both the arbitrator(s) and the parties have to seize the ordinary courts (or another arbitral tribunal if they have submitted their disputes to arbitration).

Arbitrators have the right to an advance on costs and in case of ad hoc arbitrations, typically, conclude an agreement with the parties in this respect. If a party fails to pay the advance and until payment is effected, the arbitral tribunal may exercise its right of retention and discontinue its work. It may also stay the proceedings to allow the other party to seek relief before a state court against the defaulting party with respect to the failed payment of the advance. The arbitrators, however, may not themselves pursue a claim before a court for the payment of the advance on costs.

In institutional arbitration, the institution typically manages the fees of the arbitral tribunal based 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 proceedings. This is the approach also adopted by the 2018 DIS Arbitration Rules. Arbitrators' fees are calculated on the basis of an *ad valorem* degressive cost scale. The fees may be increased in cases of multi-party arbitrations, requests for interim relief or in cases of particular legal or factual complexity. Conversely, the DIS may reduce the fees in cases of delay to issue the award or early termination of the proceedings.

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

While arbitral tribunals seated in Germany typically adhere to the rule that costs follow the event, the arbitral tribunal may apportion the costs between the parties at its discretion considering the circumstances of the case (see Section XI(i) above).

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

Courts can review the tribunal's decision on costs only in the context of setting-aside or enforcement proceedings, irrespective of whether the arbitral tribunal rendered a separate award on costs or made a decision on costs in the final award. In any event, if the award on the merits is set aside, this applies automatically to any decision on costs as well. Generally, the grounds for setting aside an award or for denying its enforcement are very limited (see Section XII(i) below). In particular, courts do not have the competence to review whether the apportionment of costs between the parties was appropriate or if the tribunal's assessment regarding the necessity of parties' costs was correct (no *révision au fond)*.

XII. Challenges to Awards

(li) 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?

Currently, awards issued by arbitral tribunals seated in Germany may be directly challenged before the competent court (*cf.* Section XII(v) below) only in setting-aside proceedings. The grounds for setting aside an arbitral award are exhaustively listed in Section 1059(2) ZPO. They are taken from Article 34 Model Law with minor amendments and can be divided into two categories.

Grounds falling within the first category need to be expressly invoked and fully pleaded by the applicant. These grounds are: (1) one of the parties lacked the capacity to enter into the arbitration agreement under the law applicable to it or the arbitration agreement was invalid under the law to which the parties have subjected it or, in the absence of such choice, under German law; (2) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present its case (ie, violations of the right to be heard); (3) the award deals with a dispute not contemplated by the agreement to arbitrate or does not fall within the arbitration clause or contains decisions beyond the scope of the arbitration agreement (ie, an arbitral tribunal's excess of powers); or (4) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a permissible agreement of the parties or with the provisions of the German arbitration law and this flaw presumably affected the award.

The second category comprises grounds that will be considered by the court *ex officio* (provided that the applicant has made factual allegations in this respect). These grounds are: (1) the subject-matter of the dispute is not arbitrable under German law; or (2) the recognition or enforcement of the award would lead to a result that is contrary to public policy (*ordre public*).

German courts tend to interpret the above grounds for setting aside restrictively. In particular, not every violation of mandatory rules is considered to be a violation of public policy. Rather, the recognition or enforcement of the award must lead to a result that is manifestly incompatible with fundamental principles of German law. This is the case when the award or the procedure upon which it is based disregards a rule essential to public or economic life or runs counter to the most fundamental notions of justice in Germany.

As a general rule, the time limit for the initiation of setting-aside proceedings is three months from the receipt of the award by the applicant, unless the parties have agreed otherwise. According to an empirical study based on court decisions between 2012 and 2016, the median duration of setting-aside (and enforcement) proceedings before the competent Higher Regional Court was approximately six months. In general, such proceedings may take between six months and two years. The duration also depends on whether the decision of the competent court is appealed to the BGH (see Section XII(v) below).

