

GERMANY

DELOS GUIDE TO ARBITRATION PLACES (GAP)

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Germany is an attractive option for domestic as well as international arbitration proceedings as it is known to provide an arbitration-friendly legal environment. The jurisprudence of German courts is consistent, and the German Civil Code of Procedure provides a functional and balanced arbitration law closely modelled on the UNCITRAL Model Law. The German Institute for Arbitration (“DIS”) is a well-functioning arbitration institution with modern rules (including Supplementary Rules for Expedited Proceedings and for Corporate Law Disputes) and an increasing (international) caseload.

Key places of arbitration in the jurisdiction	Frankfurt, Düsseldorf, Hamburg and Munich. Berlin, as capital city, has the potential to become an important seat for international arbitrations.
Civil law / Common law environment?	Civil law; the German arbitration law is contained in the 10 th book of the Civil Code of Procedure (“ZPO”).
Confidentiality of arbitrations?	German arbitration law does not provide for express confidentiality obligations. Hearings are usually held in closed session and awards are not published.
Requirement to retain (local) counsel?	Common but no legal requirement.
Ability to present party employee witness testimony?	Parties may submit witness testimonies of their employees. It lies in the arbitral tribunal’s discretion to weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat?	Parties may choose to hold meetings at a different venue. Unless the parties have agreed on a specific venue, the tribunal has discretion to decide where to hold meetings.
Availability of interest as a remedy?	Interest is a matter of the applicable substantive law. Compounded interest applied under foreign law does not violate German public policy (“ <i>ordre public</i> ”).
Ability to claim for reasonable costs incurred for the arbitration?	The arbitral tribunal has discretion in respect of the allocation of costs but must take into consideration the circumstances of the case.
Restrictions regarding contingency fee arrangements and/or third-party funding?	German lawyers (“ <i>Rechtsanwälte</i> ”) may only enter into contingency fee agreements under very limited conditions. Third party funding is not codified in German arbitration law, but it is accepted and increasingly used.
Party to the New York Convention?	Yes, with reservations with regard to reciprocity, commercial disputes and retroactive application.
Other key points to note	Germany is a Member State since 1961.
WJP Civil Justice score (2018)	Germany ranks 6 th out of 113 countries with a score of 0.86.

ARBITRATION PRACTITIONER SUMMARY

The revision of the German arbitration law in 1998 has strengthened the focus on party autonomy, giving the parties considerable freedom in structuring the arbitration proceedings according to their needs. The German arbitration law is modeled closely on the 1985 UNCITRAL Model Law. It applies regardless of whether the arbitration is domestic or international. Furthermore, the dispute need not be of a commercial nature. Only very few mandatory statutory provisions limit the parties' freedom of contract. In 2016, the Ministry of Justice and Consumer Protection has installed a working group to review the German arbitration law in light of the 2006 amendments to the UNCITRAL Model Law.

All arbitration-related matters that require the assistance of state courts are handled by the German Higher Regional Courts. They do not act as a full court of appeal but limit their review potential grounds for annulment or refusal of recognition within a strictly limited scope (mainly questions of due process and public policy). The courts are considered to be efficient when they are requested to decide on arbitration matters. Germany has ratified the New York Convention ("NYC") without any reservations. Courts tend to adhere strictly to its provisions.

Date of arbitration law?	German arbitration law is found at §§ 1025 - 1066 ZPO and was last revised in 1998.
UNCITRAL Model Law? If so, any key changes thereto?	The German arbitration law is based in large parts on an adoption of the 1985 UNCITRAL Model Law with only few minor amendments.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Ordinary courts (the Higher Regional Courts as first instance) handle jurisdictional challenges and the annulment and enforcement of awards. Within these courts, all arbitration-related cases are regularly assigned to one specific division (" <i>Kammer</i> ") ensuring a certain level of knowledge and experience.
Availability of <i>ex parte</i> pre-arbitration interim measures?	The courts may grant <i>ex parte</i> interim measures.
Courts' attitude towards the competence-competence principle?	The arbitral tribunal may rule on its own jurisdiction. If the arbitral tribunal rules on jurisdiction as a preliminary question, any party may seize the state courts (as envisaged by the UNCITRAL Model Law).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only the grounds set out in the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The question of whether German courts are bound by the foreign court's set-aside decision is not finally settled. In the past, they have regularly respected the foreign court's decision without reviewing the merits <i>de novo</i> .

