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## International Arbitration – The German Model

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*International arbitration seems predominantly common law oriented and resembles increasingly American-style Court proceedings. It is therefore no wonder that over the years the various Queen Mary studies identify the same short-comings of international arbitration proceedings (ie, time and costs). As this article will try to show, the German civil law based model for international arbitration might provide some solutions to the perceived shortcomings: tribunals that adopt a more managerial rather than inquisitorial style, limited discovery and expert witness to be appointed by the tribunal etc.*

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According to the authors' experience, international arbitration seems to be predominantly a common law affair. This is hardly surprising considering the fact that the world's largest law firms as well as major institutions taking care of international arbitration issues (eg, Chartered Institute of Arbitrators) are domiciled in common law jurisdictions. The consequence is that arbitration proceedings – even between parties that have a civil law background – more often than not are managed and led in accordance with common law procedural principles.

According to the 2018 Queen Mary University of London survey on international arbitration currently the costs of arbitration proceedings continue to be seen as its most criticised feature, followed by lack of effective sanctions during the arbitral process, lack of power in relation to third parties and lack of speed.<sup>1</sup>

As will be shown below, the German arbitration law model is in a position to offer considerable time and cost saving potential and some of its features would seem as a suitable model to address the recurring concerns pointed out by arbitration users in the various Queen Mary studies.

# Arbitration in Germany: A Natural Means of Dispute Resolution for German Companies

Germany is the leading European economy and a world leader in exports, holding the world's third rank in exports after China and the United States.<sup>2</sup> German brands like Mercedes, Porsche or BMW are known and present all over the world. The country's strong focus on exports and increased economic interactions that come along with such focus on exports, also increase the potential for commercial disputes. The preferred way for dispute resolution among German companies is clearly arbitration.

This comes as no surprise when looking at Germany's very long history with regard to arbitration. Already more than 140 years ago, Germany has taken a favourable approach to arbitration. The first codification of the German arbitration rules appeared in 1877.<sup>3</sup> The guiding principles of this early codification were the respect for far-reaching party autonomy and a minimum of judicial intervention. While these principles are widely recognised today, at the time when the first German arbitration law entered into force, this favourable attitude to arbitration was in stark contrast to the scepticism with which arbitration was treated in other legal systems.

## Statutory Basis for Arbitration in Germany – The Code of Civil Procedure

Germany's arbitration regulations that are set out in *Zivilprozessordnung*, the tenth book of the German Code of Civil Procedure (**ZPO**), are drafted with the requirements of the UNCITRAL Model Law on International Commercial Arbitration in mind. For international parties, this has the advantage of a high recognition value. Sections 1025-1066 of the ZPO are compulsory for all arbitral tribunals based in Germany and apply to institutional as well as to ad hoc arbitrations. These regulations provide a mere framework where the parties are free to choose the substantive law as well as the procedural rules and the preferred language of their proceedings.

The German arbitration law is the underlying basis of all domestic and foreign arbitrations, applicable, whenever the seat of the arbitration is situated in Germany (ie, the German arbitration law does not distinguish between international and domestic arbitrations and provides one single set of rules for both types of arbitration, with the exception of the rules governing enforcement).

With few exceptions, the provisions of the German arbitration law are of a non-mandatory nature. They are default rules which apply only where the parties have not regulated an issue either in their arbitration agreement or by submitting their arbitration to a set of arbitration rules or other rules, such as for instance the "IBA Rules on Taking Evidence in International Arbitration".<sup>4</sup>

Germany's arbitration law has some minor deviations from the Model Law, ie, there are more lenient form requirements for the arbitration agreement,<sup>5</sup> the option to request a ruling from a Court on the admissibility of arbitration prior to the constitution of the tribunal,<sup>6</sup> greater powers of state Courts to

support the appointment of arbitrators<sup>7</sup> and to enforce interim relief,<sup>8</sup> the obligation of the tribunal to apply the law of the country with which the subject matter is most closely connected in the absence of an agreement by the parties on the substantive law<sup>9</sup> and the time limits for the initiation of annulment proceedings.<sup>10</sup>

A major difference of the German arbitration law with similar laws enacted in countries with a common law legal system – and a caveat for Anglo-American practitioners and arbitrators – is the fact that “discovery” is practically unknown in German law.

