ALLEN & OVERY

What are the benefits of the planned modernisation of German Arbitration law for practitioners and users?

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German arbitration law is to be reformed to current needs and thus intended to be made more attractive overall. To this end, the German Federal Ministry of Justice on 1 February 2024 published a draft bill for an act to modernise arbitration law. However, the current proposals are likely to achieve the desired goal only partially. In this alert, we take a look at the most important aspects of the new law and their significance in legal practice.

The draft bill is aimed directly at an international audience: it was published from the outset in both German and English (**available here** and **here**), together with a **synopsis** of the planned amendments. This is remarkable, as bilingual draft bills are unusual in Germany. Some of the proposed rules will have a positive impact on arbitration practice, while others are likely only to have a partial impact and others have not yet been fully thought through. Various professional associations and legal groups can now comment on the draft bill. The Ministry will then publish a draft government version of the bill after a few months, which will then be submitted to the German Parliament (*Bundestag*) for consideration.

The topics

While German arbitration law is not being completely revised with this reform, the draft bill proposes selective revisions to individual matters, such as:

- Arbitration agreements may be concluded without any formal requirements in the context of commercial transactions.
- If an application for the (in-)admissibility of arbitration proceedings is filed, public courts may also rule on the existence and validity of the arbitration agreement.
- More detailed provisions would be introduced regarding the constitution of an arbitral tribunal in multi-party proceedings.
- If an arbitral tribunal determines that it lacks competence, that decision could be overturned before a public court.
- Measures for interim relief by arbitral tribunals would become easier to enforce, even if the seat of arbitration is outside of Germany.
- Oral hearings before arbitral tribunals may be conducted virtually via video conference.
- The arbitral tribunal may issue the arbitral award in the form of an electronic document.
- If an individual arbitrator's view deviates from the arbitral award, a concurring or dissenting opinion would be admissible.
- Arbitral awards may be published in anonymised or pseudonymised form, if the parties do not object.
- Under certain circumstances, arbitral awards may be allowed to be annulled by filing a request for retrial.
- Proceedings before commercial courts could be conducted in English (rather than German), particularly with regard to the annulment or declaration of enforceability of arbitral awards.

This alert will assess some of these proposed reforms from a practical perspective. We will conclude with suggestions as to which issues should ideally still be addressed.

Form of arbitration agreements: rules lack international scope

Currently, in order to be valid, arbitration agreements must be "contained either in a document signed by the parties or in letters, facsimile copies, telegrams or other forms of communication exchanged between them which provide evidence of the agreement". According to the draft bill, this would no longer be necessary if the arbitration agreement is a commercial transaction for all parties. In this case, it would be possible to conclude an arbitration agreement without formal requirements having to be met. By tying it to the notion of the commercial transaction, the draft bill returns to the historical model of the previous rules. In the case of an informal agreement, each party would be able to demand that the other party confirms the content of the arbitration agreement in text form, *i.e.*, the submission of a legible declaration on a durable medium.

While formal simplifications in themselves are always welcomed, the proposed revisions raise numerous practical questions:

A German lawyer knows what a commercial transaction is and whether the required merchant status exists. Internationally, however, the terms "commercial transaction" and "merchant" are not used in the same way. International practitioners and users may have little idea what these terms mean, especially as the draft bill does not refer to the corresponding provision in the German Commercial Code. It is also unclear whether this rule would apply in the context of arbitration proceedings. This is because in the case of a choice of foreign substantive law, the question arises as to whether German commercial law would apply at all. In any event, even if the new rule were clear, it is uncertain which foreign companies would fall under the definition of a merchant.

The statutory claim of one party against the other for confirmation of the arbitration agreement in text form does not lead to simplification either: there is also no

reference to the corresponding provision governing text form in the German Civil Code, and its applicability is uncertain. Furthermore, the question arises as to what the difference is between the text form (for unilateral confirmation) and the otherwise required form as stated at the beginning: in both cases, a permanently legible declaration is needed. But what happens if the other party refuses the confirmation altogether, or if the content of the declaration differs from the verbal agreement? The reverse is also conceivable: one party confirms the content of an arbitration agreement even though there have been no discussions in this context. In addition, the draft also leaves open whether the relevant claim for confirmation of the arbitration agreement should be advanced before the arbitral tribunal or a public court.

