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Arbitration Yearbook**

Germany





Germany

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A. Legislation and rules

A.1 Legislation

The last decade was characterized by consistency and dependability in German arbitration law. In the first edition of this *Yearbook*, we reported that Germany had adopted the UNCITRAL Model Law on International Commercial Arbitration in 1998. The motives behind the reform were twofold. First, the existing law was not readily accessible, was out of tune with international standards and could only be construed correctly by reference to a sizable body of case law. Second, it was felt that the antiqueness and opacity of the law deprived Germany of revenues from international arbitration proceedings. Faced with this situation, the German legislator went for a fresh start and decided to replace the existing law with the 1985 UNCITRAL Model Law on International Commercial Arbitration, subject to some minor changes. It is fair to say that the change was for the better. The law provides clear and accessible rules for both national and international arbitration proceedings in Germany. Foreign parties and arbitrators have a familiar procedural basis for conducting arbitration proceedings in Germany.

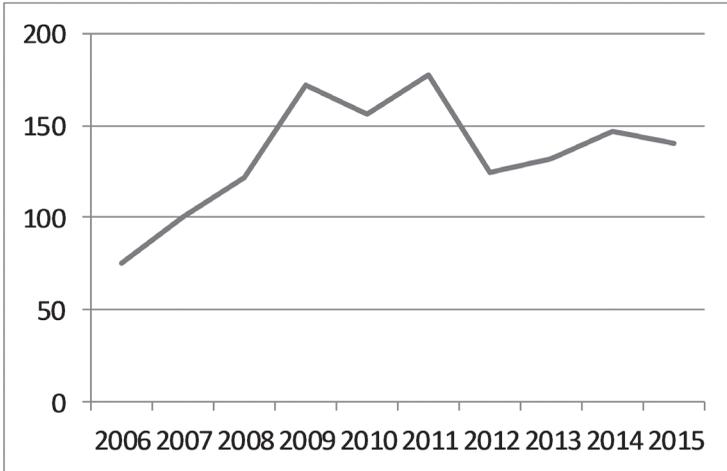
The number of arbitrations seated in Germany has increased since 1998, as the following chart of new cases under the auspices of the

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German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit* or DIS) shows:



This is probably not only due to the reform of German arbitration law, but also to other factors such as the (perceived) neutrality of Germany with regard to arbitrations seated in Germany, the attitude of German courts toward arbitration, and existing customs.

After 1998, there was only one legislative action relating to arbitration in the last decade, and this was limited to sports arbitration. It was triggered by the Pechstein decision of the Munich Court of Appeal.⁴ The legislator wanted to remove doubt as to the validity of arbitration agreements between sports associations and athletes under German law. To this end, the Anti-Doping Act of November 2015 provided that sports associations and athletes may conclude arbitration agreements as a prerequisite for participation of athletes in sports competitions if the arbitration agreements involve sports associations and athletes in national or international sports organizations and these agreements have, as their goal, the organization and promotion of such

⁴ For details, see B.2.



sports events and in particular, intend to enforce the anti-doping codes of the World Anti-Doping Agency.⁵

Apart from this limited legislative clarification, there was only new legislation dealing with procedures of alternative dispute resolution, namely the Act on the Promotion of Mediation and other Procedures of Alternative Dispute Resolution (“Mediation Act”), which entered into force in July 2012. The act is based on the European Mediation Directive 2008/52/EC of 21 May 2008. The legislative content of the Mediation Act is rather limited. It basically records what can be called “best practice” in mediation proceedings.⁶ When the act entered into force, mediation was rarely used for commercial disputes in Germany. It is probably fair to say that the Mediation Act did not change this situation.

A.2 Institutions, rules and infrastructure

Taking effect in April 2008, the DIS established a set of supplementary rules for expedited proceedings to allow parties to conduct an arbitration in a time frame of six months (sole arbitrator) or nine months (three-member tribunal).⁷

On 1 July 2010, the DIS Adjudication Rules entered into force.⁸ When presenting these Rules in the 2010 edition of this *Yearbook*, we stated that it remained to be seen to what extent the German construction industry would embrace adjudication as a means of dispute resolution.⁹ Looking at the 2015 statistics of the DIS, our skepticism seems to have been justified. The German construction industry remained reluctant to opt for adjudication: the DIS statistics do not

⁵ Section 11 of the Anti-Doping Act: *The Baker McKenzie International Arbitration Yearbook* 2015-2016, p. 123.

⁶ For details, see *The Baker McKenzie International Arbitration Yearbook* 2012-2013, p. 15 f.

⁷ See *The Baker McKenzie International Arbitration Yearbook* 2008, p. 164.