Other key points to note?

- Partial awards are recognized and enforced in accordance with the NYC.
- Duration of proceedings to obtain the enforcement of an award: usually between three months and one year (possibly longer when the German Supreme Court (“BGH”) is seized).
- Arbitration agreements are to be signed by all parties; there are stricter form requirements for particular groups of individuals (*e.g.*, consumers).
- German courts have a long-standing tradition of respecting arbitration agreements and exercising restraint in interfering with decisions by arbitral tribunals.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The German arbitration law is closely modelled on the UNCITRAL Model law. It is contained in the 10th book in §§ 1025-1066 of the Code of Civil Procedure (“ZPO”) and applies not only to commercial cases but to any kind of arbitrations.¹

Due to the broad scope of application, the legislator included some amendments and supplements to the UNCITRAL Model law, the most salient of which are outlined below:

- If the claimant or respondent is seated (or habitually resides) in Germany, German courts may be seized for assistance in the composition of the tribunal or the challenge of an arbitrator even when the seat of the arbitration is yet to be determined, *i.e.*, when it is unclear whether German arbitration law would indeed apply.²
- While German arbitration law permits a tacit acceptance to a document containing an arbitration agreement under specific conditions,³ there are stricter form requirements for arbitration agreements involving a consumer.⁴ The record or document containing the arbitration agreement must be hand-signed by the parties. The written form may be replaced by a qualified electronic form.⁵ The record or (electronic) document may not contain agreements other than those making reference to the arbitration proceedings except if the agreement is recorded by a notary.
- An application may be made to the court to declare whether or not arbitration is admissible prior to the composition of the arbitral tribunal. Yet the arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the application is pending before the court.⁶
- If an arbitration agreement puts a party at a disadvantage regarding the number of arbitrators appointed by the other party/parties, the disadvantaged party may seize the court to remedy the imbalance.⁷
- If an arbitrator refuses to take part in a decision, the other arbitrators may decide without him unless the parties have agreed otherwise.⁸
- Other than the Model Law, the German arbitration law contains an express provision on the allocation of costs (see below).⁹

¹ English translations are available at www.gesetze-im-internet.de/englisch_zpo/index.html and <http://www.disarb.org/de/51/materialien/german-arbitration-law-98-id3>.

² § 1025(3) ZPO.

³ § 1031(2) ZPO.

⁴ § 1031(5) ZPO.

⁵ § 126a German Civil Code (BGB).

⁶ § 1032(2) ZPO.

⁷ § 1034(2) ZPO.

⁸ § 1052(2) ZPO.

⁹ § 1057 ZPO.

- If an arbitral award is set aside, the arbitration agreement is regularly reinstated.¹⁰ Upon request by a party, German courts may remit a matter to the arbitral tribunal after setting the award aside.¹¹

1.2 When was the arbitration law last revised?

The German arbitration law was reformed in 1997. The new law entered into force on 1 January 1998.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The approach of the courts, when determining the law applicable to the arbitration agreement, is not always consistent.

In principle, two approaches exist:

1. Some courts and commentators have considered arbitration agreements to be contracts of a merely procedural nature that are not governed by the rules of private international law. According to this view, Art. V(1)(a) New York Convention (NYC) and § 1059(2) no. 1 lit. a ZPO contain a general principle applying beyond the recognition and enforcement, respectively annulment, of arbitral awards according to which arbitration agreements are governed by the law chosen by the parties and, in the absence of a choice of law, by the law of the place of arbitration.¹²
2. More often the courts apply by analogy the rules of private international law relating to contracts (this would now be the Rome I Regulation which expressly excludes arbitration agreements from its scope of application).¹³ Following this approach, the arbitration agreement is governed by the law chosen by the parties in the first place.¹⁴ To the extent that the law applicable to the contract has not been chosen, the arbitration agreement is then governed by the law of the country with which it is most closely connected.¹⁵

In practice, the courts often apply (without further justification) the law governing the contract in which the arbitration clause is contained, be it based on an implied choice of law or the close connection to the main contract.¹⁶

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The arbitration agreement must be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.¹⁷ This form requirement is deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties

¹⁰ § 1059(5) ZPO.

¹¹ § 1059(4) ZPO.