The prevailing view is that setting-aside proceedings are no longer permissible once enforcement proceedings have been initiated. The reason is that there is no need for (additional) judicial protection, since the grounds for setting aside the award also constitute grounds for refusing its enforcement. If such grounds are present, the court will refuse to declare the award enforceable and will set it aside. An application to set aside the award is also impermissible if the award has already been declared enforceable (Section 1059(3) ZPO).

In addition to setting-aside proceedings, the Draft Bill on the modernisation of German arbitration law introduces a so-called request for retrial of a case (*Restitution*). This remedy will only be available in exceptional cases where significant violations of fairness take precedence over the finality of the award and allow that it is overturned. Such cases include, notably, awards grounded on a forged document or perjury, awards obtained by way of a criminal offense committed by a party or counsel in relation to the dispute or the commission of such an offense by an arbitrator.

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

German arbitration law does not provide for such a waiver. It is widely recognised that, in any case, a general waiver of the right to challenge an award is invalid if it is declared before receipt of the arbitral award. By contrast, a partial waiver—especially one pertaining to certain grounds for challenge—may be valid, although there is disagreement as to when such a waiver can be declared and what matters it may cover. According to the strictest approach, a waiver is only possible after the award has been issued and the defect is known to the affected party. With respect to the extent of a waiver, the prevailing view is that, in any event, a waiver is not possible with respect to the grounds that the court reviews *ex officio* (see Section XII(i) above), as they are based on non-derogable public policy notions.

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

An appeal in the sense of a judicial review of the merits of an arbitral award is generally not permissible (no *révision au fond*; see however Section XVIII(iii) below for an exception). The parties cannot enter into an agreement that has such effect. They are, however, free to agree on an appellate procedure before an appeals tribunal.

(liv) 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 setting-aside proceedings, the court may set aside the award and remit the case to the arbitral tribunal 'in appropriate cases' upon application by one of the parties. The courts may remit the case to the arbitral tribunal if the award suffers from 'curable' procedural defects, but not severe violations of due process. The decisive factor is whether the dispute can be settled more efficiently or effectively by continuing the arbitration proceedings. If the case is remitted, the arbitral tribunal has to render a new award. While it is not bound by the court's reasoning, the arbitral tribunal will de facto consider the reasons given by the court as to the defects that led to the original award being set aside.

In cases where the court does not order a remission, the setting aside of the award will—in cases of doubt—have the effect of reviving the arbitration agreement.

(lv) Is there a specialist arbitration court in your jurisdiction?

There is no 'specialist' arbitration court in Germany. However, judicial review and assistance in arbitration matters is generally conferred on the Higher Regional Courts (*Oberlandesgerichte*, OLG) and, in the case of Bavaria, on the Bavarian Highest Regional Court (*Bayerisches Oberstes Landesgericht,* BayObLG). Within these courts, arbitration matters are referred to specific chambers ('senates'). Only evidentiary assistance (see Section VI(iii) above) is delegated to lower courts, the Local Courts (*Amtsgerichte*, AG).

In certain cases, an 'appeal on points of law' against decisions of the OLGs or the BayObLG can be filed with the Federal Court of Justice, the BGH, in which arbitration matters are also assigned to specific chambers. These cases are: (1) the determination of the admissibility of arbitration, (2) the review of the decision of an arbitral tribunal affirming its competence, (3) the setting aside of the award, (4) the declaration of enforceability of the award or (5) the annulment of the declaration of enforceability. Under the general rules of the ZPO, the appeal to the BGH is generally permissible if the case is of fundamental importance or where the appeal is necessary for the further development of the law or to ensure a uniform case-law.

