INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Working Session "State Court Participation in Arbitration – Help or Hindrance?"

Commission(s) in charge of the Session/Workshop:

International Arbitration Commission and Litigation Commission

London, 2015 Annual Congress

National Report of Germany

Donata von Enzberg
Taylor Wessing
Hanseatic Trade Center
Am Sandtorkai 41
D-20457 Hamburg
Tel +49 (0) 40 36 80 30
d.enzberg@taylorwessing.com

Benedikt Rohrßen
Taylor Wessing
Isartorplatz 8
D-80331 Munich
Tel +49 (0) 89 210 38 176
b.rohrssen@taylorwessing.com

General Reporters:

Silvia Pavlica Dahlberg, VINGE, Gothenburg, Sweden
Arnoldo Lacayo, Astigarraga Davis, Miami, USA
Gunnar Pickl, Dorda Brügger Jordis, Vienna, Austria

12 February 2015

Questionnaire……....

1. Enforcement of the Arbitration Agreement and other issues related to Jurisdiction

1.1 In your jurisdiction, is there an obligation for state courts to enforce an arbitration agreement, i.e. to deny or otherwise refrain from exercising jurisdiction on that ground?

Yes, state courts have to refrain from exercising jurisdiction – provided, however, that the respondent objects to the action before state courts (i.e. pleads the "arbitration defense" according to sec. 1032 para. 1 and 3 German Code of Civil Procedure = "ZPO"). In general, the relationship between state courts and arbitral tribunals is ruled by sec. 1025 et seq. ZPO, vastly adopting therein the UNCITRAL Model Law on International Commercial Arbitration (1985), hereafter "UNCITRAL Model Law".

1.2 If so, how is the enforcement carried out? Please give a short overview of the procedure and the type of decision that the court would issue.

If an action which is subject to an arbitration agreement is brought before a state court, the respondent can object to the action, unless the state court determines the arbitration agreement to be null and void, invalid, or impossible to implement.

Deadline: this objection must be brought prior to the start of the hearing on the merits of the case (sec. 1032 para. 1 ZPO); later objections are precluded. The state court will decide after having heard the other party (typically only in writing, sec. 1063 para. 1 ZPO). Unless the arbitration agreement is null and void, invalid, or impossible to implement, the court will dismiss the plaintiff with its claim as inadmissible (i.e. unlike in many common law jurisdictions, the state court will neither stay the proceedings, nor refer the dispute to the arbitral tribunal, as under art. 8 para. 1 UNCITRAL Model Law)[1].

1.3 Is it required that the respondent(s) challenge or object to the court's jurisdiction or would the court enforce the arbitration agreement on its own motion, provided that it becomes aware of the fact that an arbitration agreement between the parties exists?

Yes, the respondent has to object (see Q 1.2); the court does not enforce an arbitration agreement on its own motion[2].

[1] Zöller/*Geimer*, ZPO, sec. 1032 para. 7.

[2] Thomas/Putzo/*Reichold*, ZPO, sec. 1032 para. 2.

1.4 Does your jurisdiction allow a party to bring a declaratory action or any other kind of action to obtain an affirmative declaration by the court about an arbitration agreement (e.g. that an arbitration agreement exists between the parties, that it has a certain scope or that it covers a specific dispute between specific parties)?

Yes, a party can bring a declaratory action before the state courts, demanding that the court determines that arbitration proceedings are (in)admissible (sec. 1025 para. 1, 1032 para. 2, 1062 para. 1 no. 2 ZPO), either in total or in part[3].

The state court will confine its review to whether the arbitration agreement is valid, possible to implement, and whether the claim is subject to the arbitration agreement[4]. The court will not decide whether a (designated) statement of claim to an arbitral tribunal is admissible and justified[5].

1.5 If so, what are the procedural requirements, if any, for bringing such a declaratory action? Please focus on the requirements which are specific for this type of action.

The action must be brought before the court prior to the arbitral tribunal having been composed. From then onwards, the declaratory action is barred (sec. 1032 para. 2 ZPO)[6]. Instead, a party has to object to the arbitration proceedings before the arbitral tribunal (sec. 1040 para. 2 ZPO).

The action does not – unlike usually for declaratory action under German law – require the party bringing such action claims to have a special interest in it. However, courts regularly dismiss such action by denying a legitimate interest if the parties already litigate before the state courts and the respondent has raised the objection of arbitration (cf. Q 1.1–1.3)[7]. Moreover, such declaratory action can be brought with German state courts irrespective of the place of arbitration (sec. 1025 para. 2 in conjunction with sec. 1062 para. 1 no. 2, para. 2 ZPO).

1.6 Are there any restrictions as to timing for asserting an objection to the state court's jurisdiction or to bring an action for an affirmative declaration about arbitral jurisdiction? E.g. would on-going challenge to the proceedings on the ground that the tribunal lacked jurisdiction prevent such an action from being brought?