Finally, the current problems persist in cases where one party is a consumer, which means that, in principle, written form in a separate document is required. Sometimes consumer status is not immediately recognisable. It is therefore often overlooked. This often leads to legal uncertainty and/or invalidity of the arbitration agreement.

If the draft is enacted as currently proposed, numerous further disputes will be inevitable, and the result will be the equivalent of giving someone stone when they ask for bread. The arbitration agreement is the basis for the substantive dispute to be settled before an arbitral tribunal. A modern arbitration law should enable valid arbitration agreements in a simple manner. In order to strengthen Germany as an arbitration centre, the terms used must be understandable for an international audience. Hopefully, this will be improved.

Interim measures of an arbitral tribunal: enforceability in Germany helpful

According to the draft bill, German courts should support the enforcement of measures for interim relief ordered by arbitral tribunals. This would also apply if the seat of arbitration is abroad, *i.e.*, it is not a "German arbitration". The court would also be permitted to deviate from a measure if this is necessary for enforcement. The draft bill additionally sets out the reasons based on which the court may dismiss an application, *e.g.*, if a corresponding arbitral award may be set aside or if no security has been provided.

This proposal will be helpful in practice, as it has so far been unclear whether German courts were competent to admit provisional or conservatory measures of an arbitral tribunal with a seat of arbitration outside of Germany for enforcement in Germany. This reform would facilitate the enforcement of such measures. A debtor harmed by an unjustified measure would have a claim for damages against the creditor, irrespective of the seat of arbitration.

Overall, the effectiveness of arbitration proceedings with an international dimension would be promoted by the proposed amendment.

Virtual hearings: system already in place in practical application

Furthermore, oral hearings "by video and audio transmission (video hearings)" would be permitted under the revised law. In practice, this is already common in institutional arbitration proceedings, if considered appropriate for the case, for example in preparatory case management conferences or if the parties' presence at the oral hearing would impose an unreasonable burden.

The draft thus reflects a long-established practice. This provides clarity and is confirmation that the new German arbitration law has arrived in the digital world.

The proposed rules, however, are less far-reaching than the existing statutory framework governing public proceedings, which has produced multiple court rulings especially in the course of the Covid-19 pandemic. This opens up some leeway, but at the same time creates a necessity to define more detailed rules – if not in the new act, then at least in the context of the ongoing arbitration proceedings. For example, it would be necessary to stipulate who (parties, witnesses, experts) may participate in the hearing by video and how all persons present must be able to see the other participants.

Publication of arbitral awards: confidentiality must take precedence

The German legislature wishes to promote the publication of arbitral awards in order to make arbitration proceedings more transparent and to facilitate the further development of the law. The reform is therefore intended to permit the publication of arbitral awards in whole or in part in anonymised or pseudonymised form. The arbitral tribunal must request the parties' prior consent within one month of having received the request for consent from the arbitral tribunal and highlight that consent is deemed to have been granted if no objection is raised.

The parties must therefore actively object if they do not desire publication of their arbitral award. However, one of the reasons why parties choose arbitration over court proceedings is the level of confidentiality commonly applied in arbitration and provided for in many institutional arbitration rules. Parties rely on the fact that confidentiality continues to be applied after conclusion of the arbitration proceedings. A proposed publication of the arbitral award might then come as a surprise.

Even more, the deadline for lodging an objection can easily be overlooked as the proceedings will actually have been concluded at the time. A rule requiring the parties' express consent would be preferable. If no such rule will be introduced, arbitral tribunals are advised to discuss a potential publication with the parties in sufficient time in the course of the proceedings.

Concurring or dissenting opinions: helpful clarification

Until now, a concurring or dissenting opinion by an arbitrator that deviates from the arbitral award may put enforceability of the arbitral award in Germany at risk. This is due to a ruling issued by the Higher Regional Court (OLG) of Frankfurt am Main a few years ago that caused quite a stir internationally. The legislature has taken this into account and clarifies in its draft bill that arbitrators may put in writing, as a concurring or dissenting opinion, their views that deviate from the arbitral award or the reasons upon which it is based. The concurring or dissenting opinion is not to form part of the arbitral award.

This proposed rule is a valuable step towards legal certainty, as concurring or dissenting opinions on arbitral awards are otherwise common in international practice. Admission of a concurring or dissenting opinion does not involve a breach of the confidentiality of deliberations. This would only be the case if insights into the course of deliberations within the arbitral tribunal were disclosed.