The Draft Bill on the modernisation of German arbitration law allows the federal states to refer arbitration-related matters to so-called Commercial Courts at OLG level (if constituted). Subject to party agreement, the relevant proceedings before

the Commercial Courts may be conducted entirely in English. The same applies to any subsequent proceedings before the BGH if requested by the appellant and accepted by the BGH. In any event, the Draft Bill provides that, in principle, any document in English prepared or submitted in arbitral proceedings may be submitted without translation even if the language of the court proceedings is German.

(lvi) To what extent do courts in your jurisdiction allow arbitrators to amend and/or replace wrongly invoked law or the law not invoked by the parties (iura novit arbiter)? Could this be a basis to set aside the award?

German arbitration law is silent as to the powers of the arbitral tribunal to find and apply the law. In German litigation proceedings, the parties are technically only required to make the factual allegations supporting their prayers for relief or their defences. By contrast, it falls to the judge to find, construe and apply the law, including foreign law (*iura novit curia*). This principle also applies in domestic arbitration proceedings. The arbitral tribunal generally applies the law *sua sponte* and is not bound by the legal arguments made by the parties. Moreover, in international arbitrations, unless otherwise agreed by the parties, it lies in principle within the discretion of the arbitral tribunal to raise questions of law and conduct legal research reaching beyond the parties' submissions.

Due to the prohibition of a *révision au fond,* the arbitral tribunal's application of the law will—as a general rule—fall outside the scope of judicial review. However, the arbitral tribunal may not base its decision on a legal argument not raised by the parties if this would infringe upon their right to be heard ('prohibition of surprise decisions'). This may, inter alia, be the case when even a diligent and knowledgeable party could not have anticipated the arbitral tribunal's legal opinion or if the arbitral tribunal deviated from an opinion it had previously expressed. Furthermore, an application of the law by the arbitral tribunal on its own initiative may not lead to the awarding of relief that was not requested by the parties. In the aforementioned cases, the award may be set aside.

XIII. Arbitrator Liability

(lvi) Does the arbitration law in your jurisdiction expressly provide for the immunity of arbitrators, experts, translators, interpreters and/or other participants in arbitration proceedings from civil liability in connection with their mandate? If so, are there exceptions to this immunity?

German arbitration law is silent on the question of civil liability of participants in arbitration proceedings.

Arbitrators are, in principle, liable for breaches of their contractual duties or for tortious behaviour. However, the prevailing view is that—unless agreed otherwise—arbitrators enjoy immunity in relation to their judicial functions (most notably: fact finding, conduct of the proceedings and application of the law) in the same fashion as a state judge. This means that, in connection with these functions, they are only liable if their behaviour also constitutes a criminal offense. In contrast, arbitrators may be held liable for a culpable breach of their other contractual duties in connection with the arbitration (eg, failure to comply with disclosure obligations, termination of the arbitral contract without cause, unjustifiable delays in conducting the proceedings or rendering an award). However, the arbitral contract or the arbitration rules adopted by the parties may provide for a limitation of such liability (eg, under the 2018 DIS Arbitration Rules, Article 45, except for intentional breaches of judicial functions as well as intentional breaches and gross negligence regarding other contractual duties).

Tribunal-appointed experts are, according to the prevailing view, liable for errors in their report only in cases of gross negligence or intent, unless agreed otherwise. Party-appointed experts and other participants in arbitration proceedings (eg, translators) may be held liable under the general rules for breach of contract or torts.

(lvii) Does this immunity, if any, extend to criminal liability?

The above persons may be held criminally liable if they commit a criminal offense in the context of the arbitral proceedings. For instance, arbitrators may be held criminally liable for taking bribes or for perverting the course of justice (*Rechtsbeugung*).