As to the first question: yes, time limits exist both for the objection and the action:

---

[3] Musielak/*Voit*, ZPO, sec 1032 para. 10; Higher Regional Court of Hamburg, decision of 07/09/2009, ref. no. 6 SchH 4/08, para. 26; contested, however, by the Higher Regional Court of Jena, decision of 05/06/2003, ref. no. 4 SchH 1/03.

[4] German Federal Court, decision of 19/07/2012, ref. no. III ZB 66/11.

[5] Higher Regional Court of Cologne, decision of 01/10/2011, ref. no. 19 SchH 7/11 with further references.

[6] Cf. for details: Higher Regional Court of Munich, decision of 29/03/2012, ref. no. 34 SchH 12/11 para. 14; German Federal Court, decision of 30/06/2011, ref. no. III ZB 59/10.

[7] Higher Regional Court of Frankfurt, decision of 07/03/2012, ref. no. 26 SchH 16/11; Musielak/*Voit*, ZPO, sec. 1032 para. 12 with further references.

- the objection to the state court's jurisdiction has to be asserted prior to the hearing on the merits of the case (sec. 1032 para. 1 ZPO); and
- the action for a declaration about arbitral jurisdiction (affirmative or negative) has to be brought forward until the arbitral tribunal has been formed (sec. 1032 para. 2 ZPO). Regularly, courts dismiss such action if the parties already litigate before the state courts (Q 1.5).

Hence, an on-going challenge to the proceedings before a state court would only serve if brought forward in time, i.e. prior to the hearing on the merits of the case.

1.7 When deciding on arbitral jurisdiction, do the courts in your jurisdiction apply the *doctrine of assertion* or any other doctrine according to which evidence is not required with respect to certain facts (so-called facts of double relevance) or the standard of proof is lowered compared to decisions on the merits in regular civil litigations? If so, does the doctrine apply equally in a declaratory action regarding arbitral jurisdiction and in a litigation case where an objection to the court's jurisdiction has been made with reference to an arbitration agreement? Please describe.

When deciding on the due process of law, German courts generally apply the doctrine of assertion as regards facts of double relevance. The doctrine has been established in case law since a long time[8] and is especially used to decide whether civil courts or administrative courts are competent to decide about a claim. Accordingly, the doctrine could be applied to decide on arbitral jurisdiction as well. However, there appears to be no case law on its use in declaratory actions regarding arbitral jurisdiction or objections to the court's jurisdiction.

1.8 When deciding on arbitral jurisdiction, how does your jurisdiction handle the situation where there are several alternative grounds for the claims, some covered by the arbitration agreement and some not (e.g. one ground based on contract, one on tort)? Will the courts split the case between different fora or if not, what forum will it refer the entire dispute to?

Where there are several grounds for claims, and some are not covered by the arbitration agreement, the consequence is as follows:

- If the respondent to an action has pled the "arbitration defense" (Q. 1.1–Q. 1.3), the court insofar will dismiss the action as "inadmissible" (Q 1.2).
- If a party has brought a declaratory action, demanding that the court determines the (in)admissibility of arbitration (Q. 1.4–1.5), the state court will partly decide in favor of the party, and partly dismiss the action.

In both cases, the state court will not refer those parts of the case which are subject to arbitration to an arbitral tribunal. Instead, it is up to the plaintiff to start arbitration.

---

8 German Federal Court, decision of 27/10/2009, ref. no. VIII ZB 42/08.

1.9 Does your jurisdiction allow for *anti-arbitration injunctions* or any other types of decisions attempting to prevent an arbitration from being initiated or from proceeding? Please describe.

No, German law does not allow for anti-arbitration injunctions or similar measures. Instead, there are two options:

- Prior to the arbitral tribunal having established itself, a party can bring a declaratory action before the state courts, demanding that the court determines the inadmissibility of arbitration proceedings (Q 1.4). Such decision binds the arbitral tribunal – under German law, the state courts have the competence to rule on the arbitral tribunal's jurisdiction (different from art. 16 UNCITRAL Model Law, where the arbitral tribunal may do so itself)[9]. Until the state court has finally ruled, the arbitral tribunal can continue the proceedings and issue an award. However, such arbitral award is null and void by virtue of law[10] .
- After the arbitral tribunal has been composed, the party attempting to prevent arbitration from proceeding can only object to the arbitral tribunal (Q 1.5). If the tribunal rules to be competent, it utters an interim decision (sec. 1040 para. 3 cl. 1 ZPO). Subsequently, each party may file a petition for a state court's decision within one month of having received written notice of the interim decision (sec. 1040 para. 3 cl. 2 ZPO).

Against both state court's decisions (on the declaratory action and on the arbitral tribunal's interim decision regarding its competence), each party can appeal to the German Federal Court (sec. 1065 para. 1 cl. 1 ZPO).