¹² LG München I, SchiedsVZ 2014, 100, 105; *Geimer*, in: *Zöller* (ed.), *Zivilprozessordnung*, 31st ed. 2016, § 1029 para. 109.

¹³ Art. 1(2)(e) Rome I Regulation.

¹⁴ Art. 3(1) Rome I Regulation.

¹⁵ Art. 4(4) Rome I Regulation; see BGH SchiedsVZ 2011, 46, 48 (in respect of conflict of law rules preceding the Rome I Regulation); BGH NJW 1964, 591, 592; OLG Hamm, SchiedsVZ 2014, 38, 42.

¹⁶ BGH SchiedsVZ 2011, 46, 48; OLG Hamburg SchiedsVZ 2003, 284, 287.

¹⁷ § 1031(1) ZPO.

and – if no objection was timely raised – the contents of such document are considered to be part of the contract in accordance with common usage.¹⁸

A document fulfilling the above form requirements can incorporate an arbitration clause by reference to another document, *e.g.*, general terms and conditions.¹⁹

Special form requirements apply to arbitration agreements in which one party is a consumer. Such arbitration agreements must be contained in a record or document personally signed by the parties.²⁰

In international cases, the form requirement may be governed by international conventions, in particular Art. II(2) NYC and Art. 1(2) lit. a of the 1961 Geneva Convention.

The BGH has interpreted Art. VII(1) NYC as to allow for the application of national law to the extent that its form requirements are more favourable to arbitration than the New York Convention.²¹

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

In accordance with the principle of privity of contract, arbitration agreements only bind the persons which are party to it. In limited circumstances, third persons may become party to an arbitration agreement as a matter of law, rather than as a result of express consent.

The arbitration clause binds successors in title such as heirs or assignees, even if the successor does not formally accede to the arbitration agreement.²² The assignment itself does not have to follow the form requirements of an arbitration agreement.²³ The arbitration clause of a civil law partnership (“GbR”) and a general partnership (“oHG”) are also binding on the partners liable for the partnership’s liabilities.²⁴ If an arbitration clause is added to the articles of association, it will not bind the members that have not consented to this amendment.²⁵

An insolvency administrator is bound by an arbitration agreement in which the insolvent entity has entered prior to the opening of insolvency proceedings.²⁶

An extension of arbitration agreements to third parties pursuant to the “group of companies” doctrine has to date not been recognized by German courts. Although the BGH has held that the doctrine – when applied as part of a foreign law applicable according to the rules of private international law – does not necessarily violate German public policy,²⁷ it is very unlikely that the court will eventually accept the doctrine as part of German domestic law.

2.5 Are there restrictions to arbitrability?

Under German law, as a matter of principle, arbitration is allowed for all disputes over pecuniary matters.²⁸ Regarding non-pecuniary claims, an arbitration agreement is effective insofar as the parties to the dispute

¹⁸ § 1031(2) ZPO.

¹⁹ § 1031(3) ZPO.

²⁰ § 1031(5) ZPO.

²¹ BGH SchiedsVZ 2010, 332, 333.

²² BGH NJW 1998, 371; NJW 2000, 2346; BayObLGZ 1999, 255, 266 *et seq.*; *Wolf/Eslami*, in: *Vorwerk/Wolf*, BeckOK ZPO, 25th ed. 2017, § 1029 para. 16.

²³ BGH NJW 1998, 371; BayObLG SchiedsVZ 2004, 45, 46 (in respect of a „Kommanditgesellschaft“); *Geimer*, in: *Zöller* (ed.), *Zivilprozessordnung*, 31st ed. 2016, § 1029 para. 68.

²⁴ BGH NJW-RR 1991, 423, 424; *Saenger*, *Zivilprozessordnung*, 7th ed. 2017, § 1029 para. 23.

²⁵ *Geimer*, in: *Zöller* (ed.), *Zivilprozessordnung*, 31st ed. 2016, § 1029 para. 74.

²⁶ BGH SchiedsVZ 2004, 259, 261.

²⁷ BGH SchiedsVZ 2014, 151.

²⁸ § 1030(1)1 ZPO.

are entitled to conclude a settlement agreement in respect of the subject matter of the dispute.²⁹ Some limited exceptions apply to this principle (see below).