XIV. Recognition and Enforcement of Awards

(lvii) 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 arbitral awards in Germany is subject to a two-step process:

First, the party seeking enforcement of the arbitral award has to obtain a declaration of enforceability (*exequatur)*. The grounds for opposing enforcement and the procedure differ depending on whether the enforcement of a domestic or a foreign award is sought:

- The declaration of enforceability of a *domestic award* may be refused if one of the grounds for setting the award aside exists (Section 1060(2) ZPO; see Section XII(i) above). As in setting-aside proceedings, the lack of arbitrability and violations of public policy will be considered ex officio. All other grounds have to be invoked and fully pleaded by the respondent within the same time limit that would also apply to the initiation of setting-aside proceedings. In any event, grounds for setting aside/refusal of enforcement will not be considered if an application to set aside the award based on them has already been rejected. In addition, according to the prevailing view, the respondent may in principle also raise substantive law defences against the declaration of enforceability (eg, set-off or performance of the contract). The Higher Regional Court designated by the parties or, in the absence of a party agreement, the Higher Regional Court at the seat of the arbitration has jurisdiction over the declaration of enforceability.

- The recognition and enforcement of *foreign awards* is governed by the 1958 New York Convention (Section 1061(1) ZPO). Accordingly, their recognition and enforcement may be refused only on the grounds set out in Article V of the Convention. However, a more favourable enforcement regime under other international treaties or under national law (*cf.* Article VII(1) of the Convention) may apply. Furthermore, also in this case, the respondent may raise defences on the basis of substantive law. The competent court is again the Higher Regional Court. Its jurisdiction *ratione loci* is determined on the basis of the seat or habitual residence of the respondent, the district in which the respondent's assets are located or the district in which the object in dispute (or the object affected by an interim measure) is situated. The exact relationship between these alternatives is disputed; if none of them is applicable, the Higher Regional Court of Berlin (the *Kammergericht*) shall have subsidiary jurisdiction.

Second, the decision declaring the award enforceable constitutes an 'enforceable title'. On its basis, the applicant can take enforcement measures in the proper sense ('execution', see Section XIV(ii) below).

Prior to the declaration of enforceability, no enforcement measures may be taken. However, while the *exequatur* proceedings are pending, the court may grant leave to enforce. This is limited to conservatory measures (see Section XIV(iii) below).

(lviii) 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 the award has been declared enforceable, it is treated like any other enforceable title under German law. Its enforcement is governed by the general rules of the ZPO for the enforcement of judgments and other titles (Sections 704-959 ZPO), supplemented by special rules for certain categories of assets (eg, real estate, ships or aircraft). This quite complex regime provides for different procedures (and competent authorities) depending on the nature of the claim to be enforced and the specific enforcement measure:

- *Monetary* claims can be enforced against movable and immovable assets of the debtor. Movable objects are attached by a bailiff and sold at a public auction (unless they consist in money, which is handed over to the creditor). An 'attachment and transfer' order may also be obtained against the debtor's own claims against third parties or other economic rights (eg, company shares or certain IP rights). Enforcement against immovable property is effected by way of a compulsory mortgage, compulsory sale or compulsory administration.

- Measures for the enforcement of *non-monetary* claims will depend on the relief sought. For instance, the obligation to deliver specific objects is enforced by seizing these objects and handing them over to the creditor. Obligations to refrain from or tolerate specific actions are ensured by way of fines or imprisonment.

The ZPO provides the respondent with different remedies at the enforcement stage which comprise, inter alia, defences against (1) the conduct of the enforcement procedure, (2) to a limited extent, the underlying claim and (3) the enforcement in cases of undue hardship. Third parties with a claim on the assets against which enforcement is sought may also challenge the enforcement proceedings.

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

While the *exequatur* proceedings are pending, the competent Higher Regional Court may order conservatory measures at the request of the applicant. The court will balance the interests of the applicant to secure enforcement of the award against the interests of the respondent. The exact standards for this balancing act are disputed. While it is recognised that the chances of success of the *exequatur* proceedings are to be taken into account, views vary as to the necessary degree of risk that assets may be dissipated. The court's order may be rendered *ex parte*, although courts tend to make use of this option with restraint.