1.10 If so, who can such an injunction be directed at – a party, the arbitrator(s), an arbitral institute, etc.?

N/A

1.11 What connection to your jurisdiction is required for the state courts to be competent to hear such a request?

N/A.

1.12 Are you aware of any case in the past ten years where an anti-arbitration injunction or a similar type of decision has been issued by a state court in your jurisdiction? If so, please describe briefly the facts and what the effect of the injunction ultimately was.

N/A

---

[9] German Federal Court, decision of 30/06/2011, ref. no. III ZB 59/10, para. 11; Thomas/Putzo/*Reichold*, ZPO, sec. 1040 para. 8.

[10] Musielak/*Voit*, sec. 1032 para. 14; Zöller/*Geimer*, ZPO, sec. 1032 para. 14; contested e.g. by MüKo/*Münch*, sec. 1032 para. 28 footnote 130, according to whom the party can either file a petition to reverse the arbitration award (sec. 1059 para. 2 no. 1a, 1c or 2a ZPO).

2. The Arbitral Tribunal

2.1 Does your jurisdiction offer assistance by the state courts in appointing arbitrators? If so, please describe briefly what options are available.

Yes, German state courts assist in appointing arbitrators if

- the arbitration agreement puts one of the parties at disadvantage regarding the appointment of arbitrators, *or* ,
- parallel to art. 11 para. 3 UNCITRAL Model Law, if the parties cannot reach an agreement on the person to be appointed as arbitrator, (sec. 1034 para. 2, sec. 1035 para. 3, 4 ZPO).

2.2 What prerequisites, if any, must be satisfied for the court to deal with the appointment of an arbitrator (timing, failure by a party to act, etc.)?

The court will deal with the appointment of an arbitrator if:

- one party is so predominant in composing the arbitral tribunal that it disadvantages the other party (sec. 1034 para. 2 ZPO);
- in absence of an agreement on how to appoint arbitrators,
    - the parties cannot reach an agreement on the single arbitrator (sec. 1035 para. 3 cl. 1 ZPO), *or*,
    - in case of a tribunal of three arbitrators, one party fails to appoint an arbitrator in time (one month after the corresponding request of the other party), *or* the two appointed arbitrators cannot agree on the third one in time (within one month of their appointment) (sec. 1035 para. 3 cl. 2 and 3 ZPO);
- despite an existing agreement on how to appoint arbitrators, one party does not adhere to the agreed procedure, *or* the parties *or* the appointed arbitrators cannot agree on the appointment *or* a designated third person does not fulfill its tasks (sec. 1035 para. 4 ZPO).

In all cases, the state court will deal with the matter only if one of the parties files a respective petition. As regards removing or replacing arbitrators, see Q 2.7.

2.3 When deciding thereon, will the court consider whether there is arbitral jurisdiction? If so, what level of review will the court undertake in this respect?

The court considers whether the arbitration agreement is valid and whether it covers the matter in dispute (because only then there is a need to compose a tribunal).

However, the court will not review the arbitration agreement in detail. Instead, the review is confined to obvious reasons for invalidity. Nevertheless, a party can either file a counter-petition for inadmissibility of the arbitration proceedings (sec. 1032

para. 2 ZPO)[11], or object to arbitration before the arbitral tribunal (sec. 1040 ZPO) – see Q 1.4 and 1.5)[12].

2.4 Please describe briefly the procedure for the appointment of arbitrators by the state courts, including any time-limits.

Upon a party's petition, the competent Higher Regional Court appoints arbitrators per court order (sec. 1062 para. 1 no. 1, sec. 1063 para. 1 ZPO). Prior to the decision, the other party must be heard (sec. 1062 para. 1 ZPO). The court's decision is not challengeable (sec. 1065 para. 1 cl. 2 ZPO).

Procedure and time-limits are as follows:

- In case of predominance (Q 2.2), the party at disadvantage must file a petition within *two weeks* after having learned of the arbitral tribunal's composition (sec. 1034 para. 2 ZPO). Despite the petition filed, the arbitration proceedings can start and the tribunal can issue an award (sec. 1034 para. 2 cl. 3 in conjunction with sec. 1032 para. 2 ZPO). If, however, the state court substitutes an arbitrator, the previous proceedings and any results shall not be used by the arbitral tribunal, unless the parties agree to do so[13].
- In absence of an agreement on how to appoint arbitrators:
    - If the tribunal shall consist of three arbitrators, each party has to appoint an arbitrator or the appointed arbitrators have to appoint the third arbitrator within *one month* (unless the parties agree on other time-limits[14]). Having passed that term, a party can file a petition for the appointment of an arbitrator (sec. 1034 para. 3 cl. 3 ZPO).
    - If the tribunal consists of a single arbitrator upon whom the parties do not agree, statutory law does not provide for a time-limit. When assessing whether an agreement has not been reached, the courts might especially consider whether one month has passed without agreement[15].
- If an agreement on how to appoint arbitrators exists, and the composition process does not succeed, statutory law does *not provide for a time-limit*. When assessing whether an agreement between the parties or the two arbitrators has not been reached or a third person has not fulfilled its task, courts might, again, consider a one-month term[16].