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

Arbitration agreements relating to disputes over the existence of a lease of residential accommodations within Germany are null and void.³⁰

Labour law disputes, save for limited exceptions, cannot be referred to arbitration.³¹

In a series of three decisions (*Schiedsfähigkeit I-III*), the BGH has established specific limits to the arbitrability of certain types of intra-company disputes. When disputes arise between certain shareholders and a stock company with regard to the validity of shareholder resolutions, court rulings declaring shareholder resolutions invalid bind all shareholders (*erga omnes*) regardless of whether they have been a party to the court proceedings.³² This is also applied to limited liability companies by way of analogy. In its first ruling on the matter (*Schiedsfähigkeit I*), the BGH denied the arbitrability of disputes pertaining to the validity of resolutions adopted by the shareholders.³³ In *Schiedsfähigkeit II*,³⁴ the court developed a set of criteria that must be fulfilled for such disputes to be submitted to arbitration and for arbitral awards to bind all shareholders: (i) all shareholders have to consent to the arbitration agreement (be it as part of the articles of association or in a separate agreement), (ii) all shareholders need to be informed about the initiation and the progress of the arbitral proceedings so they can join the proceedings at least in the capacity of an intervening party, (iii) all shareholders must be able to participate in the appointment of the arbitral tribunal if it is not selected by a neutral third party and (iv) all disputes concerning the deficient resolution have to be submitted to and decided by the same arbitral tribunal. In *Schiedsfähigkeit III*,³⁵ the BGH expanded this jurisprudence to partnerships including limited commercial partnerships ("*Kommanditgesellschaft*").

German competition law originally considerably limited arbitration in this field. However, following the entry into force of the revised arbitration law in 1998, the respective provisions were repealed. Today, the arbitrability of competition law disputed is generally recognized.

There is still no settled view on the arbitrability of patent disputes. The BGH is yet to rule on this matter. It is argued that the exclusive competence of patent courts for the revocation of patents and the grant or revocation of a compulsory licence under § 81 PatG within the German court system is tantamount to the non-arbitrability of these disputes. Again, this is based on the reasoning that arbitral awards lack the required *erga omnes* effect of a court ruling.³⁶ According to a different view, patent disputes are arbitrable in the sense that, while the arbitral tribunal is unable to revoke a patent itself, it may still order the patent holder to apply for its deletion with the competent patent authorities (which would be an enforceable obligation).³⁷

The opening of insolvency proceedings does not render a dispute non-arbitrable. Rather, the trustee is bound like a successor in title by an arbitration clause concluded by the debtor before entering insolvency proceedings. The defendant thus may invoke the arbitration clause where the trustee has brought a claim before state courts. Creditors must file their claims with the trustee, irrespective of whether they are covered by an arbitration agreement, as to allow for the orderly liquidation of debtor's assets. However, if the trustee

²⁹ § 1030(1)2 ZPO.

³⁰ § 1030(2) ZPO.

³¹ §§ 4, 101(3) of the Labour Court Act (ArbGG).

³² § 248(1)(1) AktG.

³³ BGH, NJW 1996, 1753.

³⁴ BGH, NJW 2009, 1962.

³⁵ BGH, SchiedsVZ 2017, 194.

³⁶ Seiler, in: *Thomas/Putzo, Zivilprozessordnung*, 37th ed. 2016, § 1030 para. 6.

³⁷ Geimer, in: *Zöller, Zivilprozessordnung*, 31st ed. 2016, § 1030 para. 15.

disputes the claim the creditor may enforce it. In this case, if the claim is covered by an arbitration agreement, the creditor is referred to arbitration.

With regard to the arbitrability of disputes arising out of bilateral investment treaties between different EU member states (“Intra-EU BITs”), the BGH has submitted a question on the compatibility of Intra-EU BITs with EU law to the ECJ.³⁸ The ECJ’s decision is still pending at the time of writing.³⁹

2.5.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?

There are very few statutory limits to the capacity to conclude arbitration agreements.