(lx) 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 arbitral awards. However, foreign awards that have been set aside at the place of arbitration will generally be denied enforcement pursuant to Article V(1)(e) of the New York Convention, unless a more favourable provision exists. For instance, where the 1961 European (Geneva) Convention applies, German courts may refuse recognition and enforcement only if the award was set aside in another Contracting State for one of the reasons enumerated in Article IX of the Geneva Convention. These reasons essentially correspond to those listed in Article V(1)(a) to (d) of the New York Convention and, thus, do not include arbitrability or violations of public policy. If the award is set aside at the place of arbitration after it has been declared enforceable in Germany, the respondent may request that the declaration of enforceability is annulled.

Conversely, a court decision at the place of arbitration rejecting an application to set aside the arbitral award is not binding for German courts. Furthermore, in such cases, the BGH recently provided respondents with a remedy against the initiation of *exequatur* proceedings in Germany (see Section XVIII(iii) below).

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

The average duration of *exequatur* proceedings is approximately six months (*cf.* Section XII(i) above). The duration of enforcement measures in the proper sense may take between a few months and more than a year, depending on the assets targeted and on whether objections against the enforcement were raised (see Section XIV(ii) above).

The commencement of *exequatur* or execution proceedings is not subject to express time limits. However, where substantive German law applies, the respondent may invoke the statute of limitations and object to the enforcement if 30 years have passed since the award was rendered. In some rare cases, the creditor may be estopped from initiating enforcement proceedings even before the 30-year time-limit if doing so would violate the (substantive law) principle of good faith. In any case, the recognition and enforcement of an award may violate German public policy if it leads to a claim being treated as having no statute of limitations at all.

XV. Sovereign Immunity

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

In accordance with the well-established principle of customary international law, state parties enjoy restricted immunity, ie only with regard to sovereign or governmental acts, but not with respect to non-sovereign or commercial acts. The conclusion of an arbitration agreement by a state party is held to be a waiver of jurisdictional immunity (as opposed to immunity from execution, see Section XV(ii) below). This waiver is generally deemed to extend to state court intervention in support of the arbitration proceedings.

Germany is one of the few parties to the 1972 European Convention on State Immunity, but has not yet signed the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.

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

The prevailing view is that the agreement to arbitrate typically also includes a waiver of immunity with respect to *exequatur* proceedings. According to the BGH, this is in any event the case where the arbitration agreement explicitly provides that 'the award shall be enforced pursuant to domestic law' (which is the case with many German BITs). By contrast, the waiver does not automatically extend to execution proceedings in the proper sense. Accordingly, enforcement is generally only permissible against assets serving non-sovereign, commercial purposes, but not against assets serving sovereign purposes, even when they are only indirectly held by the state, eg, via an independent state agency like a central bank. Such non-commercial assets include, inter alia, currency reserves held at the German Federal Bank or assets of a diplomatic mission if execution could interfere with its diplomatic activities.

(lxiii) Are there any requirements for arbitrations involving sovereign entities?

There are no provisions in German arbitration law regarding arbitrations involving sovereign entities per se. In particular, German state or public entities can generally conclude arbitration agreements provided that the subject-matter of the dispute is arbitrable (which is not the case, eg, with disputes between a taxpayer and tax authorities).

XVI. Investment Treaty Arbitration

(lxiii) 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 ICSID (Washington) Convention has been in force in Germany since 1969. Germany was also a party to the 1994 Energy Charter Treaty (ECT), but recently declared its withdrawal (effective on 20 December 2023; see Section II(iii) above).

In this context, free trade and investment protection agreements negotiated by the EU with third states are also of relevance. Such agreements are concluded jointly by the EU and all EU Member States ('mixed agreements') where certain provisions—most notably, the investor-state dispute settlement (ISDS) mechanism via an investment court system (ICS)—fall within a competence shared between the EU and the Member States. The most prominent agreement of this kind, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) provisionally entered into force in 2017. However, CETA's ISDS mechanism requires a ratification by all EU Member States which is still pending. Germany ratified CETA in December 2022 (effective on 20 January 2023). The Court of Justice of the European Union (CJEU) has also found that CETA's ISDS mechanism is compatible with EU primary law.