---

[11] Cf. Higher Regional Court of Munich, decision of 04/09/2006, ref. no. 34 SchH 6/06, para. 17 et seq.

[12] Federal German Court, decision of 30/04/2009 ref. no. III ZB 5/09, Musielak/*Voit,* ZPO, sec 1035 para. 11.

[13] Musielak/*Voit,* ZPO, sec 1034 para. 9.

[14] *Lachmann,* Schiedsgerichtspraxis, para. 870.

[15] Musielak/*Voit,* ZPO, sec 1035 para. 9; *Lachmann,* Schiedsgerichtspraxis, para. 865.

[16] Bavarian Supreme Court, Decision of 16/01/2002, ref. no. 4Z SchH 9/01; Musielak/*Voit,* ZPO, sec. 1035 para. 14, contested by MüKo/*Münch,* ZPO, sec. 1035 para. 31 (requiring an agreement by the parties).

2.5 How does the court decide which arbitrator to appoint? Is there a list of arbitrators available to the court?

As criteria for the court's appointment of arbitrators, the court shall consider

- the parties' will, as laid down in the arbitration agreement,
- all aspects which ensure independent and impartial arbitrators, and
- when appointing a single or the third arbitrator, whether an arbitrator with a nationality different from those of the parties might be expedient (sec. 1035 para. 4 ZPO).

There are no lists of arbitrators available to the courts to our knowledge.

2.6 Does the above apply irrespective of whether the arbitration is administered by an institute or not?

Yes, the above rules on state court participation in the composition of a tribunal apply irrespective of whether the arbitration is administered by an institute or not, provided that the place of arbitration is in Germany (sec. 1025 para. 1 ZPO), or where the place of arbitration has not yet been determined and one of the parties has its registered seat or habitual residence in Germany (sec. 1025 para. 3 ZPO).

2.7 Does your jurisdiction offer assistance by the state courts to remove or replace an arbitrator?

Yes, state courts offer assistance in

- challenging an arbitrator (sec. 1037 para. 3 ZPO), and
- terminating the office as arbitrator (sec. 1038 para. 1 cl. 2 ZPO).

Competence lies, again, with the Higher Regional Courts (sec. 1062 para. 1 no. 1 and 2 ZPO).

2.8 If so, please describe the procedure therefore briefly.

Arbitrators can only be challenged if there are justified doubts as to their impartiality or independence or if they do not meet the requirements agreed by the parties (sec. 1036, 1037 ZPO, corresponding roughly to art. 12, 13 UNCITRAL Model Law).

The procedure is parallel to the one under art. 13 UNCITRAL Model LAW: Within two weeks after having learned of the arbitral tribunal's composition or a ground for challenge, the party has to submit the grounds for challenge in writing to the arbitral tribunal (sec. 1037 para. 1, 2 ZPO). If the challenge is unsuccessful, the party can file a petition for challenge with the state courts within one month after having learned of the decision refusing the challenge (unless the parties have agreed on different time-limits). When such a petition is pending, the arbitral tribunal can continue with its proceedings and also make an award (sec. 1037 para. 3 ZPO). If, however, the party fails to file a petition with the arbitral tribunal or with the state court in time,

the grounds for challenge are precluded unless they concern impartiality (which is an indispensable ground)[17].

If arbitrators become de jure or de facto unable to perform their duties or if they fail to perform their duties within reasonable time, the mandate terminates if they resign or if the parties agree on termination. If, however, the respective arbitrator does not resign and the parties cannot agree on termination, each party can file a petition with the state courts to decide upon the mandate's termination (sec. 1038 para. 1 cl. 2 ZPO, corresponding roughly to art. 14 UNCITRAL Model Law). German law does not provide for a time-limit for such petition. However, such right can be forfeited, e.g. if the party who is aware of the reasons for termination continues to participate in the arbitration proceedings without objections[18].

Prior to the state court's decision, the opponent must be heard (sec. 1063 para. 1 cl. 2 ZPO). The decision is not challengeable (sec. 1065 para. 1 ZPO).

If an arbitrator is removed, a new one must be appointed according to the general rules – i.e. primarily according to the parties' agreement of the parties, and, if they cannot reach an agreement, per court order (see Q 2.1–2.6).

3. Interim Measures

3.1 In your jurisdiction, does an arbitral tribunal have the power to issue an interim injunction? If yes, what is the way to enforce such interim injunction?