Arbitration agreements on future legal disputes relating to investment services, ancillary services or financial futures and forward transactions are binding only if both parties to the agreement are merchants within the meaning of the Commercial Code (HGB) or legal persons under public law.⁴⁰

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

A court seized in a matter which is the subject of an arbitration agreement must, if the respondent raises an objection prior to the beginning of the hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.⁴¹

Where an action referred to above is pending, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.⁴²

3.1.1 If the place of the arbitration is inside of the jurisdiction?

No difference.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

No difference.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Germany does not have a tradition of anti-suit injunctions. According to the ECJ’s *Gazprom* decision, the Brussels I Regulation does not prevent a member state from recognising anti-suit injunctions issued by arbitral tribunals.⁴³ However, it is highly unlikely that German courts would respect such injunctions, as this would run counter to the principle that German courts conduct a full review of the arbitration clause when they are asked to rule on the jurisdiction of an arbitral tribunal.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

German courts will not issue anti-suit injunctions restraining proceedings brought in breach of arbitration clauses. They may grant interim measures in order to support arbitrations in foreign seats (such as freezing

³⁸ BGH, SchiedsVZ 2016, 328.

³⁹ ECJ, pending case C-284/16 (Slovak Republic v Achmea).

⁴⁰ § 37h of the Securities Trading Act (WpHG).

⁴¹ § 1031(1) ZPO.

⁴² § 1031(3) ZPO.

⁴³ ECJ, Judgment of 13 May 2015, C-536/13 (*Gazprom v Lithuania*).

orders or orders to secure evidence) provided that German courts have international jurisdiction for interim relief.

4. The conduct of proceeding

4.1 Can parties retain outside counsel or be self-represented?

Both is possible. Lawyers ("*Rechtsanwälte*") may not be excluded from acting as authorised representatives.⁴⁴

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

An arbitrator may be challenged only if circumstances give rise to justified doubts as to his impartiality or independence, or if he does not meet the prerequisites established by the parties.⁴⁵ In practice, German courts tend to apply the same standards as for state court judges. The IBA Guidelines are not binding on the state courts⁴⁶ and not regularly referred to.

A failure to comply with the duty to disclose all relevant circumstances as to the arbitrator's impartiality and independence may (but need not) justify a challenge of the arbitrator.⁴⁷ Whether the failure to disclose alone is sufficient to give rise to justifiable doubts depends on the circumstances. In any case, the failure might be an exacerbating factor in the overall assessment of whether there are justifiable doubts.

The same threshold applies to experts appointed by the arbitral tribunal.⁴⁸ In a recent decision of May 2017, the BGH has held that an expert's failure to disclose all circumstances relevant to his impartiality and independence is a ground to set the award aside if (i) the award is based on the expert's testimony and (ii) the non-disclosed circumstances would have justified a challenge of the expert.⁴⁹

4.3 On what grounds do courts intervene to assist in the Constitution of the arbitral tribunal (in case of ad hoc arbitration)?

A party may request the court to appoint an arbitrator if a party fails to act as required under an appointment procedure agreed upon by the parties, unless the procedure provides other means for securing the appointment. The court will intervene accordingly if the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or if a third party fails to perform any function entrusted to it under such procedure.⁵⁰

When appointing an arbitrator, the court shall have due regard to any qualifications prescribed by the agreement of the parties and to other considerations necessary to secure the appointment of an independent and impartial arbitrator. In the case of appointment of a sole or third arbitrator, the court shall also take into account whether appointing an arbitrator of a nationality other than those of the parties might be advisable.⁵¹

⁴⁴ § 1042(2) ZPO.

⁴⁵ § 1036(1), (2) ZPO.

⁴⁶ OLG Frankfurt, decision of 13 February 2012, 26 SchH 15/11, juris, para. 33.

⁴⁷ OLG Frankfurt, NJW 2008, 1325.

⁴⁸ § 1049(3) ZPO.

⁴⁹ BGH, decision of 02 May 2017, I ZB 1/16, juris relying on § 1059(2) no. 1 lit. d ZPO.

⁵⁰ § 1035(4) ZPO.