The EU is promoting the implementation of the ICS mechanism in its relationship with other trading partners. Similarly, at a multilateral level, the EU and its Member States (including Germany) pursue through intergovernmental discussions at UNCITRAL the establishment of a Multilateral Investment Court in lieu of ad hoc established arbitral tribunals.

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

Germany has traditionally maintained a positive attitude towards bilateral investment treaties (BITs). Since concluding its first BIT with Pakistan in 1959, Germany has expanded its network of BITs into one of the largest in the world. A list of the BITs and the Treaties with investment provisions concluded by Germany can be found at the online International Investment Agreements Navigator of UNCTAD.

However, in 2020—in the aftermath of the *Achmea* judgment from 6 March 2018 (C-284/16), in which the CJEU had ruled that investor-state arbitration clauses in intra-EU BITs violated EU law—Germany alongside 22 further EU Member States terminated their intra-EU BITs.

(lxv) Have there been any recent court decisions in your country in relation to intra-European investor-state arbitration?

Following the *Achmea* judgment, both the CJEU and the BGH expanded their restrictive approach towards intra-EU investor-state arbitration. Most notably:

- In the *Komstroy* judgment from 2 September 2021 (C-741/19), the CJEU held in an *obiter dictum* that intra-EU arbitrations pursuant to Article 26 of the ECT are contrary to EU law.

- In the *PL Holdings* judgment from 26 October 2021 (C-109/20), the CJEU clarified that an ad hoc arbitration agreement between an investor and an EU Member State violates EU law if it was concluded to enable the continuation of arbitration proceedings based on an invalid arbitration agreement included in an intra-EU BIT.

- In the *European Food SA* judgment from 25 January 2022 (C-638/19 P), the CJEU held that arbitration agreements contained in intra-EU BITs become inapplicable (under the rules and principles of *Achmea*) following the accession of a Member State to the EU (ie, even if the BIT predates the accession).

- In a series of decisions from 27 July 2023, the BGH declared that two pending arbitration proceedings under the ECT and the ICSID Convention were inadmissible due to the arbitration agreement being contrary to EU law and, thus, invalid. According to the BGH, in an intra-EU context, the primacy of EU law trumps the arbitral tribunal's competence-competence pursuant to Article 41(1) of the ICSID Convention.

XVII. Resources

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

We recommend the following treatises and reference materials in English: Karl-Heinz Böckstiegel, Stefan Michael Kröll and Patricia Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd edn, Kluwer Law 2014); Richard H. Kreindler, Reinmar Wolff and Markus Rieder, *Commercial Arbitration in Germany* (OUP 2016); Inka Hanefeld and Nils Schmidt-Ahrendts, 'Germany' in Frank-Bernd Weigand and Antje Baumann (eds), *Practitioner's Handbook on International Commercial Arbitration* (3rd edn, OUP 2019); and Gerhard Wegen, Marcel Barth and Roman Wexler-Uhlich, *International Arbitration in Germany* (C.H.Beck-Hart-Nomos 2022). Among the numerous treatises in German: Rolf A.

Schütze and Roderich C. Thümmel, *Schiedsgericht und Schiedsverfahren* (7th edn, C.H.Beck 2021); Jens-Peter Lachmann, *Handbuch für die Schiedsgerichtspraxis* (3rd edn, Dr. Otto Schmidt 2008); Richard H. Kreindler, Jan K. Schäfer and Reinmar Wolff, *Schiedsgerichtsbarkeit – Kompendium für die Praxis* (Recht und Wissenschaft 2006); Karl Heinz Schwab and Gerhard Walter, *Schiedsgerichtsbarkeit* (7th edn, C.H.Beck 2005).