Yes. According to sec. 1041 para. 1 cl. 1 ZPO, the arbitral tribunal may, unless otherwise agreed by the parties, order interim measures of protection which the arbitral tribunal may consider necessary in terms of the subject-matter of the dispute. They are not limited by the types of measures admitted by the German law. However, the tribunal must not anticipate the main proceedings[19].

The arbitral tribunal cannot enforce the order itself. However, German courts are, at the request of a party, endowed to enforce these measures, unless application for a corresponding interim measure has already been made to a court (sec. 1041 para. 2 cl. 1 ZPO). Pursuant to sec. 1062 para. 1 no. 3 ZPO, the Higher Regional Court designated in the arbitration agreement or located in the district where the arbitration has its seat, is competent to decide on a petition for leave of enforcement. The court decides on the enforceability at its own dutiful discretion based on a summary examination. This gives to the court e.g. the possibility to refuse the enforcement of disproportionate orders and to verify the effectiveness of the arbitration agreement[20]. The court may issue a differently warded order if required for the enforcement of the measure (sec. 1041 para. 2 cl. 2 ZPO). However, it is not possible to change the

[17] Musielak/*Voit,* ZPO, sec 1037 para. 2, 5.

[18] MüKo/*Münch,* ZPO, sec. 1038 para. 26; Musielak/*Voit,* ZPO, sec 1038 para. 7.

[19] Zöller/*Geimer,* ZPO, sec. 1041 para. 1.

[20] Zöller/*Geimer*, ZPO, sec. 1041 para. 3; MüKo/*Münch,* ZPO, sec. 1041 para. 39.

content of the interim measure or enforce distinct measures to the ones the arbitral tribunal decided upon.[21]

3.2 In your jurisdiction, what is the way, if any, to enforce an interim injunction issued by an arbitral tribunal having its seat outside your jurisdiction?

According to sec. 1062 para. 2 ZPO in conjunction with sec. 1062 para. 1 no. 3 ZPO, if the arbitral tribunal has its seat outside Germany the Higher Regional Court where the party opposing the application has its place of business or place of habitual residence, or where assets of the respondent or the property in dispute or affected by the measure is located (as an alternative, the Higher Regional Court of Berlin (Kammergericht) shall have jurisdiction for the enforcement of the interim injunctions. The international jurisdiction of German courts is based on sec. 1025 para. 2 in conjunction with sec. 1033 ZPO. The principles in respect to the enforcement of interim injunctions of foreign arbitral tribunals are the same as regards to domestic arbitral tribunals (see Q 3.1) and laid down in sec. 1041 ZPO.[22]

3.3 If a specific interim measure as issued by a foreign arbitral tribunal is not available in your jurisdiction where it is sought to be enforced, what would be the way to proceed?

N/A.

3.4 In your jurisdiction, are state courts competent to decide on a request for interim relief despite the fact that the parties entered into an arbitration agreement? May a party file for interim relief with a state court even before arbitration proceedings are initiated? If yes, what are the consequences with respect to the "main" claim that is sought to be secured by such interim injunction, i.e. is the party asking for interim relief obliged to commence arbitration within a certain period of time?

Yes. German courts are, at the request of a party, competent to grant interim relief both prior to or after the initiation of arbitral proceedings pursuant to sec. 1033 ZPO. There exist different opinions whether the parties have the autonomy to exclude this possibility in their arbitral agreements or whether sec. 1033 ZPO is mandatory[23].

German law makes the distinction between pre-judgment or pre-award attachments (Arrest) to secure a potential future monetary judgment (sec. 916 para. 1 ZPO) and preliminary injunctions (Einstweilige Verfügung) to safeguard other rights or to regulate a legal relationship (sec. 935 ZPO). It is an established principle that the

[21] Musielak/*Voit*, ZPO, sec. 1041 para. 9; contested e.g. MüKo/*Münch*, ZPO, sec. 1041 para. 48.

[22] MüKo/*Münch*, ZPO, sec. 1041 para. 29.

[23] Supporting: Zöller/*Geimer*, ZPO, sec. 1033 para. 6; opposing: Musielak/*Voit*, ZPO, sec. 1033 para. 3 or MüKo/*Münch*, ZPO, sec. 1033 para. 18.

preliminary injunctions must not be granted as a means of anticipating the underlying decision on the merits of the matter (Verbot der Vorwegnahme der Hauptsache).[24]

Save for a few exceptions, the German court is competent to hear the application for a pre-award attachment or a preliminary injunction to the extent it has jurisdiction to hear the main action on the merits (sec. 919 and sec. 937 para. 1 ZPO); whereas, in an arbitration context, the hypothetically competent court is competent in case that no arbitral tribunal would have been selected.[25] With regard to determining the specific competent German court, the regular jurisdictional rules apply, including choice-of-forum agreements. In cases of doubt, the chosen seat of arbitration is also designating the locally competent court. Where the parties selected an arbitration seat outside Germany, there is no general derogation from the international jurisdiction of the German courts for applications for interim relief.[26] However, since jurisprudence is not clear concerning that matter, the arbitration agreement should clarify that German courts are competent to hear applications for interim relief.[27]

Following sec. 926 ZPO, it is argued that the parties asking the court for interim relief before arbitral proceedings have been initiated, have to commence arbitration, albeit with a generous time limit[28]. In order to meet this deadline, it is sufficient to conduct the request for arbitration (sec. 1044 ZPO).[29]

3.5 May parties file for interim relief with a state court even though an arbitration is already pending in the respective matter?