⁵¹ § 1035(5) ZPO.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, a provisional or conservatory measure of protection relating to the subject-matter of the arbitration upon request by a party.⁵²

4.4.1 If so, are they willing to consider *ex parte* requests?

German courts may grant *ex parte* requests.⁵³ The courts will schedule a hearing unless this would endanger the object and purpose of the interim relief.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

§ 1042(1) ZPO enshrines the principle of equal treatment and the right of each party to an effective and fair legal hearing. Subject to the mandatory provisions of German arbitration law, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules.⁵⁴ In the absence of an agreement by the parties and any stipulations in the German arbitration law, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate.⁵⁵

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

While there is no express provision on confidentiality, neither the arbitral proceedings nor the hearings in the arbitration are public. Furthermore, arbitrators are barred from disclosing the tribunal's deliberations,⁵⁶ and the lawyers involved (be it as arbitrators or counsel) must comply with professional duties of confidentiality to which they are subject under German law.⁵⁷

4.5.2 Does it regulate the length of arbitration proceedings?

There is neither an express provision on the duration of arbitration proceedings nor a remedy against excessively lengthy proceedings. There is no case law on the question whether the excessive length of arbitral proceedings can be an annulment ground (some commentators argue in favour of annulment in such case).⁵⁸

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

The parties are free to agree on the place of arbitration. In the absence of such agreement, the place of arbitration shall be determined by the arbitral tribunal which shall pay regard to the circumstances of the case, including the suitability of the place for the parties.⁵⁹

The arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the parties, for consultation among its members or for inspection of property or documents.⁶⁰

⁵² § 1033 ZPO.

⁵³ §§ 936, 922(1) ZPO.

⁵⁴ § 1042(3) ZPO.

⁵⁵ § 1042(4) ZPO.

⁵⁶ BGH, NJW 1957, 592.

⁵⁷ § 43a(2) German Federal Lawyers' Act (BRAO).

⁵⁸ Hartmann, in: Baumbach/Lauterbach/Albers/Hartmann, ZPO, 76th ed. 2018, § 1059, para. 14.

⁵⁹ § 1043(1) ZPO.

⁶⁰ § 1043(2) ZPO.

4.5.4 Does it allow for arbitrators to issue interim measures?

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such provisional or conservatory measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.⁶¹

4.5.4.1 In the affirmative, under what conditions?

There is no defined statutory threshold. German arbitration law does not include Articles 17A *et seq.* of the UNCITRAL Model Law. While some courts and commentators have held that the tribunal must apply the same threshold as state courts under German law,⁶² others have argued that the arbitral tribunal is free to apply its own standard.⁶³ In practice, this will usually boil down to the balancing of (i) the *prima facie* case and (ii) any risk of harm that cannot be adequately repaired by monetary compensation.

The tribunal may grant interim measures *ex parte*. It may require any party to provide appropriate security in connection with such measure.

Interim measures by arbitral tribunals can be enforced by state courts. Upon application by a party, the court may permit the enforcement of an interim measure of an arbitral tribunal unless a corresponding measure of interim relief has already been petitioned with a court.⁶⁴ It may issue a differently worded order if this is required for the enforcement of the measure. Likewise, the court might reverse or modify the preliminary order of an arbitral tribunal upon application by one party.⁶⁵

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

The arbitral tribunal is empowered to determine the admissibility of evidence, to take evidence and to assess freely such evidence.⁶⁶

4.5.5.1 For example, are there any restrictions to the presentation of testimony by a party employee?

There are no such restrictions.

4.5.6 Does it make it mandatory to hold a hearing?

Subject to agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials.⁶⁷ Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested by a party.

4.5.7 Does it prescribe principles governing the awarding of interest?

German arbitration law does not provide for any rules on the awarding of interest. If the main contract is governed by German substantive law, compounded interest may not be awarded.⁶⁸ If compounded interest is awarded based on the applicable foreign substantive law, this does not amount to a violation of German public policy allowing for the setting aside of the award.⁶⁹

⁶¹ § 1041(1) ZPO.

⁶² OLG Saarbrücken SchiedsVZ 2007, 323, 326; *Schwab/Walter*, Schiedsgerichtsbarkeit, 7th ed. 2005, ch. 17a para. 20.

⁶³ *Seiler*, in: *Thomas/Putzo*, Zivilprozessordnung, 37th ed. 2016, § 1041 para. 2.

⁶⁴ § 1041(2) ZPO.

⁶⁵ § 1041(3) ZPO.

⁶⁶ § 1042(4)(2) ZPO.

⁶⁷ § 1047(1) ZPO.

⁶⁸ § 248(1) German Civil Code (BGB).