With respect to international arbitration proceedings we recommend Hanns-Christian Salger and Rolf Trittmann (eds), *Internationale Schiedsverfahren* (C.H.Beck 2019); for the taking of evidence in particular, see Walter Eberl (ed), *Beweis im Schiedsverfahren* (Nomos 2015). For commentary on the 2018 DIS Arbitration Rules we recommend Gustav Flecke-Giammarco, Christopher Boog, Siegfried H. Elsing, Peter Heckel and Anke Meier (eds), *The DIS Arbitration Rules – An Article-by-Article Commentary* (Kluwer 2020); and Jan Heiner Nedden, Axel Benjamin Herzberg and Ulrich Kopetzki, *ICC-SchO/DIS-SchO – Praxiskommentar zu den Schiedsgerichtsordnungen* (2nd edn, Dr. Otto Schmidt 2022). With respect to the arbitration-dominated field of post-M&A disputes see Siegfried H. Elsing, Günter Pickrahn, Karl Pörnbacher and Gerhard Wagner, *M&A-Streitigkeiten vor DIS-Schiedsgerichten* (C.H.Beck 2022).

For regular updates on German arbitration law and practice see the bi-monthly *Zeitschrift für Schiedsverfahren* (German Arbitration Journal, or *SchiedsVZ*).

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

Major general events include the biannual conferences by the DIS (usually accompanied by a conference organised by the DIS40, the young practitioners' initiative) and the annual Petersberg Arbitration Days (*Petersberger Schiedstage*). The DIS autumn conference usually takes place every September in Berlin and is since 2022 the centrepiece of the international Berlin Dispute Resolution Days.

XVIII. Trends and Developments

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

Arbitration in Germany has developed into a well-established dispute resolution mechanism for a variety of disputes. Due to its advantages (see Section I(i) above), arbitration would even appear to be the preferred means of dispute resolution for some categories of disputes, in particular in an international commercial context. The planned introduction of Commercial Courts with the declared objective to compete with arbitration (and popular courts in other jurisdictions) bears testimony to this.

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

Even though arbitration remains the most popular form of ADR, Germany is also supportive of other ADR procedures. In 2012, the German legislator provided a legal framework for mediation proceedings, which was later supplemented by provisions on the training of certified mediators. The DIS also offers Mediation Rules, alongside Rules for conciliation, expert determination (*Schiedsgutachten*), 'expertise' or conflict management procedures.

Especially in consumer matters, ADR has become an increasingly popular form of dispute resolution. Germany has implemented the 2013 EU Directive on alternative dispute resolution for consumer disputes (ADR Directive) with the 2016 German Act on ADR in Consumer Matters (*Verbraucherstreitbeilegungsgesetz* or VSBG). According to official data, the competent conciliation bodies saw an increase in the number of applications after the Covid-19 pandemic. In October 2023, the European Commission adopted a proposal to review the existing ADR framework, to, inter alia, make it fit to the digital markets and to improve access to ADR in cross-border disputes.

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

Although arbitration in Germany enjoys stability and predictability due to its robust legal framework, elaborate theory and well-established practice, it is subject to constant development. For instance:

- On 9 March 2023 (I ZB 33/22), the BGH expressly rejected the applicability of the 'group of companies doctrine' (see Section III(vi) above). In the same decision, the BGH also settled a long-lasting controversy regarding the effects of a court decision rejecting an application to set aside the arbitral award at the place of arbitration. The BGH ruled that such a court decision does not have a binding effect in *exequatur* proceedings in Germany. In addition, the BGH provided the respondents who are unsuccessful with their setting-aside application at the place of arbitration, but face imminent enforcement proceedings in Germany with a preventive legal remedy. In such cases, the prospective respondents in *exequatur* proceedings shall be entitled to file a motion for a declaration of non-recognition of the foreign arbitral award, until such proceedings are initiated. For this motion, no specific time limit applies.

- On 26 November 2020 (I ZR 245/19), the BGH provided important clarifications as to the law governing the arbitration agreement (see Section III(vii) above).