Yes. See above Q 3.4.

3.6 In your jurisdiction, does a state court have the power to order reimbursement of legal costs in proceedings for interim relief? If yes, what are the consequences if the claim that is sought to be secured by interim relief is subject to an arbitration agreement?

Yes. If the court grants provisional relief as referred to in sec. 1033 ZPO, then the court rules on the legal costs based on the usual cost provisions depending on the loss rate of the parties (sec. 91 et seq. ZPO).[30] The court fee is determined in annex 1 no. 1410 et seq. of the Court Fees Act (Gerichtskostengesetz = "GKG") and the attorney's fees are determined in the Lawyers' Fees Act (Rechtsanwaltsvergütungsgesetz = "RVG"). The amount of controversy depends on

[24] MüKo/*Münch*, ZPO, sec. 1033 para. 4.

[25] Vorwerk/*Wolf/Eslami*, Beck'scher Online-Kommentar ZPO, sec. 1033 para. 12.

[26] Musielak/*Voit*, ZPO, sec. 1033 para. 3.

[27] Böckstiegel/Kröll/Nacimiento/*Kreindler/Schäfer*, Arbitration in Germany, sec. 1033 para. 23.

[28] Vorwerk/*Wolf/Eslami*, Beck'scher Online-Kommentar ZPO, sec. 1033 para. 13.

[29] Musielak/*Voit*, ZPO, sec. 1033 para. 3.

[30] Böckstiegel/Kröll/Nacimiento/*Kreindler/Schäfer*, Arbitration in Germany, sec. 1033 para. 33.

the interest of the applicant (sec. 53 para. 1 no. 1 GKG in conjunction with sec. 3 ZPO); commonly 1/3 of the claim.[31]

4. Evidence

4.1 In your jurisdiction, do the state courts play a role in the gathering of evidence for use in arbitration?

Yes. As there are restrictions on the powers of an arbitral tribunal (e.g. the arbitral tribunal cannot force witnesses or experts to appear), the arbitral tribunal or a party with the approval of the former has the possibility to request assistance from the competent court in taking evidence or the performance of other judicial acts which the arbitral tribunal is not empowered to carry out (sec. 1050 ZPO)[32].

The competent court for judicial assistance is pursuant to sec. 1062 para. 4 ZPO the local court (Amtsgericht), in whose district the judicial act is to be carried out.

4.2 If your state courts play a role in the gathering of evidence for use in arbitration, how is the assistance or intervention of the state court requested (letters rogatory, petition, motion, filing of an action, etc.)?

As said before, it is necessary that the arbitral tribunal or a party with the approval of the arbitral tribunal submits a respective request to the competent court. The request must be in writing and in German (sec. 184 Court Constitution Act = "GVG") designating at least sufficiently precise the solicited action and the requested court (sec. 157 GVG)[33]. Otherwise, there are no further formal regulations to be fulfilled.[34]

4.3 Is there specific legislation or other legal authority governing the assistance that the state courts can provide?

Pursuant to sec. 1050 cl. 2 ZPO, the court shall execute the request according to its rules on taking evidence or other judicial acts, unless it regards the application as inadmissible. The rules governing the taking of evidence by state courts are sec. 355 et seq. ZPO. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions (sec. 1050 cl. 3 ZPO).

4.4 What requirements must the party requesting the evidence-gathering assistance satisfy in order to obtain the state court's assistance?

As mentioned before, the requesting party needs to hand in the approval of the arbitral tribunal describing the desired action and the written request (see Q 4.2).

---

[31] MüKo/*Münch*, ZPO, sec. 1033 para. 30.

[32] Zöller/*Geimer*, ZPO, sec. 1051 para. 1.

[33] MüKo/*Münch*, ZPO, sec. 1050 para. 19.

[34] MüKo/*Münch*, ZPO, sec. 1050 para. 19.

Accordingly, the arbitral tribunal has to be constituted by this time.[35] Since necessary for deciding about the request, it is advisable to hand in the arbitration agreement as well as the submitted claim[36].