⁶⁹ OLG Hamburg, decision of 26 January 1989, 6 U 71/88, juris.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The arbitral tribunal shall allocate the costs of the arbitration between the parties unless the parties agree otherwise.⁷⁰ The cost decision is issued in the form of an arbitral award. The arbitration costs include necessary costs incurred by the parties for the proper pursuit of their claim or defence. The tribunal has discretion in its allocation but shall take the circumstances of the case, in particular the outcome of the proceedings, into consideration. Where it considers it to be appropriate an arbitral tribunal may also take into account the conduct of the parties.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

Arbitrators are not completely exempt from liability. As a matter of principle, they could be held liable for breach of contract under German contract law as any other service provider. The statutory provision limiting the state's liability for its own judges⁷¹ does not apply to arbitrators. In practice, either the terms of reference or the arbitration rules (e.g., § 44.2 DIS Arbitration Rules) will often contain an express limitation of liability. In the absence of such express provisions, the majority view (including the German Federal Supreme Court) assumes that the mandate of the arbitrators by the parties includes an implied liability limitation corresponding to the one of state court judges.⁷² Consequently, arbitrators can only be held liable if their wrongful behaviour amounts to a criminal offence. The case law on this point, however, is not finally settled and does not extend to non-judicial duties of the arbitrator. This means that an arbitrator does not benefit from the limitation of liability when he wrongfully delays the proceedings,⁷³ fails to issue the award in its proper form,⁷⁴ breaches confidentiality, recuses himself without reason or fails to disclose circumstances relevant to his appointment.⁷⁵

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

There are a number of offences that arbitrators could potentially commit, in particular intentional perversion of justice⁷⁶ and various bribery and corruption offences.⁷⁷ However, none of them give rise to any particular concerns. The threshold set by the BGH for intentional perversion of justice is extremely high so that, in practice, it is hardly ever met.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Parties can waive the requirement to provide reasons for an award.⁷⁸ It is also possible for parties to agree on the wording of a (settlement) award.

5.2 Can parties waive the right to seek the annulment of the award?

Only with respect to certain annulment grounds (see below).

⁷⁰ § 1057(1) ZPO.

⁷¹ § 839(2) BGB.

⁷² BGH, NJW 1954, 176; see *Musielak/Voit*, Zivilprozessordnung, 14th ed. 2017, § 1035 para. 27 for further references.

⁷³ See § 839(2)(2) BGB.

⁷⁴ § 1054 ZPO.

⁷⁵ *Münch*, in: MüKo, Zivilprozessordnung, 5th ed. 2017, § 1035 para. 30.

⁷⁶ § 339 German Criminal Code (StGB).

⁷⁷ §§ 331(2), 332(2) StGB.

⁷⁸ § 1054(2) ZPO.

More specifically, parties may not generally waive their right to seek annulment of the award. This is because some of the annulment grounds affect public policy and are thus not at the parties' disposal. Yet, pursuant to one view, it is possible for parties to waive their right to invoke individual annulment grounds that solely exist for the waiving party's protection and do not protect public interests (e.g., a party may waive its right to seek annulment for the lack of an arbitration agreement or the wrongful constitution of the tribunal). In general, it can be said that the annulment grounds found in § 1059(2) no. 2 ZPO (i.e., the subject matter is not arbitrable under German law or the recognition or enforcement of the award would violate the *ordre public*) may not be waived.⁷⁹ *Ordre public* also comprises certain procedural aspects such as the right to be heard; it is unclear whether the BGH would accept a waiver of the right to seek annulment in respect of such fundamental procedural violations.⁸⁰

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

N/A

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No, there is no *révision au fond* within German arbitration law.⁸¹

5.4.1 If yes, what are the grounds for appeal?

N/A

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

In respect of enforcement, German arbitration law differentiates between arbitral awards rendered in Germany and arbitral awards rendered abroad.

Awards rendered in Germany need to be declared enforceable.⁸² An application for a declaration of enforceability shall be refused and the award set aside if there is a ground for annulment. Yet the court may not consider such grounds for annulment that have already been subject of (unsuccessful) annulment proceedings or that have not been invoked within the time limits by the party opposing the declaration of enforceability.⁸³

The recognition and enforcement of foreign arbitral awards is governed by the New York Convention and other treaties on the recognition and enforcement of arbitral awards if they are applicable and provide more favorable terms.⁸⁴

German arbitration law does not provide for any time limits for the recognition and enforcement of awards.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

While annulment proceedings are pending, German courts are entitled to suspend enforcement under Article VI NYC. They will only do so if the award is likely to be set aside.

