Germany

Country Report on Commercial and Investment Arbitration

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I. COMMERCIAL ARBITRATION

1. What domestic law(s) regulate(s) commercial arbitration in your country?

a. Is this legislation applicable to both domestic and international arbitration? Are these rules based on the UNCITRAL Model Law? If yes, what are the meaningful differences?

b. Are there any legislative initiatives ongoing to amend the domestic law? If yes, on what aspect of the arbitration law(s) and for which reasons?

Arbitration in Germany is governed by the tenth book of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO), comprising Sections 1025-1066. The German Arbitration Law was for the first time comprehensively codified in the ZPO in 1879, already adopting a favorable approach to arbitration back then.[1] Besides some minor amendments, such law remained unchanged for nearly 120 years until 1 January 1998, when the current German Arbitration Law came into force.[2]

The 1985 UNCITRAL Model Law served as the main source of inspiration for the current law governing arbitration in Germany. The main purpose of an almost *verbatim* adoption was to make the German arbitration law more user-friendly, particularly for foreign parties.[3] As a result, Germany became more attractive as a venue for international arbitration. In a study conducted in 2014 by the EU Parliament, Germany ranked as the fifth most preferred arbitral seat amongst

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1 Karl-Heinz Böckstiegel et al "General Overview" in Karl-Heinz Böckstiegel et al (eds), *Arbitration in Germany. The Model Law in Practice* (2nd edition, Wolters Kluwers 2015) 4-5.

2 Ibid.

3 Chambers and partners, International Arbitration 2020, Law and Practice Germany, Point 2.1, available at https://practiceguides.chambers.com/practice-guides/international-arbitration-2020/germany (last access 29.11.2020).

EU Member States and Switzerland.[4] The adoption of the Model Law in 1998 contributed to such popularity, aligning the German Arbitration Law with international standards and contemporary views on the regulation of international arbitration.[5] In some respects, German law is even more "arbitration-friendly" than the UNCITRAL Model Law, which is reflected in some of the deviations therefrom.[6]

One of the main deviations is the wider scope of application of the ZPO's tenth book, which applies to domestic and international as well as commercial and non-commercial arbitrations, as long as the seat of arbitration is in Germany.[7] Another important deviation is reflected in Section 1032(2) ZPO which allows a party to apply to the competent state court to determine the admissibility of the arbitration *prior* to the constitution of the arbitral tribunal. The purpose of this deviation is to minimise the risk that the parties spend time and money on arbitral proceedings and only notice at the post-award stage that the tribunal lacked jurisdiction.[8]

Moreover, Section 1031(4) ZPO imposes less strict form requirements for the arbitration agreement, accepting also the so-called half-written form, *i.e.* arbitration agreements in letters of confirmation where the other party did not respond or contest them. In addition, German Arbitration Law foresees further supportive powers of German courts in the appointment of arbitrators (Section 1025(3) ZPO), the enforcement of interim measures (Section 1041(2) ZPO) and the taking of evidence (Section 1050 ZPO). While the original subject-matter jurisdiction over all arbitration matters lies with the Higher Regional Courts (*Oberlandesgerichte*), the local courts (*Amtsgerichte*) are competent for the taking of evidence and other judicial acts (Section 1062(4) ZPO).

There have been no significant amendments to the German Arbitration Law since 1998. However, in the wake of the 2006 reform of the UNCITRAL Model Law, a working group was

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4 European Parliament, Legal Instruments and Practice of Arbitration in the EU, 2014, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf (last access 29.11.2020) 102.

5 Klaus Berger, "Herausforderungen für die (deutsche) Schiedsgerichtsbarkeit" (2009) German Arbitration Journal 290.

6 Alexander Grimm et al, "§1.02: International Arbitration in Germany" in Gustav Flecke-Giammarco et al (eds) *The DIS Arbitration Rules – An Article-by-Article Commentary* (Kluwer Law International 2020) 17.

7 There are, however, certain sections of the tenth book concerning support of the arbitral process, which apply irrespective of whether the seat is in Germany or elsewhere, e.g. the dismissal of a court action where there is a valid arbitration agreement, court provision of interim measures or court assistance in taking evidence.

8 Karl-Heinz Böckstiegel et al "General Overview" in Karl-Heinz Böckstiegel et al (eds), *Arbitration in Germany. The Model Law in Practice* (2nd edition, Wolters Kluwers 2015) 19.

established by the German Federal Ministry of Justice to assess whether the tenth book of the ZPO should be amended.[9]

c. By your expertise, is the legislative framework efficient and effective?