## **Procedural Aspects of Arbitration in Germany**

The limits imposed by the few existing mandatory provisions under the German arbitration law are intended to ensure that the basic requirements of due process are fulfilled. The guiding principle of arbitration proceedings in Germany is laid down in section 1042(1) of the ZPO which states that the parties in arbitration proceedings shall be treated with equality and each party shall be given an effective and fair hearing.

The parties may freely determine all other procedural rules, such as the commencement of the arbitral proceedings,<sup>11</sup> the language of the proceedings,<sup>12</sup> time-limits for the statements of claim and defence,<sup>13</sup> whether an oral hearing shall take place or the proceedings shall be on a documents only basis,<sup>14</sup> the effect of a default of one party,<sup>15</sup> and the appointment of experts.<sup>16</sup>

In addition, the law to be applied to the merits as well as to the arbitration agreement itself may be determined by the parties.<sup>17</sup> Furthermore, the parties may choose the Court, which has jurisdiction for the various supportive and supervisory actions either by a specific forum selection clause or by determining the place of arbitration.<sup>18</sup>

According to section 1032(2) of the ZPO, a party may, prior to the constitution of the tribunal (ie, until the last arbitrator has been appointed), apply to the Courts to determine the admissibility or non-admissibility of arbitral proceedings.

The German arbitration law contains several provisions to prevent parties or party-appointed arbitrators successfully engaging in delaying tactics or obstructive behaviour. Firstly, the various fall-back provisions contained in sections 1034 *et seq.* The ZPO ensure that the arbitral tribunal may be constituted despite a party's failure to cooperate or take the necessary steps in the appointment proceedings. The required appointments will then be made by the Courts, not only in cases where the place of arbitration is in Germany, but also when the location has not yet been fixed. Moreover, the ZPO explicitly provides for default proceedings where one party does not take the necessary steps in the arbitral proceedings.<sup>19</sup>

As stated already above, while the German arbitration law does not address the question of confidentiality, it is widely accepted that arbitrators are under an implied duty of confidentiality. Various rules of German arbitrations institution explicitly reference to it.<sup>20</sup>

It is generally recognised in view of section 1040(1) of the ZPO that arbitrators may decide on their own jurisdiction and thus possess the “competence-competence”, which can be challenged before a state Court.

The various IBA Rules (on Conflict of Interests; Taking of Evidence) are not part of German arbitration law, but are widely followed and have also influenced German case law.

With regard to disclosure and discovery, German practitioners take a comparatively restrictive approach. Because it is a general principle of German law that each party must gather the evidence necessary to fully substantiate its respective claims and defences and that the opposing party is not obliged to assist or otherwise participate in that process. However, the approach taken in international arbitration proceedings is somewhat more liberal.

Regarding the appointment of expert witnesses, there is another difference with arbitral proceedings in common law jurisdictions: the default regulation under German arbitration law is to use tribunal-appointed rather than party-appointed expert witnesses. Nevertheless, parties frequently appoint also their own experts.

German law does not know any punitive or exemplary damages. If a German award contained any such punitive damages, this would be a reason to have the award set aside by the German Courts.

As to the costs of the proceedings, also under German law the general rule is followed that “costs follow the event”. So costs are awarded at the tribunal’s discretion, taking into account the circumstances of the case and ultimately the outcome of the proceedings.

Another aspect that comes often as a surprise to arbitration practitioners with a common law background is the active role that arbitral tribunals take with regard to settlements in Germany.