Request for retrial: unclear if needed

The legislature intends to lay down in the revised law rules for cases where the deadline for cancellation of an arbitral award has expired but the arbitral award contains gross errors. A request for retrial would then be possible. Potential scenarios are, *e.g.*, arbitral awards based on false statements, forged documents, procedural fraud, etc.

It is unclear how frequently cases of this kind actually occur in practice. It is more likely, though, that parties dissatisfied with an arbitral award may also resort to this legal remedy in bad faith in order to challenge unfavourable awards on the merits, regardless of the prospects of success.

English language before German courts: long overdue

Proceedings before the German higher regional courts, in particular for the annulment or declaration of enforceability of arbitral awards, would be conducted before newly-instituted commercial courts. These would be specialised courts for international disputes. It would also be possible to conduct proceedings before these courts entirely in English (rather than German) if the parties so wish. Regardless of whether the proceedings are conducted in German or English, it would be possible to submit documentary evidence in English.

These plans are long overdue and have been demanded by practitioners for some time. It is a welcome development that the need for court proceedings in English has been recognised by the German legislature. Arbitration proceedings in

particular frequently involve foreign parties who have previously only been able to participate in German court proceedings with time-consuming translations or through interpreters.

The applicability of the new rules is uncertain only before the German Federal Court of Justice (BGH), the highest court of civil and criminal jurisdiction in Germany. For appeal proceedings to be conducted in English before the BGH, it is proposed that prior approval must be sought by a relevant motion. The BGH would then be able to decide on the motion "at its discretion"; however no criteria have been specified so far. Thus, if at the last instance all documents still must be translated to German and international parties still cannot be directly involved due to the language barrier, this would be an unfortunate limitation that does not contribute to strengthening Germany as an arbitration centre.

More unfulfilled wishes

Unfortunately, the legislature has so far not responded to all the wishes expressed by practitioners and users in order to make arbitration proceedings in Germany more attractive.

- The intended reduction in form requirements is not far-reaching enough. The current rules governing the form of consumer arbitration agreements should be reviewed and revisited in terms of their actual suitability. The requirement for a separate agreement with a common written form is more likely to cause problems in practice than to protect consumers. The requirement is easily overlooked in commercial contracts involving consumers, among others. Frequently, this results in the invalidity of an arbitration clause actually intended by all parties. There are no similar formal requirements in foreign jurisdictions, either.
- In the future, there would be only one further instance for the review of arbitral awards in the context of cancellation and enforcement proceedings. Instead of the current option of appealing to the BGH following an OLG decision, a direct concentration of jurisdiction at the level of the BGH would be desirable, similar as is the case in Switzerland and Austria. This would save the parties time and money and enable arbitral awards to be enforced more quickly. By choosing arbitration proceedings, parties are in any case opting for only one instance; and the exceptional review of an arbitral award should therefore be swift.
- The desired strengthening of Germany as a centre of arbitration in terms of legal policy can only be achieved with attractive contract law. Contractual partners often agree in international contracts that (arbitration) procedural law and substantive law should run in parallel. German law on general terms and conditions is known to be particularly strict and impractical in business-to-business; this can hardly be solved by individual agreements. In order to prevent the "escape into foreign arbitration law" sometimes chosen by selecting a seat of arbitration outside of Germany and at the same time opting out of German general terms and conditions law, there is an urgent need for adjustment under substantive law and liberalisation of general terms and conditions law in the area of business-to-business contracts.

Summary

The draft bill contains some sensible approaches to modernising German arbitration law. The clarifications regarding the enforcement of interim relief measures and permissibility of concurring or dissenting opinions are positive developments. Stipulations on virtual hearings and English-language proceedings before the commercial courts are welcome but are not revolutionary in either case. Simplifying the form requirements for arbitration agreements is an important goal, but the execution is too complicated in detail. In this case, and in consumer arbitration agreements, improvements are urgently needed. The same applies for the publication of arbitral awards if confidentiality remains one of the key arguments in favour of arbitration proceedings. The request for retrial is questionable and should be revisited. Other reforms are more urgent, such as the creation of a single additional instance at the German Federal Court of Justice (BGH) to review arbitral awards and the relaxation of the German law on general terms and conditions. The revision of German arbitration law is a unique opportunity to make Germany more attractive and competitive as an arbitration centre. This opportunity should be utilised courageously and constructively.

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