Efficiency is a key consideration in arbitration practice in Germany today. A perception has arisen among German companies that arbitration is becoming increasingly institutionalised and complex, with long proceedings and unnecessary burdens related to the taking of evidence.[10] Many sophisticated users strive for cost- and time-efficient arbitrations, high quality and enforceable decisions. The demand for efficiency can be satisfied by effective case management, with which German judges or arbitrators are already familiar.[11] German judges apply the so-called *Relationstechnik*, limiting the taking of evidence to those facts that are disputed and material to the case.

This pro-active approach is equally reflected in the German arbitration practice, which is strongly influenced by counsels and arbitrators following German court-inspired traditions.[12] It is not untypical that active or retired state court judges act as arbitrators. Since those judges often have a much more active role in conducting the proceedings than common-law judges,[13] users looking for a tribunal willing to manage the case in a time- and cost-efficient manner may prefer arbitration in Germany over other venues.

2. Is there an arbitration institution in your country? If yes, how is it structured and are these structures sufficient? Did this institution create its own procedural rules?

There are numerous arbitration institutions in Germany, such as:

- Arbitration Court of the Frankfurt Chamber of Commerce and Industry (FIAC)
- Chinese European Arbitration Centre (CEAC)
- Court of Arbitration of the Hamburger Chamber of Commerce
- German Arbitration Institute (DIS)

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9 Reimar Wolff, „Empfiehlt sich eine Reform des deutschen Schiedsverfahrensrechts?“ (2016) in German Arbitration Journal, 295.

10 Jürgen Reul, “Effizienz im Schiedsverfahren”, in Horst Eidenmüller (ed) Alternative Streitbeilegung – neue Entwicklungen und Strategien zur frühzeitigen Konfliktbewältigung (C.H. Beck 2011) 25.

11 Klaus-Albrecht Gerstenmaier, “The ‘German Advantage’ – Myth or Model” (2010) 8 German Arbitration Journal 22; Reimar Wolff, „Empfiehlt sich eine Reform des deutschen Schiedsverfahrensrechts?“ (2016) in German Arbitration Journal, 22.

12 Klaus Berger, “Herausforderungen für die (deutsche) Schiedsgerichtsbarkeit” (2009) German Arbitration Journal 290.

13 Markus Rieder and Richard Kreindler, “Introduction“ in Richard Kreindler et al, *Commercial Arbitration in Germany* (OUP 2016) 8.

- German Maritime Arbitration Association (GMAA)
- Arbitration Court of the Association of the Foreign and Wholesale Trade

The Court of Arbitration of the Hamburger Chamber of Commerce is one of the oldest currently-operating arbitral institutions in the world.[14] It was founded in 1893 in response to the needs of Hamburg's international trading community, which is still reflected in its caseload today, primarily focused on small and medium-sized businesses in Northern Germany.[15]

Currently, the DIS (*Deutsche Institution für Schiedsgerichtsbarkeit*) is the leading arbitration institution in Germany. It originated in 1992, when two German arbitration institutions[16] merged to create the DIS. As its predecessor was already founded in Berlin in 1920, the DIS can look back to 100 years of experience, 25 years under the current name. Today, the institution has more than 1000 members. Since 2002, the DIS also includes an organisation for young arbitration practitioners and professionals (*Deutsche Initiative junger Schiedsrechtler*, DIS40).

The first set of DIS Rules was adopted by its predecessor in 1920. Those rules were revised in 1998 and more recently in 2018. Over a period of 18 months, almost 300 people, including national and international arbitration practitioners, were involved in the revision process of the DIS Rules.[17] In comparison to the previous versions, the 2018 Rules are characterised by increased codification and more detailed provisions.[18] The two most significant changes introduced into the Rules are (i) provisions aimed at increased efficiency and (ii) the more active role of the DIS itself, taking over some of the duties that were previously imposed on the arbitrators.[19]

Increased efficiency is enhanced e.g. by setting out a number of new deadlines at different stages of the proceedings. The active role of the DIS is reflected, for instance, in Article 15.4 DIS Rules, which confers the competence to decide a challenge of an arbitrator on the newly created Arbitration Council – which is an independent body – and no longer on the arbitral tribunal

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[14] European Parliament, Legal Instruments and Practice of Arbitration in the EU, 2014, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf (last access 29.11.2020) 106.

[15] Ibid.

[16] The German Arbitration Committee (Deutscher Ausschuss für Schiedsgerichtswesen, DAS) and the German Institute of Arbitration (Deutsches Institut für Schiedsgerichtswesen, DIS).

[17] Alexander Grimm et al, "§1.02: International Arbitration in Germany" in Gustav Flecke-Giammarco et al (eds) *The DIS Arbitration Rules – An Article-by-Article Commentary* (Kluwer Law International 2020) 27.