As an example, the 2018 *Deutsche Institution für Schiedsgerichtsbarkeit (DIS) Arbitration Rules (DIS Arbitration Rules)* provides as follows:<sup>21</sup>

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*“Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.”*

German arbitration follows the inquisitorial system rather than the adversarial system. In other words, it is the arbitrator who actively leads the proceedings, by directing the course of the debate, by asking questions, by referring the parties to particular factual aspects or to particular legal aspects (for instance even to such aspects which a party might have overlooked, but which, in the arbitrator’s opinion, could be relevant for deciding the dispute).

# Arbitration Conventions and International Treaties to which Germany is a Party

Germany has ratified the “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards” of 1958.<sup>22</sup> Other international conventions that Germany has acceded to include the “Geneva Protocol on Arbitration Clauses of 1923”,<sup>23</sup> the “Geneva Convention on the Execution of Foreign Arbitral Awards of 1927”,<sup>24</sup> the “European Convention on International Commercial Arbitration of 1961”<sup>25</sup> as well as the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID Convention**)”<sup>26</sup> and the “Energy Charter Treaty of 1994”.<sup>27</sup> Last not least, there are more than 150 Bilateral Investment Treaties that contain regulations relevant to arbitration and cross-border enforcement of arbitral awards.<sup>28</sup>

## Arbitration Institutions in Germany

The leading non-specialised arbitration institution in Germany is DIS the German Arbitration Institute.<sup>29</sup> The new DIS Arbitration Rules came into effect on 1 March 2018 and have a number of key changes aimed at improving procedural efficiency, including: accelerated constitution of the arbitral tribunal, accelerated initiation of proceedings, increased use of sole arbitrators and digitalisation (more electronic communication and document management) etc.

Roughly more than one third of all cases at the DIS are conducted in English.<sup>30</sup> The increasing number of cases conducted in English does not come as a surprise given that Germany’s economy relies heavily on exports.

Even though the German arbitration law does not contain any confidentiality provisions, the DIS Arbitration Rules explicitly provide that the parties, the arbitrators and persons at the DIS Secretariat involved in the arbitration are to maintain strict confidentiality towards any third person regarding the conduct of the arbitral proceedings and, in particular, regarding the parties and any means of evidence.<sup>31</sup>

The DIS serves also as the competent authority for the duties of the International Chamber of Commerce in Germany, regularly acts as appointing authority for ad hoc proceedings, and provides general advice on the selection of arbitrators.

The DIS provides effective and speedy dispute resolution, with many cases completed in 12 to 18 months from the date of filing and at reasonable rates.

In addition to the DIS, there are a number of other specialised arbitration institutions in Germany, to name but a few: the **German Maritime Arbitration Association**,<sup>32</sup> the **Chinese European Arbitration Centre**,<sup>33</sup> the **Frankfurt International Arbitration Centre**,<sup>34</sup> and other specialised arbitration institutions.<sup>35</sup>

# Ad Hoc Arbitrations in Germany

The German arbitration law provides a legal fall-back position for ad hoc arbitrations in various provisions regarding the powers of the arbitral tribunal,<sup>36</sup> place of arbitration,<sup>37</sup> language of the proceedings<sup>38</sup> as well as the governing law.<sup>39</sup>

## The Attitude of German Courts Towards Arbitration

German Courts are arbitration-friendly and can be relied upon to uphold, recognise and enforce awards where requested to do so and also to protect the principle of the finality of the arbitral award. Whenever it is clear that the parties have agreed on arbitration, Courts will try to uphold the parties' agreement despite any defects. This is underlined by the fact that German Courts have specialised commercial chambers.

German law provides for very limited review of arbitral awards. Section 1026 of the ZPO expressly limits the extent of Court intervention to the instances regulated in the ZPO. There is no inherent jurisdiction of the Courts to supervise the arbitral proceedings or even their outcome. No review of the awards on the merits is possible and German Courts have been very cautious in making use of the few supervisory powers granted to them.

Grounds for review include the lack of capacity of a party, invalidity of the arbitration agreement, violation of due process principles, *ultra vires* decisions and an improper constitution of the arbitral tribunal, invalidity of the arbitration agreement, and thus, the lack of jurisdiction of the arbitral tribunal.