⁸ For details, see *The Baker McKenzie International Arbitration Yearbook* 2010-2011, p. 279 ff.

⁹ See *The Baker McKenzie International Arbitration Yearbook* 2010, p. 244.

count one single adjudication case under the DIS Adjudication Rules in 2014 or 2015.¹⁰

In 2016, the DIS decided to start the reform of its arbitration rules. The present DIS Arbitration Rules were adopted in 1998 and the members and users of DIS feel that it is time for an update to adapt the DIS Arbitration Rules to the present and future needs of German and international users. All members of DIS have been asked to participate in the reform process. This process is still underway.

Although it is still unclear what the new rules will look like, some have raised the concern that the new rules may become too similar to the rules of other international arbitration institutions, namely the ICC Rules. Given that German arbitration law already is in line with international standards, it may be the right time to focus on the “unique selling points” of German law rather than on further harmonization and internationalization. The users’ most common complaints are still the costs and the duration of arbitral proceedings. And here, German law has something to offer to users of arbitration. The so-called *Relationstechnik* applied by German-trained judges limits the taking of evidence to those facts that are: (i) disputed; and (ii) relevant and material to the case. It requires judges to take an active role in the proceedings, eg, by way of specific evidence limiting the taking of evidence to facts that are relevant to the case and material to its outcome. All too often, the length of evidentiary hearings in arbitral proceedings is disproportionate to the gain of knowledge such hearings produce. An early intervention by the arbitral tribunal can help to streamline the proceedings.

The same holds true for a second specialty of German civil procedural law, ie, the judges’ obligation to give early instructions to the parties as to the content and relevance of their submissions (Section 139 (1) German Code of Civil Procedure). Judges are therefore permitted, even required, to point parties to those facts that are relevant in the

¹⁰ <http://www.dis-arb.de/upload/statistics/DIS-Statistiken%202015.pdf>
(Unfortunately, the table is only available in German.)



judges' view. Rather than having to second-guess what may be going on in the decision makers' minds, parties obtain direct feedback early on in the process. Parties generally appreciate such early directions, as they help to reduce submissions and evidentiary hearings to those aspects that are finally relevant for the decision, and thereby save time and costs. In order to foster the objective of strengthening Germany as a venue for arbitral proceedings, it may be useful to promote such "peculiarities" of German law rather than to opt for further international harmonization.

B. Cases

In the period covered by the *Baker McKenzie International Arbitration Yearbooks* since 2007, there were discernable developments relating to recognition and enforcement of foreign awards as well as to sports arbitration.

B.1 Preclusion of objections against the enforceability of foreign awards

In former times, it was settled case law that a party's failure to raise grounds to vacate a foreign award in its country of origin precluded this party from raising any objections in defense against an *exequatur* application in Germany that: (i) could have been raised in proceedings to vacate the award abroad, which (ii) had to be commenced before a certain deadline, and which (iii) had expired at the time of the *exequatur* proceedings. The underlying reasoning for this line of authority that dates back to decisions from 1969 and 1984¹¹ was that it would be against good faith for a respondent to resist an *exequatur* application without having previously attempted to have the award set aside in its country of origin. A Federal Supreme Court decision of 17

¹¹ Federal Supreme Court, decision of 26 June 1969, file no. VII ZR 32/67, BGHZ 52, 184, 188, *The Baker McKenzie International Arbitration Yearbook* 2011-2012, p. 203; Federal Supreme Court, decision of 10 May 1984, file no. III ZR 206/82, BGH NJW 1984, 2763, 2764; *The Baker McKenzie International Arbitration Yearbook* 2009, p. 155. For more examples of this case law, see *The Baker McKenzie International Arbitration Yearbook* 2008, p. 177.

April 2008¹² indicated that the case law may be changing in this respect. In proceedings under the ICC Rules in Copenhagen, the tribunal had ordered the respondent state of Lithuania to pay damages in excess of USD 12.5 million to the claimant. Lithuania did not apply to vacate the award in Denmark. At first instance in the German *exequatur* proceedings under the New York Convention, the *Kammergericht*¹³ declared the award enforceable, dismissing the respondent's objections without further review based on the good faith reasoning. On appeal, the Federal Supreme Court recognized that, while the principle of good faith may be invoked against objections raised in *exequatur* proceedings, the mere fact that the respondent had not attempted to have the award vacated in its country of origin was not sufficient to exclude jurisdictional defenses against the award's enforceability. A respondent may have legitimate reasons not to pursue the award's vacation, for instance if the award could not be enforced in its originating country for lack of assets situated there. The Federal Supreme Court further held that the fact that the respondent had not applied for the award to be vacated in Denmark did not give rise to a justified expectation on the applicant's part that the respondent would not raise objections in *exequatur* proceedings in Germany.