[18] The 1920 Rules had around 2200 words, whereas the 1998 Rules had approximately 4200 and the recent 2018 Rules have nearly 15000 words including the six Annexes. See Robert Hunter, "§1.05: Introduction to DIS – Past, Present and Future" in Gustav Flecke-Giammarco et al (eds) *The DIS Arbitration Rules – An Article-by-Article Commentary* (Kluwer Law International 2020) 86.

[19] Gustav Flecke-Giammarco and Max Blüher, „The New DIS Rules – Bucking the Trend to Succeed in a Changing Market?" in Christoph Müller et al (eds), *New Developments in International Commercial Arbitration 2018* (Stämpfli Editions 2018) 116.

itself. The Arbitration Council has also the power to adjust the fees of the arbitral tribunal if an arbitration ends without an award or by settlement (Article 34.4 DIS Rules).

Contrary to the trends observed in the rules of other institutions, arbitral tribunals have a duty under Article 26 DIS Rules to consider amicable settlement at every stage of the proceedings, reflecting the pro-settlement approach of German legal culture.[20] In addition, in contrast to other institutions, the DIS did not opt for introducing rather intrusive provisions, such as the ICC's automatic application of Expedited Procedure to smaller value disputes, leaving those options to party autonomy.[21] As a result, the new DIS Rules slightly depart from the international trend of harmonisation among arbitration institutions, partially returning to notions of German legal culture – such as the pro-settlement approach – as "unique selling point".

3. How is the commercial arbitration practice in your country?

a. How many commercial arbitration cases are there annually in your country?

b. Which are the main subject-matters the cases deal with?

c. Are there any subject matters considered non-arbitrable in domestic laws?

In 2005, 72 new arbitral proceedings were administered by the DIS.[22] Since then, the numbers have been steadily increasing, in total by 86% between 2005 and 2015.[23] In 2019, 151 DIS proceedings were initiated, of which 110 were conducted pursuant to the DIS Rules.[24] *Ad hoc* arbitration is also widely used, particularly in maritime, construction and gas price review disputes. The exact number of those proceedings is unknown but can be estimated in the range of 1000 proceedings per year.[25]

Any past or future dispute concerning a specific legal relationship, whether contractual or non-contractual in nature, is arbitrable (Section 1029(1) ZPO). In particular, claims involving an economic interest (*vermögensrechtlicher Anspruch*) may be referred to arbitration under Section

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20 Robert Hunter, "Arbitration in Germany – A Common Law Perspective" (2003) 4 German Arbitration Journal 163.

21 Robert Hunter, "§1.05: Introduction to DIS – Past, Present and Future" in Gustav Flecke-Giammarco et al (eds) *The DIS Arbitration Rules – An Article-by-Article Commentary* (Kluwer Law International 2020) 87.

22 See DIS-Statistics 2005, available at http://www.disarb.org/en/67/content/2005-id26 (last access 29.11.2020)

23 Gerhard Wagner, Rechtsstandort Deutschland im Wettbewerb (C.H. Beck 2017) 100.

24 DIS-Statistics 2019, available at: http://www.disarb.org/files/veranstaltungen/614/DIS%20Statistics%202019%20EN.pdf (last access 29.11.2020)

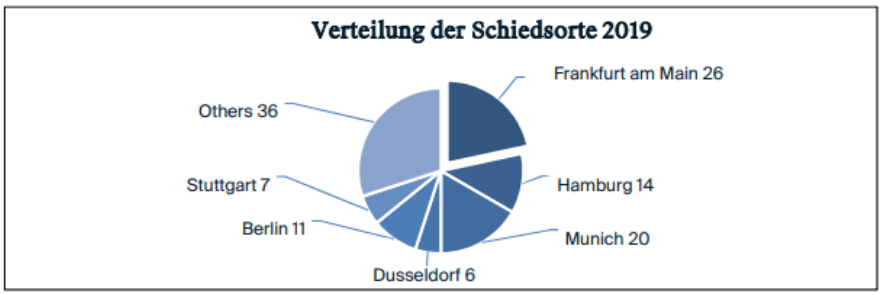
25 Stephan Wilske, "Ad hoc Arbitration in Germany" in Karl-Heinz Böckstiegel et al (eds) *Arbitration in Germany. The Model Law in Practice* (2nd edition, Wolter Kluwer 2015) 729.