- In a much-discussed decision from 27 September 2022 (KZB 75/21), the BGH confirmed that core rules of German competition law (like the prohibition of abuse of a dominant position) are of fundamental nature and, thus, form part of German public policy. According to the BGH, when such fundamental rules are at issue, the general prohibition of a revision au fond does not apply. Therefore, in the context of setting-aside or *exequatur* proceedings, German courts shall conduct a full factual and legal review of the arbitral tribunal's application of fundamental competition law rules. It remains to be seen whether the prohibition of a *révision au fond* will be eroded in further areas of public policy. However, the aforementioned BGH judgement is presumably best explained on the basis of purely competition-related considerations, so that a spill over appears rather unlikely.

- As mentioned above, the German government and courts are effectively dismantling investor-state arbitration in an intra-EU context in line with the CJEU case law (see Section XVI(ii) *et seq.*).

(lxix) Are there any official plans to reform the arbitration laws and practice in your jurisdiction?

Germany intends to modernise the German arbitration law to adapt it to the advancing digitalization of the procedural law as well as to various developments in international and national commercial arbitration. The Draft Bill of the German Federal Ministry of Justice (published on 1 February 2024), addresses, inter alia, the following key points: (1) the possibility of form-free arbitration agreements in commercial transactions (see Section III(i)); (2) the introduction of provisions on the joint appointment of arbitrators in the case of multi-party arbitrations (see Section III(iv)); (3) the introduction of judicial recourse against awards declining jurisdiction (see Section IV(iii)); (4) the enforceability of interim measures issued by foreign arbitral tribunals (see Section VI(i)); (5) the permissibility of remote hearings (see Section IX(xii)); (6) the issuance of awards also in electronic form (see Section X(i)); (7) the admissibility of dissenting opinions (see Section X(iv)); (8) the introduction of a so-called request for retrial (see Section XII(i)); (9) the submission of enforcement or setting-aside proceedings to the jurisdiction of Commercial Courts (if constituted) alongside the option to conduct such proceedings in English (see Section XII(v)); (10) in any case, the possibility to submit arbitration related documents in English (ibidem); and (11) the possibility to publish (anonymised) arbitral awards with the consent of the parties.

(lxx) Are there any rules governing third-party funding in your jurisdiction? Is there an obligation to disclose the identity of any non-party who has an economic interest in the outcome of the proceedings, including any third party funder? Have there been any recent court decisions in your jurisdiction in relation to third-party funding?

There is no comprehensive regulatory framework for third-party funding (TPF) in Germany. Both courts and commentators deem TPF to be generally permissible within the limits of general contract law and of some special provisions which prohibit the provision of TPF by some categories of professionals (eg, lawyers). In particular, there is no general statutory obligation to disclose the existence or identity of a third-party funder. However, such an obligation was recently introduced in the context of so-called representative actions for the protection of the collective interests of consumers (a form of class actions). In arbitration, a disclosure of the identity of TPF and potentially of the details of the funding arrangement may become de facto necessary in the context of other findings (eg, when examining a request for security for costs or as a circumstance that could raise doubts as to the independence and impartiality of an arbitrator, *cf.* General Standards 6(b), 7(a) of the IBA Guidelines on Conflicts of Interest).

(lxxi) Has your country implemented a sanctions regime? Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent court decisions in your country in relation to the impact of sanctions on international arbitration proceedings?

Germany generally implements sanctions based on UN Security Council resolutions or EU regulations (eg, against Russia over Ukraine), although sanctions can also be imposed under domestic law. International sanctions are seen by commentators as part of public policy. EU regulations often expressly provide that sanctions also extend to claims for the recognition or enforcement, including by the procedure of *exequatur*, of arbitral awards. We are not aware of any recent court decisions concerning the impact of sanctions on international arbitration. The DIS has, however, established a compliance system to secure adherence to the applicable sanctions regimes.