The Federal Supreme Court's decision did not outright overturn the previous case law, as in the instant case, proceedings to vacate the award in Denmark were still possible. However, it suggested that the old case law is under review. Subsequent decisions show that a respondent seeking to resist enforcement of a foreign arbitral award in Germany is still well advised to consider applying for vacation of the award in its country of origin:

- In 2008, the Hamm Court of Appeal¹⁴ tentatively followed the old case law in four parallel cases concerning Russian arbitral

¹² File no. III ZB 97/06, SchiedsVZ 2008, 196.

¹³ Decision of 10 August 2008, file no. 20 Sch 07/04, SchiedsVZ 2007, 108.

¹⁴ File nos. 25 Sch 06/08, 25 Sch 07/08, 25 Sch 07/08 and 25 Sch 09/08; *The Baker McKenzie International Arbitration Yearbook* 2009, p. 156.



awards against which the respondent had raised objections, such as a violation of the right to be heard and a violation of public policy.

- In 2010, the Federal Supreme Court¹⁵ finally departed from the old case law with respect to *jurisdictional* objections. It upheld an order by which the Munich Court of Appeal¹⁶ had refused to declare a French arbitral award enforceable for lack of an arbitration agreement. The respondent had raised this objection in the arbitration proceedings, but had not applied for vacation of the award in France, and the time period for such an application had passed. The Federal Supreme Court held that the respondent was not barred from raising the jurisdictional defense because the respondent had not waived its right to raise the jurisdictional objection in the enforcement proceedings.
- As to *non-jurisdictional* objections, in 2012, the Karlsruhe Court of Appeal¹⁷ revisited the issue and upheld the old case law. The respondent had attempted to resist an *exequatur* application relating to a US award that it had not contested at the seat of the arbitration, seeking to rely on a number of alleged breaches of public policy, including the submission that one of the arbitrators had fallen asleep during the hearings. The court of appeal declared the award enforceable, holding that all non-jurisdictional objections that could have been raised in proceedings to vacate the award were precluded, as the time period for vacation of the award in the US had lapsed.

It thus remains advisable for a respondent to seek vacation of an award in its country of origin where enforcement in Germany is an

¹⁵ File no. III ZB 100/09, SchiedsVZ 2011, 105; *The Baker McKenzie International Arbitration Yearbook* 2011-2012, p. 202.

¹⁶ Decision of 23 November 2009, file no. 34 Sch 13/09, SchiedsVZ 2010, 50.

¹⁷ File No. 9 Sch 02/09, SchiedsVZ 2012, 101; *The Baker McKenzie International Arbitration Yearbook* 2012-2013, p. 184.

option, at least as far as non-jurisdictional objections are concerned. A failure to raise jurisdictional objections in the *arbitral* proceedings still precludes reliance on these objections in *exequatur* proceedings, as such conduct demonstrates that the respondent had no objections to the arbitral proceedings.¹⁸

B.2 The Pechstein saga – final rescue for sports arbitration?

The case of German speed skater Claudia Pechstein kept German courts busy from 2012 to 2016. The first and second instance judgments temporarily called the future of sports arbitration into question and entailed the inclusion of a provision on sports arbitration in the new German Anti-Doping Act in November 2015.¹⁹ The third instance decision now put the matter to an, albeit possibly temporary, end.

As a precondition for competing in the Skating World Championships in 2009, Ms. Pechstein had to accept the International Skating Union's (ISU) Constitution including the "ISU Arbitration Agreement" that authorized the Court of Arbitration for Sport (CAS) to issue awards in disputes between Ms. Pechstein and ISU. The ISU Disciplinary Commission banned Ms. Pechstein from competitions and practice for two years over doping allegations. Ms. Pechstein filed an appeal against this decision with CAS, which the CAS tribunal rejected. Two appeals to the Swiss Federal Tribunal also failed. Ms. Pechstein then sued ISU for damages before the Munich District Court, relying on an alleged nullity of the ISU Arbitration Agreement for coercion.

In 2014, the Munich District Court²⁰ accepted that Ms. Pechstein had been forced to enter into the ISU Arbitration Agreement against her will and that the agreement was thus void due to coercion. The court also expressed criticisms of the CAS system, most notably because it

¹⁸ Munich Court of Appeal, decision of 12 January 2015, file no. 34 Sch 17/13; *The Baker McKenzie International Arbitration Yearbook* 2015-2016, p. 129.

¹⁹ For details, see A. I.