1030(1) ZPO. Arbitration is often used for disputes regarding maritime transport, post-M&A, large construction projects, gas-related disputes and complex license disputes.[26]

In case of non-commercial disputes, more restrictive requirements may exist, such as the special form requirements for arbitration agreements involving consumers (Section 1031(5) ZPO).[27] In addition, Section 1030(2) ZPO excludes the arbitrability of disputes regarding tenancy relationships for residential accommodation in Germany. Finally, some other disputes are non-arbitrable by virtue of statutory provisions outside the tenth book (Section 1030(3) ZPO). Examples are:

- Certain aspects of family matters, which affect the status of a person, such as divorce or the custody of a minor
- Patent validity disputes
- Individual employment disputes
- Generally, any criminal law matter.[28]

There are certain venues within Germany that play a major role for arbitration, such as Frankfurt, Cologne/Düsseldorf, Hamburg, Munich and Stuttgart.[29] The state courts in those cities are often better prepared to supervise and support international arbitration proceedings.[30] The distribution of arbitral proceedings submitted to the DIS in 2019 according to their location in Germany is reflected in the following chart:[31]



[26] Chambers and partners, International Arbitration 2020, Law and Practice Germany, Point 1.1, available at https://practiceguides.chambers.com/practice-guides/international-arbitration-2020/germany (last access 29.11.2020).

[27] Stephan Balthasar, "§ 10 International Arbitration in Germany" in Stephan Balthasar (ed) *International Commercial Arbitration. A Handbook* (C.H. Beck, Nomos, Hart 2016) 379.

[28] See Markus Rieder and Richard Kreindler, "The Arbitration Agreement" in Richard Kreindler et al, *Commercial Arbitration in Germany* (OUP 2016) 44-51.

[29] Richard Happ "Germany" in Michael Ostrove et al, Choice of Venue in International Arbitration (OUP 2014) 168.

[30] Ibid 169.

[31] See http://www.disarb.org/files/veranstaltungen/614/DIS%20Statistics%202019%20EN.pdf (last access 29.11.2020).

4. What are the grounds for refusal of recognition and enforcement of arbitration awards in your country? Is your country party to the New York Convention (with reservations)? How strict are your national courts when enforcing awards (e.g. in relation to public policy)?

Germany is a Contracting Party to the New York Convention (NYC) since 1961 and has originally declared the reciprocity reservation in Article I(3) NYC. However, such reservation was later withdrawn with the entry into force of the revised German Arbitration Law on 1 September 1998.[32] Thus, Germany exhibits today a very liberal approach to the application of the NYC without any reciprocity requirement and irrespective of the fact whether the country where the award is rendered is a Contracting Party.[33]

The grounds for refusal of recognition and enforcement of foreign awards are those established under Article V NYC, to which Section 1061 ZPO explicitly refers. Those grounds are construed narrowly by German courts, confirming their arbitration-friendly attitude.[34] One example is that German courts typically take a narrow view on the concept of public policy as comprising only the fundamental principles of the German legal order. The competent Court of Appeals often hears applications for the recognition and enforcement of arbitral awards in a special senate dealing with arbitration matters.[35] The decision of the respective Court of Appeal may be challenged before the Federal Supreme Court (*Bundesgerichtshof*).

5. Is commercial arbitration in your country perceived as a viable alternative to taking cases in front of national courts?

In general, arbitration seems to be more attractive for international disputes, considering that the German judicial system with specialised commercial chambers is able to provide expeditious and competent dispute resolution for domestic matters.[36] In case of rather complex disputes or if

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[32] Karl-Heinz Böckstiegel et al "General Overview" in Karl-Heinz Böckstiegel et al (eds), *Arbitration in Germany. The Model Law in Practice* (2nd edition, Wolters Kluwers 2015) 10.

[33] Alexander Grimm et al, "§1.02: International Arbitration in Germany" in Gustav Flecke-Giammarco et al (eds) *The DIS Arbitration Rules – An Article-by-Article Commentary* (Kluwer Law International 2020) 25.

[34] Karl-Heinz Böckstiegel et al "General Overview" in Karl-Heinz Böckstiegel et al (eds), *Arbitration in Germany. The Model Law in Practice* (2nd edition, Wolters Kluwers 2015) 15.

[35] ICLG, The International Comparative Legal Guide to: International Arbitration 2019, 16th edition, Germany, 311.

[36] Karl-Heinz Böckstiegel et al "General Overview" in Karl-Heinz Böckstiegel et al (eds), *Arbitration in Germany. The Model Law in Practice* (2nd edition, Wolters Kluwers 2015) 6.

issues of confidentiality arise, arbitration becomes an attractive option.[37] The relationship between arbitration and state court proceedings can be characterised by the terms of "fair competition" and "sound cooperation".[38] In respect of domestic disputes, German courts constitute a true alternative to arbitration, but with regard to international disputes, arbitration is often the preferred venue.[39]

However, there are also certain areas, in which arbitration is frequently resorted to in both domestic and international settings. One example is the area of Mergers & Acquisitions, in which disputes are almost exclusively resolved by way of arbitration.[40] By contrast, domestic construction disputes are rather referred to state courts and consumer arbitration is almost non-existent due to the stricter form requirements for the arbitration agreement in that case.[41]

II. INVESTMENT ARBITRATION

6. How is the international legal framework for investment arbitration constituted?

a. Do(es) your country's arbitration law(s) also apply to investment arbitration?

b. Has your country signed and ratified the ICSID Convention?

c. Is your country party to many BITs and/or regional investment treaties (such as the Energy Charter Treaty)?

d. Does your country have a Model BIT, or otherwise use model language in its BITs?