In case the request for court support is not introduced by the arbitral tribunal itself but by one of the parties, the other party must be heard before the request is carried out (sec. 1063 para. cl. 2 ZPO)[37]. The court may then review the request and refuse assistance either if the arbitral tribunal itself has not mandated the evidence-gathering, if the arbitral tribunal itself could undertake the requested measure or if the requested measure is not permitted under German procedural law. Otherwise, it is obliged to perform the requested assistance[38].

The court decides by means of an order (Beschluss); regularly without oral hearing (sec. 1063 para. 1 cl. 1 ZPO).[39]

4.5 What kinds of evidence gathering can the state courts authorize or assist in (document production, sworn interrogation, depositions, in-court examination by the judge, inspections, etc.)?

The local court is only authorized to carry out such measures that are admissible under German procedural law (e.g. no document discovery)[40]. The rules governing the taking of evidence are sec. 355 et seq. ZPO and follow a civil law-style procedure, which leaves hardly any room for investigation by the parties themselves[41]. The evidence gathering process is concentrated to in-court examination by the judge.

Admissible means of evidence are: the personal inspection (sec. 371-372a ZPO), the witness statement (sec. 373-401), the expert witness (sec. 402-414 ZPO), the documentary evidence (sec. 415-444 ZPO), and, quite limited, the hearing of (sec. 445-55 ZPO). The court is also able to ask the respective person to swear an oath on the evidence given (sec. 478-484 ZPO).

4.6 What rules govern the evidence gathering (rules of the state court, rules of the arbitral institute, others)?

If state courts are requested to assist in taking evidence according to sec. 1050 ZPO, then the German procedural law governs the evidence gathering process (see Q 4.5). By contrast, during the arbitral tribunal, the taking of the evidence is largely given in to party autonomy. General rules concerning this matter are stipulated in sec. 1042

[35] MüKo/*Münch,* ZPO, sec. 1050 para. 22.
[36] MüKo/*Münch,* ZPO, sec. 1050 para. 23.
[37] Zöller/*Geimer,* ZPO, sec. 1050 para. 3.
[38] Zöller/*Geimer,* ZPO, sec. 1050 para. 6.
[39] MüKo/*Münch,* ZPO, sec. 1050 para. 28.
[40] Zöller/*Geimer,* ZPO, sec. 1050 para. 6.
[41] *Kühn/Gantenberg,* Arbitration World, p.102.

ZPO. According to sec. 1042 para. 4 cl. 2 ZPO the arbitral tribunal has the power to determine the admissibility of taking evidence, take evidence and assess freely such evidence. Though, it is also possible to use elements from different systems of law. The parties may also agree to submit the whole process to a particular set of rules such as the IBA Rules on Taking of Evidence in International Arbitration[42]. Sec. 1049 ZPO empowers the tribunal to assign experts and to define their terms of reference.

4.7 Does the kind of arbitration (domestic vs. international, investor-state, commercial, etc.) impact what evidence can be gathered with the assistance of the state court?

According to sec. 1025 para. 2 ZPO, the before mentioned assistance applies also to such cases where the arbitration proceedings take place outside Germany. Hence, there are no differences in the treatment of domestic and international tribunals[43].

4.8 Who can the courts order disclosure or discovery from? In other words, who do the state courts have jurisdiction over?

German civil litigation does not know discovery as for example practiced in common law systems. Under German procedural law it is even considered as prohibited 'fishing expedition"[44]. German procedural law provides that each party must gather the evidence necessary to substantiate its own claim and defence without obliging the adversary to assist ("Beibringungsgrundsatz"). Nevertheless, in some very narrow cases the court may demand the production of documents from the other party or a third party in the possession of the document one party referred to (sec. 142 ZPO).

4.9 Does the state court have the power to compel the discovery or disclosure target to give the evidence? When will the state court take that step?

No and yes. As mentioned before, the court may demand the production of documents from the other party or a third party in the possession of the document (sec. 142 ZPO) under very strict conditions, provided that someone of the involved parties referred to the document or file before in a sufficiently specific way. The requested specific document has to be relevant for the wanted decision of the court and the identification of that specific document must be easily possible. Moreover, the party asking for that document must concretely demonstrate that the specific document is in the possession of the other or the third party. If these conditions are fulfilled, then the court has the discretion to decide, whether or not to order the disclosure of that specific document.

[42] Böckstiegel/Kröll/Nacimiento, Arbitration in Germany, p. 40 para. 93.

[43] *Kühn/Gantenberg*, Arbitration World, p.103.

[44] Böckstiegel/Kröll/Nacimiento/*Sachs/Lörcher*, Arbitration in Germany, sec. 1047 para. 20.

If the other party does not obey, then the court cannot compel the discovery. However, they might lose the case if they bear the burden of proof. In case that the demanding party bears the burden of proof, the court has the discretion to decide upon and might draw an adverse inference against the reluctant party[45].