²⁰ File No. 37 O 28331/12, SchiedsVZ 2014, 100; *The Baker McKenzie International Arbitration Yearbook* 2014-2015, p. 134.



only allowed arbitrators to be chosen from a closed list on which the athletes had no “authoritative influence.” Nevertheless, Ms. Pechstein’s action failed at first instance, as the district court held that it could not re-open the CAS proceedings for *res judicata* reasons, as Ms. Pechstein had failed to invoke the alleged invalidity of the ISU Arbitration Agreement in the course of the arbitration proceedings, which precluded this objection.

On appeal, the Munich Court of Appeal²¹ reversed the decision, holding that the ISU Arbitration Agreement was invalid on grounds of antitrust law and did thus not exclude jurisdiction of German courts to hear Ms. Pechstein’s action. ISU was held to have abused a dominant market position by forcing athletes to sign the ISU Arbitration Agreement and thus to accept an arbitration regime that was dominated by the sports federations.

Upon CAS’s further appeal, the Federal Supreme Court²² reinstated the outcome of the first instance proceedings. It upheld the validity of the ISU Arbitration Agreement. Although the court found ISU to be market dominant with respect to the competitions it organizes, it held that ISU does not abuse its power if it requires athletes to agree to CAS arbitration as a precondition for competing. The CAS arbitration rules safeguard the athletes’ rights to a sufficient extent, and CAS awards are also subject to control by the Swiss Federal Tribunal. The Federal Supreme Court also saw no structural imbalance in the selection of arbitrators from a list. Athletes and federations were not “opposing camps,” guided by adverse interests, but bound to cooperate in their fight against doping.

Ms. Pechstein has meanwhile brought a constitutional complaint to the Federal Constitutional Court against the Federal Supreme Court’s judgment. As a last resort, she can still bring a further complaint to the European Court of Human Rights.

²¹ Judgment of 15 January 2015, file no. U 1110/14 Kart, SchiedsVZ 2015, 40.

²² Judgment of 7 June 2016, file no. KZR 6/15, NJW 2016, 2266; English translation and annotation Rombach in SchiedsVZ 2016, 268.

C. Trends and observations

In general, the last decade has confirmed that Germany is an arbitration-friendly country. In particular, German courts continue to be *pro-arbitration*. The number of successful challenges, or successful oppositions in enforcement proceedings, is extremely small; the duration of such proceedings is comparatively short.

The German legislature in general also supports the parties' autonomy to opt for arbitration as their preferred dispute resolution mechanism. Recently, the Ministry of Justice tasked a working group with reviewing German arbitration law.²³ The motives seem very similar to those in 1998, ie, strengthening the user-friendliness of German arbitration law and thereby increasing the potential for revenues from international arbitrations.

There is, however, one area where the public opinion in Germany has become arbitration-critical, and that is international investment arbitration. Probably since 2012, investment arbitration has become the subject of a heated public debate in Germany (and other parts of Europe). This debate was triggered by the critics of the envisaged Transatlantic Trade and Investment Partnership Agreement (TTIP), which is supposed to include an Investor to State Dispute Settlement (ISDS) provision.²⁴

The critics of the TTIP negotiations argue that the intended investment protection provisions of TTIP will undermine European standards of consumer and environmental protection and that this expected erosion of standards will mainly be caused by ISDS. Arbitral tribunals have been denounced as “secret courts” and arbitration proceedings as “shadow justice in luxury hotels”²⁵ conducted by lawyers from major international law firms who are biased and influenced by their own

²³ Wolff, *Empfiehl sich eine Reform des deutschen Schiedsverfahrensrechts?*, SchiedsVZ 2016, p. 293.

²⁴ *The Baker McKenzie International Arbitration Yearbook 2014-2015*, p. 129 ff.

²⁵ *Schattenjustiz - Im Namen des Geldes* (“Shadow Justice - In the Name of Money”), *Die Zeit* of February 27, 2014, p.15.

economic interests. It has also been claimed that the proceedings lack transparency, are non-appealable and provide unjustified privileges to business enterprises to the detriment of the community in which they operate.²⁶

As a result of this public debate, the German government has been influential in changing the ISDS provisions in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada from investment arbitration to the introduction of an investment court. In the meantime, a tendency has evolved to abolish investment arbitration over time in all bilateral and multilateral investment treaties between the EU and third countries and replace it with an investment court system.²⁷

²⁶ Von Frankenberg, *Rechtsstaaten vor privaten Schiedsgerichten* (“Rule-of-law States Before Private Arbitral Tribunals”), *Deutsche Richterzeitung* 2014, p. 238.

²⁷ European Commission, Directorate-General on Trade, The Multilateral Investment Court project, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>.