The German Arbitration Law contained in the tenth book of the ZPO equally applies to arbitration pursuant to International Investment Agreements (IIAs). Germany has concluded what is considered to be the first modern bilateral investment treaty (BIT) with Pakistan in 1959.[42] Such treaty was the result of Germany's economic recovery after World War II leading to new international relations and new flow of outward investments.[43] In that time, decolonizing states were increasingly questioning existing rules of customary international law for the

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37 Chambers and partners, International Arbitration 2020, Law and Practice Germany, Point 1.1, available at https://practiceguides.chambers.com/practice-guides/international-arbitration-2020/germany (last access 29.11.2020).

38 Alexander Grimm et al, "§1.02: International Arbitration in Germany" in Gustav Flecke-Giammarco et al (eds) *The DIS Arbitration Rules – An Article-by-Article Commentary* (Kluwer Law International 2020) 10.

39 Ibid.

40 Ibid 21.

41 Ibid.

42 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed 25 November 1959, Federal Law Gazette (Bundesgesetzblatt) (1961), Part II, 793 et seq.

43 Rudolf Dolzer and Yun-I Kim, "Germany" in Chester Brown (ed) Commentaries on Selected Model Investment Treaties (OUP 2013) 293.

protection of alien property.[44] Against that background, Germany decided to commit to treaty-based international standards of investment protection on a bilateral basis.

Since then, Germany has created a densely knitted web of BITs all over the world.[45] Until today, it has concluded a total number of 155 BITs, 127 of which are currently in force.[46] Many of these treaties are based on a German Model BIT that was used as a starting point for negotiations. The first German Model BIT was adopted around 1960 and has been continuously revised since then, the last time in 2009.[47] The Model BIT, which reflects the German approach to the protection of foreign investment, can be characterised as investment-focused, in line with Germany's outward-oriented economy and its particular interest to protect German investors abroad.[48]

Overall, the German Model BIT contains language reflecting common international practice, with provisions on fair and equitable treatment (Article 2), full protection and security (Article 2), national and most favoured nation treatment (Article 3) and compensation in case of expropriation (Article 4), among others. The Model BIT also foresees both state-to-state (Article 9) as well as investor-state dispute settlement (Article 10). In addition, Germany is a contracting party to the Energy Charter Treaty since 1994 as well as to the ICSID Convention, which it ratified in 1969. In 2015, Germany has signed, but not yet ratified, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention).[49]

Germany's place in the investment protection regime, both as pioneer and as the state with the highest number of concluded BITs,[50] was changed with the entry into force of the Treaty of Lisbon in 2009.[51] The Treaty of Lisbon extended the Common Commercial Policy (CCP) of the European Union (EU) to foreign direct investment.[52] Since then, EU Member States are confronted with an emerging European legal regime for the protection of foreign investments,

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44 Ibid.

45 Matthias Füracker, "Relevance and Structure of Bilateral Investment Treaties – The German Approach" (2006) 4 German Arbitration Journal 237.

46 See https://investmentpolicy.unctad.org/international-investment-agreements/countries/78/germany (last access 29.11.2020).

47 See https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download (last access 8.12.2020).

48 Gebhard Bücheler and Gustav Fleeke-Giammarco, ICLG Investor-State Arbitration Laws and Regulations 2021 – Germany, available at: https://idg.com/practice-areas/investor-state-arbitration-laws-and-regulations/germany (last access 15.12.2020) para 1.1.

49 See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&dang=_en (last access 15.12.2020).

50 Followed by China with 145 conduded BITs. See https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china (last access 15.12.2020).

51 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, [2007] OJ, C 306/01 (entered into force 1 December 2009).