Section 1063(3) of the ZPO allows an enforcing party to make an application to secure or freeze the German assets of the losing party up to the value of the arbitral award, prior to official service of the award. The winning party only needs to show that the award debtor has assets in Germany, bank accounts in particular that could be easily transferred out of the jurisdiction, and that the creditor knows of no other immovable assets in Germany that could be used to satisfy the award.<sup>40</sup>

## Courts Recognise and Support Party Autonomy in Arbitration

German Courts are strong supporters of party autonomy in arbitration.<sup>41</sup>

Furthermore, the various Court proceedings in support and in supervision of the arbitral proceedings are regulated in a way to ensure that they are conducted in a fast and efficient manner. Pursuant to section 1062 of the ZPO, the jurisdiction for nearly all arbitration-related proceedings is concentrated at the Higher Regional Courts (*Oberlandesgericht*); most Federal States (*Bundesländer*) have assigned one senate at a particular Higher Regional Court to deal with these matters.

# The German Arbitration Model Offers Substantial Time and Cost Savings for the Parties

The various Queen Mary reports contain one steady complaint by users of international arbitrations like a red thread over the years:<sup>42</sup> international proceedings take too long and are too costly. The German model could be an interesting option and provides an answer to resolve some of those shortcomings pointed out in the Queen Mary studies. Features like an almost complete absence of discovery proceedings, tribunal-appointed expert witnesses and a more managerial and active role of the arbitral tribunal regularly lead to substantial time and cost savings without any sacrifice with regard to due process considerations.

## Conclusion

As a leading export nation and Europe's leading economy, Germany is an important commercial centre with an efficient infrastructure and is easily accessible (by air and high speed rail etc). Nowadays, Germany is not only among the major users of arbitration, in recent years it has also become an increasingly popular location for international arbitration proceedings.

Germany's arbitration law offers an efficient and up-to-date legal framework and a neutral and impartial judiciary at the highest level for international arbitration proceedings. The German legal system is based on codifications, which enable swift and straightforward access to the law by providing a systematic and transparent legal framework for all legal issues. General features of German arbitration are the principle of territoriality, the prevailing role of party autonomy, the guarantee of due process and effective proceedings, and the limitation of Court interference.

In addition to a modern law, Germany also has an experienced and arbitration-friendly Court system. Arbitration matters are allocated to a specialist section of the Higher Courts, thereby guaranteeing expert judges for arbitration matters. German Courts have very restrictive annulment practices, resulting in a high legal certainty for the parties.

With arbitration-friendly statutory rules, a neutral and impartial judiciary at the highest level, Courts that respect party autonomy and brand-new rules of the most prominent German arbitration institution DIS,<sup>43</sup> Germany compares favourably with its international competitors. Arbitration in Germany is reliable, consistent and without any "surprises" for non-German parties who are otherwise unfamiliar with German law. This makes arbitration in Germany an attractive option not only for domestic but also international parties.

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## Footnotes

1.	See “2018 International Arbitration Survey: The Evolution of International Arbitration” < <a href="http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF">http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF</a> > (accessed 3 October 2018).
2.	See “Top 20 Export Countries Worldwide in 2017” < <a href="https://www.statista.com/statistics/264623/leading-export-countries-worldwide">https://www.statista.com/statistics/264623/leading-export-countries-worldwide</a> (accessed 3 October 2018).
3.	<i>Zivilprozessordnung</i> (“ZPO”) is the tenth book of the German Code of Civil Procedure < <a href="https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html">https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html</a> > (accessed 3 October 2018).
4.	See “IBA Rules on the Taking of Evidence in International Arbitration”, International Bar Association (2010) < <a href="https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC">https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC</a> > (accessed 3 October 2018).
5.	See section 1031(2) of the ZPO.
6.	See section 1032(2) of the ZPO.
7.	See section 1025(3) of the ZPO.
8.	See section 1041(2) of the ZPO.
9.	See section 1051(2) of the ZPO.
10.	See section 1059(3) of the ZPO.
11.	See section 1044 of the ZPO.
12.	See section 1045 of the ZPO.
13.	See section 1046 of the ZPO.
14.	See section 1047 of the ZPO.
15.	See section 1048 of the ZPO.
16.	See section 1049 of the ZPO.
17.	See section 1051(1) of the ZPO.
18.	See section 1062(1) of the ZPO.
19.	See section 1048 of the ZPO.
20.	Eg, 2018 DIS Arbitration Rules, Article 44.
21.	See 2018 DIS Arbitration Rules, Article 26.