⁷⁹ Geimer, in: Zöller (ed.), Zivilprozessordnung, 31st ed. 2016, § 1059 paras. 79 *et seq.*

⁸⁰ See BGH, decision of 02 May 2017, I ZB 1/16, juris, paras. 16, 25 in which the BGH held that the right to be heard is part of the German *ordre public* and thus not at the parties' disposal. The Court did not explicitly address the admissibility of a waiver in respect of the *ordre public*.

⁸¹ Cf. BGH NJW 1999, 2974, 2975.

⁸² § 1060(1) ZPO.

⁸³ § 1059(3) ZPO.

⁸⁴ § 1061(1) ZPO.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

From a German viewpoint, an award that has been set aside by the courts at the seat of arbitration can no longer be enforced under Article V(1)(e) NYC. Accordingly, if the award is set aside abroad after having been declared enforceable in Germany, the declaration of enforceability may be set aside upon application by a party.⁸⁵

The question of whether German courts are bound by the foreign court's decision to set the award aside is not finally settled. In the past, German courts have followed a relatively liberal approach by not reviewing the merits of a foreign set-aside decision⁸⁶ and by not requiring reciprocity for its recognition and enforcement (as required for other foreign court decisions).⁸⁷

5.8 Are foreign awards readily enforceable in practice?

Germany is a member state of the New York Convention. Foreign arbitral awards are enforced unless there are grounds for refusal. The existence of a ground for refusal is not accepted lightly. In particular, the BGH has established a relatively high threshold for violations of public policy according to which not every breach of mandatory German law but only violations that run counter to fundamental value-based decisions of the German legislator infringe public policy.⁸⁸ Consequently, arbitral awards are hardly, if ever, set aside for violation of the German *ordre public*.

As in other EU member states, the German notion of public policy is influenced by EU law, in particular the jurisprudence of the ECJ.⁸⁹

What is more, set-aside applications are limited to one instance in the vast majority of cases thus providing for a relatively speedy process. This is because the application to set an award aside must be made with the Higher Regional Court. The only higher instance, the BGH, may only be seized if the dispute is of fundamental importance or if the development of the law or the consistency of the jurisprudence require a decision by the highest court. In practice, this is the rare exception rather than the rule.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Yes.

6.1.1 If so, what is the practical and/or legal impact of such restrictions?

German lawyers ("*Rechtsanwälte*") subject to the Law on the Remuneration of Lawyers ("*RVG*") may only enter into contingency fee agreements under limited circumstances. A contingency fee may only be agreed upon if the client's economic circumstances would prevent him from asserting his rights in the absence of a success-related fee. Apart from that, German lawyers are barred from funding legal fees of their clients or other third parties.

⁸⁵ § 1061(4) ZPO.

⁸⁶ OLG München, SchiedsVZ 2012, 339, 341 which only reviewed the set-aside decision with regard to (i) whether the foreign court was competent for the annulment of the arbitral award, and (ii) whether the annulment was based on one of the grounds provided in the international treaty requiring German courts to enforce (the 1961 Geneva Convention in the case at hand).

⁸⁷ BGH, SchiedsVZ 2013, 229, 230.

⁸⁸ See, most recently, BGH, decision of 14 January 2016, I ZB 8/15, juris with further references.

⁸⁹ See, BGH SchiedsVZ 2016, 328, 333 *et seq.*; ECJ, Judgment of 1 June 1999, C-126/97 (*Eco Swiss v Benetton*) stating that a violation of EU competition law amounts to a failure to observe national rules of public policy.

These restrictions do not apply to foreign lawyers appearing before arbitral tribunals seated in Germany. Third-party funding by a person not subject to the RVG is permissible under German law and increasingly used in state court proceedings.

German arbitration law and jurisprudence are silent on the question of whether contingency fees can be recovered as part of the arbitration costs. Given that (i) German courts can only review a tribunal's cost decision within the setting aside or enforcement proceedings and that (ii) contingency fees are not unheard of in Germany, it is rather un-likely that a court would find a contingency fee (unless egregiously high) to be in breach of German public policy.

7. Is there likely to be any significant reform of the arbitration law in the near future?

A taskforce has been installed by the Federal Ministry of Justice and Consumer Protection in order to investigate the necessity of reforming the German arbitration law.