52 See Artide 207(1) TFEU.

which has to be considered when discussing Germany's approach to investment treaty arbitration.[53]

As a result of the new competences conferred upon the EU, Germany is no longer competent to conclude new treaties on foreign direct investment with third states without prior permission by the EU.[54] In December 2012, the EU adopted Regulation 1219/2012[55] which requires its Member States to notify the Commission of all BITs signed before 1 December 2009 that they wish to maintain or permit to enter into force. In addition, the Regulation lays down the conditions for the conclusion of new BITs with third countries. Interestingly, on the day the Treaty of Lisbon entered into force, Germany concluded a new investment agreement with Pakistan to replace the first-ever BIT of 1959.[56] The fact that such treaty has not yet entered into force may be due to discussions between Germany and the EU in respect of the aforementioned conditions required by the EU for the conclusion of new BITs with third countries.[57] In 2010, Germany signed two additional BITs with Iraq and Congo, which have equally not entered into force so far.[58]

While foreign direct investment has become an exclusive competence of the EU, investor-state dispute settlement (ISDS) as such, as well as portfolio investments, remained a shared competence, as ruled by the European Court of Justice (ECJ) in Opinion 2/15.[59] This means that the EU could, in theory, exercise its competence to the exclusion of EU Member States,[60] concluding EU agreements with ISDS provisions with third states. However, since there is currently no political will to let the EU alone exhaust its competence, investment or trade agreements with ISDS provisions are, in practice, jointly concluded by the EU and its Member

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53 Marc Bungenberg, "A History of Investment Arbitration and Investor-State Dispute Settlement in Germany", in Armand de Mestral (ed) Second Thoughts. Investor-State Arbitration between Developed Democracies (Centre for International Governance Innovation 2017) 259, 262.

54 According to Article 2(1) TFEU, "[w]hen the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

55 Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transition arrangements for bilateral investment agreements between Member States and third countries, 12 December 2012, OJ L 351/40.

56 Agreement Between the Islamic Republic of Pakistan and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5505/download (last access 15.12.2020).

57 Gebhard Bücheler and Gustav Flecke-Giammarco, ICLG Investor-State Arbitration Laws and Regulations 2021 – Germany, available at: https://idg.com/practice-areas/investor-state-arbitration-laws-and-regulations/germany (last access 15.12.2020) para 1.2.

58 This information is given by UNCTAD, see https://investmentpolicy.unctad.org/international-investment-agreements/countries/78/germany (last access 15.12.2020).

59 ECJ, Opinion 2/15, 16.05.2017, ECLI:EU:C:2017:376, para 305.

60 Pursuant to Article 2(2) TFEU, "(...) The Member States shall exercise their competence to the extent that the Union has not exercised its competence. (...)".

States as so-called "mixed agreements". Examples of such mixed agreements are the Comprehensive Economic and Trade Agreement (CETA), the EU – Singapore Investment Protection Agreement as well as the EU – Vietnam Investment Protection Agreement. At the time of writing, none of the agreements has entered into force.

With regard to intra-EU investment arbitration, the ECJ held in March 2018 in its landmark decision in the *Achmea* case[61] that the arbitration clause contained in the Dutch-Slovak BIT[62] was incompatible with EU law. In October 2018, the German Federal Supreme Court implemented the ECJ's preliminary ruling, setting aside the underlying arbitral award.[63] Subsequently, Achmea lodged a complaint (*Anhörungsrüge*) against the BGH's decision on the basis of a purported violation of its right to be heard. Such complaint was rejected by the BGH in January 2019.[64]

As a result of the ECJ's Achmea decision, Germany and 22 other EU Member States signed an Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (Termination Agreement) in May 2020.[65] The Termination Agreement has entered into force on the 29 August 2020 for those states that have already ratified it.[66] Since Germany has so far not ratified the Termination Agreement, it is not yet in force in Germany until 30 calendar days after the date of deposit of its instrument of ratification. Once the Termination Agreement enters into force in Germany, its intra-EU BITs[67] are terminated in accordance with Article 2 thereof.

7. How is the investment arbitration practice in your country?

a. How many investment arbitration cases are there annually against your country?

b. How many investment arbitration cases are there annually initiated by investors from your home country?

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61 CJEU, Case C-284/16 Slowakische Republik v Achmea BV (6 March 2018).

62 Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/968/download (last access 14.12.2020).

63 BGH, Beschluss vom 31. Oktober 2018 – I ZB 2/15.

64 BGH, Beschluss vom 24. Januar 2019 – I ZB 2/15.

65 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 29.5.2020, OJ L 169/1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A0529(01)&from=EN (last access 29.11.2020).

66 The Termination Agreement entered into force 30 calendar days after two signatory states (Denmark on 6 May 2020 and Hungary on 30 July 2020) ratified it. At the time of writing, Bulgaria, Croatia, Cyprus, Malta and Slovakia had also ratified the instrument. See https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en (last access 8.12.2020).

67 The ratification of the Termination Agreement would affect 10 BITs intra-EU BITs that are currently in force between Germany and other EU Member States: Croatia (1997), Romania (1996), Estonia (1992), Lithuania (1992), Czech Republic (1990), Hungary (1986), Bulgaria (1986), Portugal (1980), Malta (1974) and Greece (1961).