22.	BGBI. 1961 II, 121.
23.	RGBI. 1925 II, 47.
24.	RGBI. 1930 II, 1068.
25.	BGBI. 1964 II, 425.
26.	BGBI. 1969 II, 369.
27.	BGBI. 1997 II, 5.
28.	See < <a href="http://investmentpolicyhub.unctad.org/IIA/CountryBits/78">http://investmentpolicyhub.unctad.org/IIA/CountryBits/78</a> > (accessed 3 October 2018).
29.	See < <a href="http://www.disarb.org">http://www.disarb.org</a> > (accessed 3 October 2018).
30.	For more statistical information, see < <a href="http://www.disarb.org/upload/statistics/DIS-Statistics%202017.pdf">http://www.disarb.org/upload/statistics/DIS-Statistics%202017.pdf</a> > (accessed 3 October 2018).
31.	See 2018 DIS Arbitration Rules, Article 44(1).
32.	See < <a href="http://www.gmaa.de/">http://www.gmaa.de/</a> > (accessed 3 October 2018).
33.	See < <a href="http://www.ceac-arbitration.com">http://www.ceac-arbitration.com</a> > (accessed 3 October 2018).
34.	See < <a href="http://www.frankfurt-main.ihk.de/english/legal_matters/disputeregulation/index.html">http://www.frankfurt-main.ihk.de/english/legal_matters/disputeregulation/index.html</a> > (accessed 3 October 2018).
35.	Eg, Court of Arbitration of the German Coffee Association < <a href="https://www.hk24.de/en/fairplay/arbitration-mediation-conciliation/arbitration/court-arbitration-german-coffee-association/1168216">https://www.hk24.de/en/fairplay/arbitration-mediation-conciliation/arbitration/court-arbitration-german-coffee-association/1168216</a> > (accessed 3 October 2018) and Hamburg Friendly Arbitrage < <a href="https://www.hk24.de/en/fairplay/arbitration-mediation-conciliation/arbitration/hamburg-friendly-arbitration/1168694">https://www.hk24.de/en/fairplay/arbitration-mediation-conciliation/arbitration/hamburg-friendly-arbitration/1168694</a> > (accessed 3 October 2018).
36.	See section 1042(4) of the ZPO.
37.	See section 1043(1) of the ZPO.
38.	See section 1045 of the ZPO.
39.	See section 1051 of the ZPO.
40.	See Higher Court (OLG) Frankfurt < <a href="http://www.arbitration-adr.org/documents/?i=199">http://www.arbitration-adr.org/documents/?i=199</a> > (accessed 3 October 2018).
41.	See Higher Court (OLG) Munich: 34 Sch 19/11, <i>Beschluss</i> dated 23 July 2012 < <a href="http://openjur.de/u/542034.html">http://openjur.de/u/542034.html</a> > (accessed 3 October 2018).
42.	See “2018 International Arbitration Survey: The Evolution of International Arbitration” < <a href="http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF">http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—The-Evolution-of-International-Arbitration-(2).PDF</a> > (accessed 3 October 2018).
43.	See 2018 DIS Arbitration Rules < <a href="http://www.disarb.org/upload/bgbl/2018-DIS-Arbitration-Rules.pdf">http://www.disarb.org/upload/bgbl/2018-DIS-Arbitration-Rules.pdf</a> > (accessed 3 October 2018).

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