The situation is different for third parties, which might be forced according to the rules applying to witnesses. In the first place this means imposing a fine on the third party or, if prior measure shows no success, to order detention (sec. 142 para. 2 cl. 2 ZPO in conjunction with sec. 390 ZPO). However, witnesses may have the right to refuse to give evidence. Detailed provisions concerning privileges are contained in sec. 142 para. 2 ZPO (unreasonableness, e.g. temporal or financial expenditure) and sec. 383 - 385 ZPO. Moreover, pursuant to sec. 383 ZPO, witnesses who have a personal relationship with one of the parties as fiancée, spouse or close relative, as well as priests, journalists and persons who are subject to a duty of confidentiality are excused from the obligation to testify in general.

4.10 What can the state court do if the discovery or disclosure target fails to comply?

See Q 4.9.

4.11 Who can request assistance from the state court (parties to the arbitration, the tribunal, the arbitral institution, others)?

As said before, it is necessary that the arbitral tribunal or a party with the approval of the arbitral tribunal submits a respective request to the competent court. It has, however, to be considered that there is no general disclosure or discovery obligation (see Q 4.2).

4.12 Can the disclosure or discovery target seek relief from state court or to otherwise modify or prevent the disclosure or discovery?

In principal, it is possible to seek relief from the German courts for the preservation of evidence either directly by respective request pursuant to sec. 1033 and sec. 1041 para. 2 ZPO or pursuant to sec. 1050 in conjunction with sec. 485 et seq. ZPO[46]. However, the court is only able to render assistance to such measures that are admissible under German civil procedure law (see Q 3.1).

However, as explained before, there are limited circumstances where the disclosure or discovery is allowed, but there is no pre-trial discovery of documents under German civil procedure law.

[45] Vorwerk/Wolf/*von Selle,* Beck'scher Online-Kommentar ZPO, sec. 142 para. 17.

[46] MüKo/*Münch,* ZPO, sec. 1041 para. 12.

4.13 What consideration will be given by the state court to concerns about the invasion of a privilege (attorney-client, etc.), confidentiality protections, or potential criminal liability in the event of disclosure? Whose laws and rules will the state court apply?

Since German law does not offer general discovery obligations, confidential information must only be disclosed within the narrow framework of the procedural law. In addition, the German law comprises privileges such as sec. 203 of the German Criminal Code (Strafgesetzbuch = "StGB"), which imposes criminal sanctions on the members of certain professions if they reveal information obtained from their own clients in the context of their profession. A witness may also, for example, refuse to testify with regards to questions disclosing a trade secret[47].

4.14 Do the state courts need to enquire into the view of the arbitral tribunal on the disclosure or discovery?

No. See above.

4.15 Do the state courts need to enquire into the ultimate admissibility of the evidence in the arbitration?

No, the state courts only enquire whether

- (i) the taking of evidence is permitted by the arbitration agreement,
- (ii) the arbitral tribunal is not authorised to take the evidence, and
- (iii) the taking of evidence conforms to German procedural law (cf. sec. 1050 clause 2 and 1042 para. 4 clause 2 ZPO).[48]

4.16 Do the state courts have the power to order reimbursement of attorneys' fees or expenses incurred by the disclosure or discovery target? If so, in what instances will they order that?

Yes. If the court renders assistance to the gathering of evidence as foreseen in sec. 1050 ZPO, the court rules on the legal costs based on the cost schedule (annex 1 no. 1625 GKG).

[47] Böckstiegel/Kröll/Nacimiento/*Sachs/Lörcher, Arbitration in Germany,* sec. 1047 para. 25.

[48] MüKo/*Münch,* ZPO, sec. 1050 para. 24 et seq.

BIBLIOGRAPHY

- Böckstiegel/Kröll/Nacimiento/*Author,* Arbitration in Germany, The Netherlands, Kluwer Law International , 2007.
- *Kühn/Gantenberg*, Arbitration World, 2rd ed. Suffolk, The European Lawyer Ltd., 2006.
- *Lachmann*, Handbuch für die Schiedsgerichtspraxis, 3rd ed. Cologne, Dr. Otto Schmidt Verlag, 2008.
- Musielak/*Author*, ZPO, 11th ed. Munich, C.H. Beck, 2014.
- Münchener Kommentar ("MüKo") zur ZPO/*Author*, 4th ed. Munich, C.H. Beck, 2014.
- Thomas/Putzo/*Author*, ZPO, 35th ed. Munich, C.H. Beck, 2014.
- Vorwerk/Wolf/*Author*, Beck'scher Online-Kommentar ZPO, C.H. Beck, 2015.
- Wieczorek/Schütze/*Author*, ZPO, 4th ed. Munich, C.H. Beck, 2014.
- Zöller/*Author*, ZPO, 30th ed. Cologne, Dr. Otto Schmidt Verlag, 2014.