According to the data provided by UNCTAD, there have been in total 4 publicly known investment arbitrations against Germany as a respondent host state.[68] Three of these cases were brought pursuant to the Energy Charter Treaty and were administered by ICSID.

Short Case Name	**Home State of Investor**	**Year of Initiation**	**Outcome**
Strabag and others v Germany[69]	Austria	2019	Pending
Vattenfall v. Germany (II)[70]	Sweden	2012	Settled
Vattenfall v. Germany (I)[71]	Sweden	2009	Settled
Sancheti v. Germany[72]	India	2000	Settled

The most prominent of these cases is *Vattenfall v. Germany (II)*.[73] The claim brought by the Swedish-owned company Vattenfall arises out of Germany's decision to phase out of nuclear power, which was taken in the aftermath of the 2011 Fukushima nuclear power plant disaster in Japan. Vattenfall claims that Germany's policy reversal breached its international obligations undertaken under the Energy Charter Treaty. At the time of writing, the ICSID arbitration is still pending. In a separate proceeding, the German Constitutional Court (Bundesverfassungsgericht, BVerfG) found in September 2020 that Germany's regulations of its nuclear phase-out violate the constitutional rights of Vattenfall and its local subsidiaries.[74]

In contrast to the rather few cases brought against Germany as a respondent state, there are 71 known cases, in which German investors initiated an arbitration against the host state of their

68 See https://investmentpolicy.unctad.org/investment-dispute-settlement/country/78/germany/respondent (last access 29.11.2020).

69 Erste Nordsee-Offshore Holding GmbH, Strabag SE, Zweite Nordsee-Offshore Holding GmbH v. Federal Republic of Germany, ICSID Case No. ARB/19/29).

70 Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, available at https://www.italaw.com/cases/1654 (last access 8.12.2020).

71 Vattenfall AB , Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6, ICSID Case No. ARB/09/06, available at https://www.italaw.com/cases/1148 (last access 8.12.2020).

72 No further publidy available data.

73 Vattenfall AB and others v Federal Republic of Germany, ICSID Case No. ARB/12/12, available at: https://www.italaw.com/cases/1654 (last access 15.12.2020).

74 BVerfG, 1 BvR 1550/19 (29.09.2020).

investment.[75] The first of these cases was submitted to arbitration in 1994. In 2020, two investment arbitrations were commenced by German investors, one against Iraq[76] and one against Italy.[77] Prominent cases that were brought by German investors are: *Franz Sedelmayer v Russian Federation*,[78] *Siemens AG v Argentine Republic*,[79] *Wintershall AG v Argentine Republic*[80] and *GEA Group Aktiengesellschaft v Ukraine*.[81]

Foreign investment takes place in almost all sectors of the German economy, ranging from automobiles, steel, energy and manufacturing to banking, insurance and financial services.[82] Since December 2005, parties have the opportunity to conduct ICSID proceedings at the Frankfurt International Arbitration Centre (FIAC) on the basis of a cooperation agreement concluded between ICSID and DIS pursuant to Article 63 ICSID Convention.[83]

Already in May 2015, Germany proposed the inclusion of a permanent international investment court – instead of *ad hoc* arbitral tribunals – in the Transatlantic Trade and Investment Partnership (TTIP) negotiated with the United States.[84] While the TTIP negotiations failed, a modified version of such permanent body was included in the CETA text. With regard to the future of investor-state dispute settlement, Germany follows the line of the EU. This entails Germany's adherence to the proposal put forward by the EU to create a Multilateral Investment Court (MIC).[85] The different options for an institutionalized MIC are now discussed in detail in UNCITRAL Working Group III.

III. CATCH-ALL QUESTION

8. Are there any further noteworthy trends or current discussions in your country that are worth mentioning?

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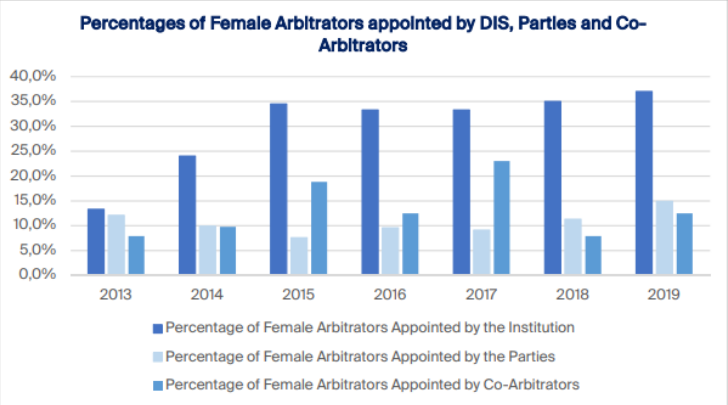
75 See https://investmentpolicy.unctad.org/investment-dispute-settlement/country/78/germany/respondent (last access 29.11.2020).
76 AHG Industry GmbH & Co. KG v. Republic of Iraq (ICSID Case No. ARB/20/21).
77 Hamburg Commercial Bank AG v. Italian Republic (ICSID Case No. ARB/20/3).
78 Mr. Franz Sedelmayer v The Russian Federation, SCC, Award (07.07.1998).
79 Siemens A.G. v The Argentine Republic, ICSID Case No. ARB/02/8, Award (17.01.2007).
80 Wintershall Aktiengesellschaft v Argentine Republic, ICSID Case No. ARB/04/14, Award (8.12.2008).
81 GEA Group Aktiengesellschaft v Ukraine, ICSID Case No. ARB/08/16, Award (31.03.2011).
82 Alfred Escher et al "Investment Arbitration and the Participation of State Parties in Germany" in Karl-Heinz Böckstiegel et al (eds), *Arbitration in Germany. The Model Law in Practice* (2nd edition, Wolters Kluwers 2015) 1018.
83 Karl-Heinz Böckstiegel, "Die Schiedsgerichtsbarkeit in Deutschland – Standort und Stellenwert" (2009) 3 German Arbitration Journal 5.
84 Marc Bungenberg, "A History of Investment Arbitration and Investor-State Dispute Settlement in Germany", in Armand de Mestral (ed) Second Thoughts. Investor-State Arbitration between Developed Democracies (Centre for International Governance Innovation 2017) 274.
85 For further information, see in general Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (2nd edition, Springer, 2020), available at: https://link.springer.com/book/10.1007/978-3-662-59732-3 (last access 15.12.2020).

One particular issue, which will be relevant in the German arbitration practice of the next decade(s) is gender balance. According to the DIS Gender Statistics, in average only 11 – 18% of arbitrators appointed in DIS proceedings are female.[86] The DIS Appointing Committee promoted the appointment of women as arbitrators by selecting around 36% female arbitrators in 2019, compared to only 12-15% in case of appointments by parties and co-arbitrators.[87]



This shows that the DIS is aiming for more gender balance in response to the 2015 initiative called "Pledge for Equal Representation in Arbitration" started by numerous members of the global arbitration community.[88] Recently, the DIS has published a note on its webpage about female representation in arbitration in the COVID-19 era, arising out of the Equal Representation in Arbitration initiative.[89]

Other current trends and discussions were triggered in 2020, as in many other countries, by the COVID-19 pandemic. In order to respond to those challenges, the DIS has signed a joint statement by the leading international arbitral institutions encouraging parties and arbitrators to mitigate the impediments caused by the pandemic, e.g. through appropriate case management techniques.[90] In addition, the DIS has published a document announcing certain procedural particularities for arbitrations brought pursuant to the DIS Rules to adapt its provisions to the current circumstances.[91] As a result of these developments, German arbitral practice in 2020 has

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86 See DIS Gender Statistics 2013-2019, available at: http://www.disarb.org/files/veranstaltungen/623/DIS%20Gender%20Statistics%202013-2019_web.pdf (last access 29.11.2020).

87 Ibid.

88 For more information, see http://www.arbitrationpledge.com/ (last access 29.11.2020).

89 Female Representation in Arbitration in the COVID-19 era, available at: https://www.arbitralwomen.org/female-representation-in-arbitration-in-the-covid-19-era/ (last access 29.11.2020).

90 Arbitration and COVID-19, Joint Statement, available at: http://www.disarb.org/files/veranstaltungen/592/Covid-19%20Joint%20Statement.pdf (last access 29.11.2020).

91 See Deutsche Institution für Schiedsgerichtsbarkeit, Bekanntmachung zu prozessualen Besonderheiten bei der Administration von Schiedsverfahren aufgrund der COVID-19 Pandemie, 1.07.2020, available at:

been characterised by discussions around the legal admissibility of remote hearings as well as certain practical implications, including cybersecurity and data protection.[92] It is likely that those discussions will continue in the following years and involve different issues related to the digitalisation of international arbitration.

http://www.disarb.org/files/veranstaltungen/608/Zweite%20Fassung%20-%20DIS%20Bekanntmachung%20prozessuale%20Besonderheiten%20Covid-19.pdf (last access 29.11.2020).

92 Chambers and partners, International Arbitration 2020, Law and Practice Germany, Point 1.2, available at https://practiceguides.chambers.com/practice-guides/international-arbitration-2020/germany (last access 29.11.2020).